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# Human Rights in the Contemporary World

*Edited by Trudy Corrigan*





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Human Rights in the Contemporary World  
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Edited by Trudy Corrigan

#### Contributors

Nanche Billa Robert, Deepak Basumatary, Ana Cristina González-Vélez, Laura Castro González, Simon Antony Hull, Jennifer Whittal, John P. Patrick Williams, Obed Adonteng-Kissi, Muhammad Bello Nawaila, Umar Mohammed Kani, Sezer Kanbul, Chris Jones, Trudy Corrigan

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# Meet the editor



Dr. Trudy Corrigan is an assistant professor at Dublin City University (DCU), Ireland. She is a staff member in the School of Policy and Practice at DCU and a research fellow at the Dublin City University Anti-Bullying Centre. Her research interests include adult education, lifelong learning, and intergenerational learning. She was recently a recipient of the New Foundations Irish Research Award in partnership with the Age & Opportunity organization, whose research evaluates ageism and bullying in the workplace. The organization's aim is to provide a solution-oriented approach to addressing ageism through policies and practices relevant to employers and employees. Dr. Corrigan is passionate about human rights across a variety of disciplines, including education, health, sociology, culture, and the arts. She is interested in providing multi-disciplinary spaces through both the printed word and online media to disseminate the work of those who want to ensure that human rights are adhered to and upheld. This is to enable the narrative, research, and voice of academics and practitioners interested in promoting human rights to be heard and shared in a contemporary world.



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# Preface

This book provides an important worldview perspective of human rights. It provides a compelling narrative to give voice to authors from a variety of interdisciplinary and diverse perspectives across the world. Their narratives and research are drawn from human rights issues related to law, education, sociology, literature, health, and history. The authors illuminate how issues of human rights need to be respected and protected in their communities and countries. Through their work, this book is representative of people, culture, and communities in both the Northern and Southern Hemispheres. The narrative, reporting, opinions, and research of the authors are a call to respect the rights of all people in their communities. This is regardless of gender, ability, race, age, sexual orientation, religion, or civil status. It is an interdisciplinary understanding of how human rights, developed as the Universal Declaration of Human Rights and accepted by the General Assembly of the United Nations in 1948, can still be disrespected, misunderstood, or ignored.

Each chapter calls attention to the need to understand the implications of the practice of human rights and to ensure that these rights are upheld. This is to eliminate oppression, prejudice, and suffering of all people where human rights are not observed and implemented. It provides a spotlight on communities or people who have been hindered by a lack of understanding of human rights practices. The key themes highlighted draw on the voice and the opinions of the authors. This is evidenced in the reflection of some on history and literature. For others, it is based on their experience and reportage of human rights policy and practices that have been ignored. For others, it is embedded in their research and work that strives to ensure that human rights are respected.

This book highlights the need to protect human rights and gives voice to authors who aim to make a difference in achieving the successful and peaceful implementation of the practice of human rights through their published work. This is specifically related to people in their communities and in their own countries. This is of great importance in their writing of these chapters. This global understanding of world issues related to human rights demonstrates how people, campaigns, and understanding of human rights need to be respected. We hope that this book will inspire those who read it to uphold the structures, policies, and practices to promote human rights. This is to ensure that the dignity and human rights of all people are upheld and respected in our modern world.

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# The Realisation of Human Rights Issues of Older People in Contemporary Ireland to Ensure Equal Life Opportunities

*Trudy Corrigan*

## Abstract

Across the world, there is a growing ageing population. The number of older people living longer is unprecedented in our contemporary world. The longevity dividend has now ensured that people are living for a longer time than ever before. It is anticipated that by 2050, the world's population of people aged over 60 years of age will double from 1 billion to 2.1 billion. The number of people aged 80 years and over is expected to triple between 2020 and 2050 to reach 426 million. The population of older people aged 65 plus years of age and older in Ireland was estimated at approximately 696,300 in 2019 and it is estimated to double to 1.56 million by 2051. This is an increase from 11.0% of the population in 2009 to 14.1% in 2018. In recent years, issues for older people, such as the ability to continue to live in their community, to have ease of access to health care, to have access to workplace training, and to ensure equal life chances, are issues of importance for people as they age. This is increasingly perceived within the framework of human rights as guided by the Universal Declaration of Human Rights (UDHR).

**Keywords:** older people, human rights, equal life opportunities

## 1. Introduction

The Universal Declaration of Human Rights (UDHR) is an extremely important document that was proclaimed by the United Nations General Assembly in Paris on December 10, 1948 [1, 2]. This document established for the first time that human rights were to be universally protected. Today, it is translated into over 500 languages. It is universally recognised and has been influential in the adoption of more than seventy human rights treaties across the world. Yet, there is much more to be done to ensure that it is upheld in all countries, across all cultures, and across all geographic boundaries. Article 1 states that 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. Perhaps this might need to be amended today to represent sisterhood as well as a brotherhood in a spirit of equality and respect between men and women in all representations of all gender, ages, culture, and beliefs. Article 7 highlights that all are equal before the law and are due equal protection free from discrimination. The template has been

universally accepted to determine why human rights need to be upheld for people across the world regardless of culture, ethnicity, sexuality, age, and beliefs.

The strong emphasis on equal protection of the law as enshrined in the UDHR is very relevant in contemporary Ireland, especially in relation to protection against ageism and ageist attitudes in the workplace. The Employment Equality Acts promulgated from 1998 to 2015 to ban discrimination in employment on a number of grounds including age [3]. Yet this has not protected people from being denied access to the workplace or denied promotional opportunities. Frequently, there have been cases in the Workplace Relations Commission (WRC) from older workers who have to leave the workplace because of discrimination based on their age. Ageism or negative perceptions of older people has emerged because of stereotypes, prejudice, and general behaviour towards older people. Age Action—An organisation founded as a leading advocacy organisation for older people in Ireland—is a charity registered organisation that promotes positive ageing and the rights of older people in Ireland. This organisation, together with other organisations with a similar goal, aims to influence policy to address the digital exclusion of older people. This is chiefly to support older people to continue to live in their own homes should they wish to do so. They highlight why ageism is harmful since it leads to poorer health, social isolation, and earlier deaths and can even cost an economy billions, especially in health care and provision. A major issue for many older adults is stereotyping which frequently makes them feel no longer useful in society. Frequently, these stereotypes are classified as discrimination based on age.

## **2. Loneliness and older people**

For health reasons, the western world frequently deems it a better option to have older people living in nursing homes which are also referred to as residential care. Although most retirement or nursing homes provide adequate facilities for older people who are unable to continue to live in their own homes for health reasons, such adults once removed from their homes and local community sometimes start to feel isolated and lonely. Such feelings not only add up to a human rights issue but also to health care issues, such as dealing with loneliness or suffering from depression.

During their study, Fayoka et al. [4] evaluated a total of 33 reviews pertaining to older people living both in the community and in institutionalised contexts. Their findings revealed that loneliness and social isolation among older people mostly result from family members moving away from home, the death of a loved one, a decrease in income, or the weakening of their own health and abilities. Factors such as these do not only have a major impact on the lives of older people but also result in them having less opportunity to engage with people of different age groups and cultures. Albeit having a negative effect on the older people living within communities, many older people are found to prefer to continue to live in the community in which they have lived for many years.

Where older people are found to be excluded or isolated from those around them, they can subsequently experience loneliness once they have retired or have reached pension age. The retirement age can differ across countries but is usually between 60 and 70 years of age. Some of the common reasons for becoming socially isolated include leaving the workplace, disability or illness, and no longer being needed within the family. The issue of loneliness is a growing concern across the world and in particular in the western world due to the impact thereof on the health care services and support structures necessary to adequately care for older people. In North America, loneliness is not just experienced by older people but



by younger people and this has increased since COVID in 2019. Loneliness itself is often referred to as a pandemic. Pervasive loneliness ‘has widespread effects’ said Professor Bert Uchino, a professor at the University of Utah who studies relationships and health. Loneliness is strongly linked to mental health issues, such as anxiety and depression. He states that ‘evidence is pointing to the fact that relationships—the kinds of bonds you have with people, how close you are, how connected you feel to others—impact physical health as well’. Professor Uchino’s report [5] found several factors which were associated with increased loneliness and in particular feelings of loneliness experienced by people in 2019.

This report found that loneliness was more common in men. It found that 63% of men were lonely compared to 58% of women. Social media was also a factor with 73% of frequent social media users being considered to be lonely compared to 52% of users who rarely use social media. Feelings of isolation were prevalent across all generations. People aged between 18 and 22 years old had the highest average loneliness scale on the 80 point scale (about 50), while older people born between the 1940s and the early 1960s had the lowest (about 43). The report highlights that, while loneliness is usually attributed to older people, it can affect people across all age groups and it does need to be addressed. What is frequently attributed to addressing loneliness is the need to have meaningful relationships whether in the workplace or our lives. In addition, participation in creative and meaningful activities has also been highlighted to address issues of loneliness across generations.

### **3. Human rights and older people**

In Ireland, human rights and equality issues facing older persons were evaluated by the Irish Citizens Assembly in 2017. It highlighted that age is an equality ground under Irish Law and this means that age-related discrimination is prohibited in employment and in accessing goods and services. However, despite the existence of this law, the Commission acknowledged that there were significant human rights and equality issues facing older people in Ireland (The Irish Human Rights and Equality Commission) [6]. The issues which they highlighted referred to gender inequality, deprivation of liberty in care, reporting of abuse, and other issues pertinent to older people. Older people have the right to receive safe, high-quality care and services, and to be treated with dignity and respect. Good quality care requires respect and honest communication with and for older people and this includes teamwork with family members and/or health care providers. Human rights include the right to life and liberty, freedom of opinion and expression, the right to work and education.

There are, however, inequalities that exist and these include the increased rising costs of long-term care, the rights of older people while in care, and safety measures to ensure that older people are not abused. Where it does happen the correct support systems need to be in place to ensure that the older person has the right to report the abuse and to ensure that it is acted upon through the correct procedures. The Irish Human Rights and Equality Commission has stated that its work is to advocate for the protection of human rights. Everyone has the right to have equal opportunities. This means that everyone has the right to take part in the economic, political, social, or cultural life of the state. To uphold the principles of human rights is also to understand the value of diversity within society. This is to respect and embrace people of all ages, cultures, diversity, and beliefs. It is to respect their rights to fair treatment and to eradicate discrimination based on age, gender, or culture. However, some older people in Ireland over 60 years of age have experienced a pervasive and subtle form of prejudice and discrimination. This is in the

form of ageist attitudes which regard them either as invisible or no longer useful in the workplace. While there are many efforts to address these prejudices and stereotypes, there is still much more work to be done. This is in particular to influence policy and practice and the structures which need to eradicate these practices, such as management structures in the workplace.

#### **4. The right to continue to live in one's own community**

It is increasingly becoming a fundamental right for older people to age well within their own community. For this to happen appropriate health care support service need to be put in place to ensure safe and healthy environments for older people so that they can continue to live in. In such environments, the highest standards should be maintained to assure that older people remain physically fit, mentally stimulated, live meaningful lives, and have the best life opportunities. These are factors that are very relevant to their overall good health and well-being. On June 3, 2021, Age Action joined the Irish Council for Civil Liberties (ICCL) for the launch of their report [7] 'Human Rights in a Pandemic'. This was to highlight the recent experiences of older people based on their living with the pandemic. This was especially in the context of many older people feeling isolated and lonely as a result of their being required to cocoon or isolate at home for important health reasons, such as COVID-19.

This took place in 2020. This request by the Irish government was chiefly to protect older people for health reasons. They were requested to stay at home due to the increased fatalities caused by the pandemic in retirement homes and among older people in the community. The increase of deaths in nursing homes was attributed to the spread of COVID-19 by transmission within the community. This approach put a spotlight on the issue of isolation and loneliness experienced by many older people for a number of years. In addition, it placed a spotlight on the issues for older people who understood the important health issues at this time but who also felt powerless or lacked a sense of agency or voice in government and in particular in health policies during this time. Age Action through its CEO focused its attention on the issue of older people living in nursing homes and the community. The pandemic highlighted how older people felt isolated due to COVID-19. This highlighted how their voice, agency, and sense of independence need to be protected now and in the future. It was suggested that there should be an establishment of a Commissioner for older people to protect the voice of older people, especially in relation to issues, such as institutional policy and practice at the government level. Age Action believes that one of the first roles of the Commissioner for older people should be to raise public awareness of ageism and to ensure that negative or demeaning stereotypes of ageing and older people should be eradicated.

#### **5. What are human rights age care?**

The guarantee in [8] the Irish Constitution of Article 40.1 which states that 'all citizens shall be held equal before the law' should mean that older people have access to the means to have their rights upheld. One of the most common issues for older people in Ireland today is to be aware of their rights to access health services in their homes and their communities. The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right to health [9]. This is in relation to the access of all citizens and the overall quality of the health care systems available to all. This also includes access to goods and services for all

citizens. Ireland supports the Covenant on Economic, Social and Cultural Rights. Many organisations in Ireland that care for older people and who advocate for positive ageing have stated that without legislation it can sometimes be difficult for older people to access important information to access these services. Sometimes it is difficult for older people, especially older people who live alone, to obtain information about services relevant to them at important stages of their life. For example, if they become suddenly unwell, information about discharge from hospital, dealing with a new disability, or the diagnosis of long-term or life-limiting illness, this information may not be always available in a timely manner to them. Access to health services in the community and information about these services is hugely important for older people. This is sometimes only sought by the older person when they have become ill and when decisions need to be made urgently about their ability to remain living in their own home or where they and their family have to choose to make a decision for them to live in a nursing home or residential care. Funding for residential care can frequently be a huge factor in this decision. Over the years there have been government schemes to support older people and their families to make this decision, such as the [10]. Nursing Homes Support Scheme Act 2009. Despite this, it is still a very difficult decision for many older people to decide to move from their own home and their community. In addition, the rights and liberties available to them while they are in residential care can also impact the quality of their lives for better or for worse. This depends on the support systems available in residential care to enable them to live full and healthy lives. The key issue for many older people in Ireland today is the right to continue to live in their homes and their community with the proper health care services provided. This includes the right to access to carers and family supports even where the needs of the older person are very dependent on external health care services to enable them to live full and healthy lives in their own home.

## **6. The need for a human rights-based approach**

What is a Human Rights-Based Approach (HRBA) when accessing the needs of older people? [11]. The Human Rights and Older People Working Group came together and was inclusive of a number of organisations that have the interests of older people in Ireland at the core of their mission statement and work. What all these organisations had in common was prioritising the needs of older people through the lens of human rights and older people. The members of the Group were The Alzheimer Society of Ireland; Irish Council for Civil Liberties; Age and Opportunity; Third Age; Public Interest Law Alliance; Age Action; Active Ageing in Partnership and Active Retirement Ireland. They met in March 2013 and this was to initially discuss the issues for older people in Ireland today. This was in particular to evaluate many of these issues in the context of human rights. The working group wanted to address many of the issues for older people by using a human rights-based approach. The Healthy Ireland Strategy promotes a positive ageing strategy. They state that the key principles guiding their strategy being underpinned by the UN Strategy of older persons. These principles are independence, participation, care, self-fulfillment, and dignity. A workshop was held on June 21 2013 by the Human Rights and Older People Working Group to bring together a range of perspectives and identify core issues. This was subsequently developed into a report. The findings suggested that human rights were to be embraced in all decision-making relevant to the older person. At the core of this aim was the need to respect equality and to ensure the non-discrimination of older people.

## **7. Age discrimination in the workplace**

The Equal Status Acts 2000–2010 and the Employment Equality Acts 1998–2010 include age as one of the nine grounds on which discrimination is outlawed in employment and access to services [12]. The Employment Equality Act currently allows for an upper age limit to be included in a contract of employment, in certain public service jobs, and protected by law. However, this does not align with the EU Directive 2002/78 EC which only permits age discrimination where it can be objectively justified [13]. Access to cost-effective insurance is one of the areas in which older people have reported discrimination. This is where older people believe that if they are in good health, this can be overlooked based on actuarial evidence that older people are at a higher risk. Many older people question the validity of this evidence based on their own history of having good health. Active Retirement Ireland which is also a charity registered organisation that originated to promote positive ageing is working with Public Interest Law Alliance to pursue the experience of older people here in Ireland. While the equality legislation related to employment and the Health Act 2007 [14] are regulations to protect the rights of older people, there are still much more policies needed to improve the legislation for the rights of older people in the workplace and to age well in their local community. In 2020, Corrigan and Morgan [15] compiled a comprehensive working document for the National Anti-Bullying Centre in Dublin City University which highlighted the extent to which ageism and bullying affect older workers by undertaking an extensive review of the literature at a global level. This was chiefly conducted among industrialised nations within the western world. They found that stereotyping of older workers is a prohibitive factor for the recruitment, training, and promotional opportunities of older workers.

Stereotyping of older workers is a negative characteristic that can directly prevent the career paths of older people from recruitment or access to promotional opportunities. Frequently behaviours and attitudes towards older workers are instrumental in encouraging ageism in the workplace. Much literature at the international level confirms the high levels of workplace discrimination of older workers. There have been a number of important empirical studies over the last 20 years that evaluate the perception of the stereotyping of older workers [16–20]. Negative stereotypes about older workers may include perceptions that they are poor performers, resistant to change or technology, more expensive to the company, have less ability to learn, and have shorter tenure [19]. The positive characteristics attributed to older workers are also somewhat generalised as being reliable and dependable. Finklestein et al. [17] ask are these characteristics or stereotypes accurate? Their understanding is based on the concept that a stereotype is a generalisation. Because of this, it cannot be an accurate evaluation for every worker.

Posthuma and Campion [19] have also evaluated stereotyping of older workers. Their study found that many older worker stereotypes have neither been supported nor have been fully investigated Wolfson et al. [21] have also investigated the stereotyping of older workers. An important factor with the research on ageing and in particular of the research on older workers concerns the hard evidence in relation to intellectual functioning. The research which is chiefly based on psychometric studies as well as work-based outcomes highlights that the common perception regarding older people may be quite wrong.

What the findings found was that an increase in age is not usually associated with lower levels of cognitive functioning. Salthouse [22] suggests that some elements of intellectual functioning (as measured usually by IQ tests) decline to a small extent from age 40 onwards and more especially from age 75–80 years. The capacity to learn new material which is called fluid intelligence is especially

affected. However, other aspects remain largely unaffected. Knowledge, capabilities, and skills, which have been learned in earlier life, can remain with the person at the later stage in their life. This is known as crystallised intelligence. Where this knowledge or skills has declined, older people learn to compensate in many ways for those areas which have been affected by the intellectual decline. These include strategies that maximise their strengths and their experiences of similar events in the past.

The United States study by Yanson et al. [23] highlighted those older workers were more likely to report incidents of workplace bullying than any other type of difficult experience for them. Namie [24] also carried out a study at the Workplace Bullying Institute. This research wanted to establish in detail the correlation of age differences associated with the bullying of older people. For employers who were aged less than 30 years, just under 10% said that they had been bullied, while for people aged 50–54 years the percentage who said that they had been bullied was 17%. Research in Sweden and Australia has added to the growing body of research. The work of Einarsen and Skogstad [25] evaluated the frequency of bullying at work and this research aimed to identify risk groups. Based on data from 14 different surveys from Norway, it showed that older employees had a higher risk of bullying than younger employees. Bennington [26] studied age discrimination in the recruitment of prospective employees in Australia. Here the findings showed evidence of age discrimination. This varied from the language used in advertisements to reports of employers when they were selecting potential employees. The evidence from this study highlights that ageism can be associated with the early stages of recruitment of prospective employees but also in the promotion process. Vasconelos [27] study was based on 100 companies. These were shown to be the best companies to work for in Brazil. This study wanted to see if these companies demonstrated any age bias and discrimination. If this was the case, what was the frequency of this form of bias? The results showed that there was a bias towards older workers in these companies. What this study highlighted was that there were inadequate policies to address demographic diversity in the workplace.

## **8. Law and legislation and the role of management related to older workers**

The research which has been conducted to evaluate the levels of stereotyping and discrimination of older workers has highlighted a key important aspect to address these issues. This is awareness of legislation that prevents discrimination against older workers. When awareness of legislation is not present in the policies and structures of the organisation, negative stereotyping of older workers tends to exist. This compares to less discrimination and stereotyping of older workers when there is greater awareness of the legislation. Cox and Barron [28] highlighted that when employers and employees were made aware of the laws which prevent age discrimination, they perceived older workers as more competent and capable of change was required of particular processes or tasks in the workplace. When this was compared to another study where employers and employees were made aware of the limitations of legislation in preventing age discrimination of older workers, they were likely to use stereotyped perceptions such as that older employees were less suitable for their jobs. Gordon and Arvey [18], in their research, outlined that what was extremely important in terms of job recruitment was the match between the age of the prospective employee and the specific knowledge and skills required for the job. In their study, they found evidence that if holistic aspects of a worker

did not link with the requirements of the job specification, then age became an important factor. But if age was the only relevant feature, then the extent to which older workers were discriminated against was not a key issue. Richardson et al. [29] did not support these findings. This study evaluated the extent to which prospective job applicants (aged 33–66 years) suitability related to work-related competencies as well as age. This study highlighted that where there was a preference for hiring workers in relatively younger age groups, then the oldest applicants (over 54 years) were least likely to be employed by the organisation. There is evidence that the perceptions and behaviours of management have a crucial role in either preventing or supporting ageism in the workplace.

A study, by Nilsson [30] of over 900 managers in local authorities in Sweden, found that a major influence in their attitude to older workers was their own retirement plans. If managers were planning to work beyond 66, they had very positive views of older workers but if they were planning earlier retirement, they perceived older workers as slower and resistant to change. McMullin and Marshall [31] showed how economic concerns of management and ageism can interact in certain circumstances. A study by Browne et al. [32] examined how the workplace psychosocial environment (including bullying) influences retirement intentions. Their meta-analysis is quite extensive and their study evaluated how low job satisfaction and loss of control over the work environment were associated with both intentions to retire and actual retirement. While it is not very clear whether bullying was directly related to intentions to retire, behaviours and attitudes towards older workers can frequently influence their decision to retire from the workplace. McGann et al.'s [33] study interviewed older Australian workers with a view to examining their perceptions of events leading to retirement. The study showed that many of such workers perceived themselves to be on the periphery of the employment market.

Despite legislation and increased opportunities to continue working, many of these workers felt an overwhelming sense of insecurity existed for them between work and retirement. Instead of feeling positive about the changes regarding longer working lives, these older workers felt devalued and no longer needed in the workplace. These perceptions of feeling undermined or undervalued despite new opportunities and new legislation to remain in the workplace are frequently the experience of many older workers. In 2018, the Public Service Superannuation [34] in Ireland was signed into law to enable people to continue to remain in work until 70 years of age. The increase in the pension age together with rising house prices and rent has made this not just a preferred option but a very important career decision for many older employees. In April 2018, the Irish Human Rights and Equality Commission [35] published new guidelines for employers to ensure that older workers who want to work beyond the age of 65 are permitted to do so. Despite this new legislation, older workers can feel that the attitudes, behaviours, and perceptions, in particular of managers can prevent them from working until the new retirement age of 70. What is needed is a change in these attitudes and behaviours and an awareness of the legislation to ensure that older workers can remain in the workplace and contribute in a very meaningful way.

## **9. What are the benefits of feeling meaningful and engaged in our communities as we age?**

What does the study of psychology tell us about how people feel when they are engaged and active in their societies? There are many possibilities but the most successful way for older people to feel visible and valued is when the appropriate

structures, policies, and behaviours are in place in society to make them feel valued. Studies show that it is linked with physical as well as mental well-being. This in turn leads to higher levels of engagement, satisfaction, and motivation. Humans have a strong sense of relational fairness (how we feel treated when this is compared to the treatment of others). This is very much promoted and developed by the mindset, by the policies and structures which are in place to support relational fairness, access, inclusion, and equality for all.

For older people what they see, think, and believe is impacted by both the internal and external experiences that they experience on a day-to-day basis. Positive ageing is supported through good economic, health, political, educational, cultural policies and practices which surround them every day. Attributes such as finding other people empathetic to the opportunities and challenges that arise as older people age can have a positive outcome on their ability to age well. When their intention to remain independent for as long as they can is supported through the structures that are in place in government, in education, in health, and in the workplace; this supports healthy and independent living. This is also affected by appropriate legislation to prevent ageism and to have a positive impact on the attitudes, perceptions, and behaviours of others.

A key aspect of healthy ageing is to continue to be creative and to stay positive as people age. The psychologist Csikszentmihalyi [36] tried to understand the experience of creativity which he defined as 'flow'. He believes that great ideas come when you lose yourself in your work and creative moments. This, he believes, is that the best creative experiences come from working in collaboration with others. The source of creativity comes from our imagination and this allows us to imagine all kinds of possibilities for ageing which move beyond the narrative of ageing that has been imposed on us for many years but now seems to be simply outdated. This new understanding of ageing as a time to be positive, to be creative, and to be connected to the wider community is one to be embraced by both older and younger people. This is important in helping younger people to understand what it is to age well. If younger people have been presented with a narrative of the othering of older people then many of them do not relish the stage when they will reach this time in their lives. But if the narrative is changed to embrace ageing as a time to look forward to and a time of many creative opportunities, then this will be a time to be cherished and embraced.

Being a lifelong learner is also a very important part of staying physically and mentally well. But what if our structures in education, in the workplace, and in society do not allow for this kind of lifelong learning opportunities? For many older people if these opportunities are not provided close to home then there is no possibility of them participating either because of lack of transport or lack of ability to access these opportunities if they are not cost-effective. Today technology is more important than ever for older people to stay connected. They need to have access to training, to technology, and to skills to enable them to stay connected to family and friends and to keep their minds stimulated. Much of our education structures are built around the professionalisation of knowledge for usefulness in the workplace. What if this could somehow be changed in part to allow learning for learning sake? What benefits could this have for the wider community in terms of what it has to offer to older people across the world to participate in learning opportunities where they have an opportunity to share this with younger people but also to keep their minds stimulated as they age? Many older people during their lifetime have led organisations or they have been leaders, now when they retire this is no longer a role yet they have much talents, knowledge, and skills developed to be an effective leader. Can society promote this role in safe spaces where older people have an opportunity to share these talents, for example, with university students? This is

to advocate for safe spaces in education, in our communities, and in the workplace which promote intergenerational dialogue, activities, and engagement between older and younger people together.

## **10. Conclusion and recommendations**

To grow older in a safe environment where older people are valued and visible is the continued work of governments, organisations, and educators to ensure that older people have a right to continue to live in their own community with the appropriate health care services available to them. In addition, it is to ensure that they have opportunities to keep their mind stimulated through relevant educational and creative opportunities. The workplace is a key area where older people need to find that there are equal opportunities for them to be recruited, to participate in training opportunities, and to be allowed to advance through promotional pathways when the opportunities arise. Loneliness and isolation for older people can be addressed when there are many opportunities provided for them to engage in meaningful activities across generations, across cultures, and in a diversity of social, creative, and workplace contexts. The American professor Brene Brown [37] discussed the 10 guideposts for Wholehearted Living. She sees this as the ability of people to cultivate ten attributes, such as cultivating a resilient spirit. The attributes she outlines are important attributes for older people to remain healthy and well. Attributes, such as cultivating a resilient spirit or cultivating calm and stillness, can take place when older people feel valued in their communities. Cultivating laughter, song, and dance and cultivating creativity can be fulfilled when older people continue to have an opportunity to engage in creative and social spaces relevant to healthy living. Cultivating meaningful work can be supported when older people are facilitated to do this in the workplace and their daily lives. These can only happen when the appropriate policy, practice, and structures are in place to support this form of high-quality living as people age. Awareness of the legislation which prevents discrimination based on age and in addition, awareness of the rights of older people through the lens of human rights will ensure that they continue to live full and healthy lives. This is not only in Ireland but across the world. They deserve to do this in the spirit of being valued for what they have done in the past and for how they will continue to be empowered and valued in the future. The implementation of human rights and human rights guidelines relevant for older people across the world is hugely important to ensure that older people flourish are visible and are valued in their communities.



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# Protest March Restrictions in Cameroon

*Nanche Billa Robert*

## Abstract

Southern Cameroonians stage protest marches because of their low or negative social status identity comparative to their French-speaking compatriot. This produces a negative perception of themselves: that of a marginalized people which is a negative or a low social identity. Accordingly, they try to change this situation by mobilizing their members for a protest march as it was on the 22nd September and 1st October, 2017 and their clamor for absolute independence is much clearer today than before. They have therefore constructed a collective identity with a common goal and an emotional bond of organizing protest marches, lockdowns and executing the weekly ghost towns among other. The shared goal of the Anglophone is different from that of the Francophone while one is protesting against the form of state and the protection of their English culture, the other is protesting against a change of government or better governance. In each protest, law enforcement officers brutalized, injured, harassed, seized and destroyed their phones, barred some from joining the demonstrations and dispersed them ruthlessly by violently repressing them, using teargas as well as shooting live bullets on the crowds. While southern Cameroonians share a collective identity and massively organize protest marches, their French-speaking compatriots have conflicting interests and low protest march participation.

**Keywords:** Protest March, social status, repression, independence, Ambazonia, collective identity, Anti-terrorism law

## 1. Introduction

Since 2016 the government of Cameroon has been doing everything to stop any collective action organized by the population in the English-speaking part of the country to denounce their marginalization by sending security forces to roughly brutalize the population in order to discourage protest march. Lawyers and teachers in Southern Cameroon went on strike in 2016 and they were later on joined by the general public. The call by asking for a federation in which the Anglophone could manage their own affairs, a situation which existed before the referendum in 1972 later on turned into a call for independence. Equally, in French-speaking Cameroon, the government too have done everything to quell protest march against electoral frauds and the departure of the government which has been ruling for over 38 years and which is doing everything to maintain itself in power. In Cameroon, there are two groups of people with distinct colonial heritage: the Anglophone in the minority are dissatisfied with their relation with their French-speaking brothers and want total freedom while the French-speaking citizens are protesting for better governance and a change of system.

All these as [1] puts it, is a mode of political action oriented toward objection to one or more policies or conditions, characterized by showmanship or display of an unconventional nature, and undertaken to obtain rewards from political or economic systems while working within the system. Equally, [2] states that, a protest act includes the following elements: the action expresses a grievance, a conviction of wrong or injustice; the protesters are unable to correct the condition directly by their own efforts; the action is intended to draw attention to the grievances; the action is further meant to provoke ameliorative steps by some target group; and the protestors depend upon some combination of sympathy and fear to move the target group in their behalf”.

A protest group is, by definition, a collectivity of actors who want to achieve their shared goal or goals by influencing decisions of a target group. In our case the protest group is either the Anglophones who are fighting for secession because they have been marginalized for over 50 years or the French-speaking Cameroonians who are protesting to kick out a system that has been in power for over 38 years. In this case, the shared goal of the Anglophone is different from that of the Francophone while one is protesting against a change of state, the other is protesting against a change of government. Does this differing shared goals and collective identity affect their various mobilization and collective action? Our objective is to examine how protest marches in both the English-speaking and French-speaking parts of Cameroon differ.

It is worth-noting that article 11 of [3] states that everyone has the right to associate with others and gather together for a common purpose and it stresses that it is fundamental for people to be free. People must protest peacefully, join trade unions and hold the powerful to account. People have the right to come together with others and peacefully share their views. Authorities must allow people to take part in marches, protests and demonstrations. There is the freedom of expression as it applies to protests, marches and demonstrations, counter-demonstrations, press conferences, public and private meetings but it does not protect intentionally violent protest. However, this right is limited if it is covered by law, for the interest of national security or public safety, prevention of crimes or disorder, the protection of health or morals and the protection of others’ rights and freedoms.

The article clearly states that the state should not interfere with people’s right to protest just because it disagrees with protesters’ views, because it’s likely to be inconvenient and cause a nuisance or because there might be tension and heated exchange between opposing groups. Instead it must take reasonable steps to enable people protest and to protect participants in peaceful demonstrations from disruption by others. Contrarily in Cameroon, the government thinks that protest marches will affect the integrity of the state and style protesters as terrorists. The questions we ask are: How does the government of Cameroon restrict the protest marches of protesters? How do the protesters and the general public react to these restrictions? Our objective is to explain how human rights are abused in Cameroon through protest march restriction and how Cameroonians react to the restriction.

This work is divided into two distinct parts: part one concerns the protest march of secession demanded by the English-speaking (Southern Cameroon or Amnazonia) part of the country due to the French-speaking part dominance over them and the second part concerns the French-speaking part of the country which is protesting to overturn a system that has ruled the country for over 38 years.

## **2. Data collection and interpretation**

We collected the qualitative data of acts of protest marches in English-speaking and French-speaking Cameroon from the Internet, using the accounts of seasoned

activists who had sent out numerous posts on different protest marches to their targeted population. Those posts are important textual material: videos, blog posts, comments, social networking posts which are all as [4] calls them, essential parts of the expanse of qualitative material online. Equally, [5, 6] considers them as “a new continent, rich in resources but in parts most perilous.” which had “lain undiscovered, unmined and uninhabited” for about 30 years.

Activists posted many materials online to keep their audiences abreast of the difficulties of organizing a protest march in Cameroon and to awaken their consciousness of the importance of protest marches to either secede from the country and restore their independence or to change the government that has been in power for over 38 years. Therefore Facebook was a fruitful site of the way as [7] puts it, hundreds of millions of Cameroonians and other nationals connect to one another and share protest march information: it provides an entirely preserved archive of data featuring, write-up, friends’ comments, pictures, about the protest marches in English and French speaking parts of Cameroon. We judged the information as a true reflection of participants’ minds, uses and behavior. Therefore, the participants were ‘doing’ things with their postings. As may be expected from our theoretical stance, our questions focused on how people talked and interacted on Facebook of events of protest marches in Cameroon. The symbols of the posts to the public drew our attention as well as the people’s reactions. We considered their comments in order to understand how both English-speaking and French-speaking Cameroonians differ in the appreciation of the posts of protest marches in Cameroon.

In this age of smartphones images or video-making is easy as most people even in the third world possess a smartphone with a built-in camera. They film relevant events in their daily lives: usually the remarkable, the extraordinary, the exceptional and not the ordinary or everyday activities [8]. We decided then to collect videos of protest marches in Cameroon in order to analyze them because they provide information that other types of data do not provide. They are ‘proofs of facts’ because a picture or video is more, and different, than a thousand words since they contain much more visual information on bodily movement and include acoustic data. Although images are specific reality constructions ambivalent, subjective and diffuse, their interpretation must be substantiated in words [9]. The questions we asked concerning each of the videos were similar to those asked by Becker, 1974 [10]: What are the acts of violence and human rights abuses in each video? How can they be interpreted and linked to our theoretical concept? What insight do they generate and substantiate? What different kinds of people are there? We link observations to theoretical concepts such as status, groups, norms, rules, and common understandings, deviance and rule violation, sanctions and conflict resolution.

### **3. Protest march restrictions in English-speaking Cameroon - Ambazonia**

This part dwells on three main protests marches in Southern Cameroon, two of which triggered the Anglophone or Ambazonia crisis: the common lawyer and the university of Buea students’ strike. Both of them were clammed down by a heavy police force and the second was the 22nd September, 2017 massive and pervasive march protest that took place all over Ambazonia; it took the government off-guard.

The Southern Cameroon crisis is an Ambazonians’ attempt to break from the dominant Francophone cultural hegemony. La République du Cameroun has dominated and tried to absorb them into the broader Francophone cultural system since 1972 by silently destroying their dignity and statehood because they came into union with them from a weaker position: a numerically smaller population [11].

The relationship that exists between Southern Cameroon and La République du Cameroun is one of two people, two inheritances, and two divergent mentalities: one struggles for its liberation while the other suppresses and abuses its human rights or struggles to maintain control over it by using its mighty state military. They speak different languages with little or no rapprochement although they live in the same country [11].

### **3.1 The police and the Southern Cameroon common law lawyers confrontation**

The protest which was led by Barrister Agbor Balla, Dr. Fontem Neba and Tassang Wilfred began on October 6, 2016 as a sit-down strike initiated by the Cameroon Anglophone Civil Society Consortium (CACSC), an organization consisting of lawyer and teacher trade unions from the Anglophone regions of Cameroon.

According to Wikipedia 20 [12], the common lawyers of Anglophone Cameroon had written an appeal letter to the government complaining of the use of French at schools and courtrooms in the English-speaking regions of Cameroon. Desirous to protect the English culture, they began a sit-down strike in all courtrooms on October 6, 2016. Peaceful marches began in the cities of Bamenda, Buea, and Limbe calling for the protection of the common law system in Anglophone Cameroon and the practice of the Common Law sub-system in Anglophone courts and not the Civil Law as the French-speaking magistrates were using in court. They equally asked for the creation of a common law school at the University of Bamenda and Buea.

In addition, Francophone occupied all the outstanding positions at the Supreme Court. Although Francophone had little or no knowledge in English and the Common Law, they were mostly magistrates and bailiffs in the Anglophone zone. As a result, Anglophones lawyers were disgruntled of the domination of the Civil Law to the detriment of the common law as if Cameroon was uniquely a Civil Law country. Equally, the Business law for Africa (OHADA) uniform acts, CEMAC code, and others were not translated into English because Francophone wanted to assimilate the Common Law sub-system.

In Africanews, Morning call 2016 [13], Barrister Bobga Harmony lamented that the government of Cameroon had completely ignored them which violated their right to self-determination. He said that “since 1972, they have been a progressive, an inexplicable, illegal and illegitimate erosion of the common law.” He regretted the Francophone gradual replacement of the Common Law with the French Civil law as if Anglophone “were a conquered people”. The lawyers had complained to competent authorities through writing for years before taking concrete actions in order not to be swallowed up by the dominant Francophone system. They held a Common Law conference on the 9th May 2015 which was followed by a 2nd conference in Buea where they made a declaration to reinforce their position.

Although they had sent a communiqué to the presidency of the Republic of Cameroon, nobody paid attention to them. The Minister of Justice insulted the Common Lawyers in the government newspaper: Cameroon Tribune instead of defending them. Having exhausted all negotiation with the executive and the legislature, they protested and insisted to talk only with the president of the Republic of Cameroon or his properly mandated agent. They had filed a petition to the National Assembly and the Senate and they were planning to file another petition to the constitutional council to determine the question of whether they had been any act of union between West Cameroon and East Cameroon. They equally planned to proceed to the following international jurisdiction: African Commission for Human and People’s Right, the Human Right Commission if the



government failed to listen to them. Bobga Harmony insisted “We are going to seize the international community because these are grave abuses of human rights. The international community cannot fold its arms and allow us to be brutalized in our land,” [14].

### **3.2 Molestation of lawyers**

The government sent over 5000 troops to thwart the Anglophone crisis. The crisis was considered to be “a strong organized and well-coordinated violence from angry protesters and the government did not want to allow that part of the country to be destroyed and the protesters too said they would not stop protesting until the government solved their problems [15].

Policemen hit the ‘the men in uniform’: lawyers with their batons in Buea. The Special Rapid Response (ESIR), the police and gendarmerie locked down and monitored the entire city. There was also a heavy police presence to confront the demonstrators. The policemen demanded that the lawyers hand over their black robes to them [16].

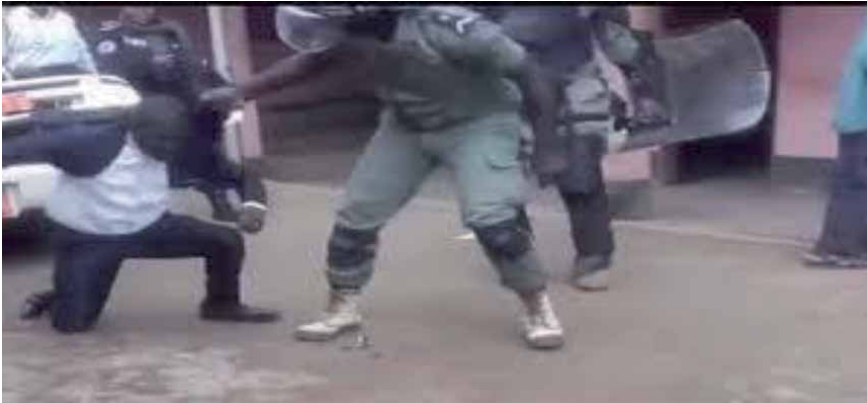
The demonstration of lawyers in Buea in the Southwest region on the 10th November, 2016, met with heavy-handed police response. Law enforcement officers reportedly brutalized, ransacked the offices of lawyers, seized their wigs and gowns, injured and harassed many in their cars, seized and destroyed their phones, barred some from joining the demonstrations, raided hotels in search for them and harassed them (**Figures 1 and 2**).

A video [18] went viral showing how police brutalized lawyers and the commotion that took place in the Muea police station. It clearly shows a police officer pursuing a young lawyer, then another lawyer is pushed into the police station by yet another policeman. Another man in robe is brutalized and pushed out of the police station. The police hit another who falls down and his watch falls off but the police pull him up by dragging his coat. A policewoman encourages her colleagues to hit the lawyer by clearly articulating the phrase in French “frappe,” “frappez-lui” over and over.

The episodes of police brutality in Ambazonia were not limited to lawyers only; it extended to the University of Buea students as well as the general public. Police molested many and a lot of disturbing videos show armed police officers hitting or rolling them in water, invading students’ quarters and beating them [11].



**Figure 1.** Confrontation between police and lawyers. Source: Cameroon online [17]: <http://www.cameroonconcordnews.com/category/news/page/373/>.



**Figure 2.**

Source: Cameroon online [17]: <http://www.cameroonconcordnews.com/category/news/page/373/>.

### **3.3 Police confrontation with students**

Teachers and the general public joined the lawyers in the strike by vehemently opposing what they described as the “imposition of French at schools in Anglophone parts of the country.” Students either struggled on their own at school because even private schools teachers had deserted classroom in support of the public sector teachers and so many classrooms and schools across Ambazonia were empty. They did not want the government to continue sending teachers who spoke only in French or Pidgin English. Even students supported the strike action because they were unemployed after completing school. “For over fifty years Anglophone students have not been able to have a headway in Cameroon in most disciplines that bring about development: science and technology because the government has refused to train teachers for our schools,” declared Tassang Wilfred over Aljazeera (2016) [19].

The University of Buea strike pulled a mammoth crowd of students who came protesting in order to attract the attention of the authority of the university to their plights. One student carried a placard on which it reads: “enough is enough”. They had a variety of complaints: the non-payment of the 50,000frs CFA that the government had promised them, the cancelation of the 10,000frs CFA penalty fees for the late payment of school-fees, the payment of fees before being given a semester result and as it was the general cry with the secondary and high schools in the Anglophone zone, they also demanded the removal of French-speaking lecturers from the faculty of the university [19].

They stood firm in front of the Administrative Block in order to meet the Vice Chancellor to complain to her but instead security forces took her away and a huge number of security forces were sent to dispatch the students. As they arrived, the students ran into different directions and the atmosphere became very tense and misty because the security officers had thrown teargas and fired gun-shots in the air. The students shouted “no violence” as they darted away for safety. Despite beating and arresting them, the spirit of the strike action was not dampened so the students left and marched into the street (**Figure 3**).

### **3.4 The Ambazonia massive and pervasive protest march**

According to [20, 21] renewed mass protests broke out early morning on Sept. 22, (Friday) 1st October 2017, in major towns and villages across the North West and South West regions thereby intensifying the crisis. Close to 80,000 people of

demonstrators in across thirty Anglophone towns and communities (Bamenda, Buea, Kumba, Kumbo, Limbe, etc.) marched through the streets on Friday in protest against the continuous detention of some of the inhabitants of the regions and demanded their independence from French Cameroon as well as the release of Anglophone political prisoners, the departure of President Biya, the implementation of federalism, and secession. The demonstrations was at the time President Paul Biya was scheduled to address the United Nations General Assembly in New York. Paul Biya's speech ended without mentioning the Anglophone crisis in his country. This infuriated some protesters who spoke to the media (**Figure 4**).

The demonstrations took off in Bamenda in the North-West Region on Friday morning by defying a ban on movement of persons imposed on Thursday night by the region's Governor Adolphe Lele Lafrique, following a bomb attack on Thursday that injured three police officers. Local media reported that security forces were stationed at vantage points in the town and the protesters peacefully waved banners with



**Figure 3.**  
*Protest march and mass arrest of students. SOURCE: CHRDA <https://www.chrda.org/torture-of-university-of-buea-students-2-years-after/>.*



**Figure 4.**  
*The Ambazonia massive protest march [20].*

inscriptions calling for the release of their compatriots and independence. The demonstration spread to Buea in the South-West Region where women spearheaded the march with hundreds behind them carrying leaves, tree branches and flags of the Cameroon separatist movement. The aggrieved population also took to the streets placards, whistles and flags of Southern Cameroons/Ambazonia; a country they clamor to create when they secede from the Republic of Cameroon. Protesters moved to public places, hoisting blue-white flags and seeking to meet with administrative and traditional authorities. It was the same scene in other towns like Fontem, Bafia, Kumba and Mamfe among others in the same region where separatists demanded independence from French Cameroon. The civil disobedience call was made by the Ambazonia Governing Council and amplified by Anglophone activists in the diaspora, as a build up to Oct. 1, the day the pro-secessionist groups intended to restore their independence (**Figure 5**).

Other Anglophone also protested at the UN headquarters in New York. According to [23], in the diaspora Southern Cameroonians took hostage the UN headquarters in their host countries. It was hot at the UN headquarters in New York where the two distinct peoples of Southern Cameroons and La Republique du Cameroon challenged each other.

According to [24] the crisis in the Northwest and Southwest regions of Cameroon escalated on 1st October 2017, when militant secessionist groups symbolically proclaimed the independence of Ambazonia. Violence left dozens of protesters dead and over 100 injured. The event was to commemorate the 1961 reunification between the Cameroon under French mandate and the British Southern Cameroons.

On 1 October, tens of thousands of people began a peaceful march holding a plant symbolizing peace and chanting “no violence” to proclaim the independence of Ambazonia (the name given by secessionists to their hypothetical state. In Bamenda, Buea and across dozens of towns and communities, people marched and hoisted Ambazonian flags at intersections and on top the residences of traditional chiefs as well as at police stations and gendarmerie posts. Independence was symbolically proclaimed in chiefs’ compounds.

The march protest showed to the Biya’s regime that the Anglophone minority is a potential time bomb that will destroy national unity and reconciliation if the government failed to respect their cultural and linguistic traditional. Hon Joseph Wirba of the Jakiri Special Constituency while addressing his colleagues of the national assembly made it clear ‘when the people shall rise, even if you bring the whole of the French army and add to yours, you shall not be able to stop them.’



**Figure 5.**  
*Women leading the march [22].*

### 3.5 Government's response

According to [20, 25] security forces responded with bullets and teargas, injuring some protesters in Santa and Ekona in the North West and South West Regions and arrested dozens of people. Government ordered the banning of all radio and television discussions on the political situation in the region. President Biya subsequently signed a decree establishing the National Commission of Bilingualism and Multiculturalism to solve the matter. In August 2018, the president signed a decree releasing Anglophone leaders detained for months because of the protests. Several others including journalists are still behind bars facing terrorism charges.

Crisis Group [26] states that defense and security forces responded with disproportionate force, leading to at least 40 deaths and over 100 injured protesters between 28 September and 2 October. This death toll is the result of live ammunition and excessive use of tear gas on those at homes as well as faithful going to church. Defense and security forces arrested hundreds of people without warrant, including those who were in their homes. They made use of torture and inhuman and degrading treatment. Sexual abuse, destruction of property and looting of homes by soldiers and police, as well as shooting from helicopters at protesters in Kumba, Bamenda and near Buea were reported by a dozen residents, local politicians, senior officials, the press, human rights organizations and the Catholic bishops of the two regions.

According to Primus F. [27], the villages of secessionist leaders such as Ewele, Akwaya, Eyumodjock and Ekona were targeted by the defense and security forces, forcing thousands of young men to flee to the bush for fear of being killed or arrested and tortured. Violence, arrests and looting by military and police continued throughout the following week, notably in the department of Manyu. Suspected of secessionism, Deputy Mayor of Ndu was reportedly killed at home by the military on 2 October.

This widespread violence took place during a *de facto* state of emergency and martial law, imposed by the two regional governors from 29 September to 3 October: they enforced curfews, banned demonstrations and gatherings of more than four people, closed regional land and sea borders, brought in military reinforcements, banned all movement from one department to another, banned motorcycling, and cut off social networks, followed by the internet and electricity. On 1 October, people were also forbidden from leaving their homes [21].

Some senior officials and high-ranking officers explained that the excessive measures were due to lack of police officers, insufficient police equipment, the lack of blank cartridges and an inadequate stock or misuse of tear gas. Their claim was that gendarmes and police officers mismanaged their insufficient stock of tear gas by using it at homes, and ran out when facing protesters.

They also accused protesters of inciting unrest by burning vehicles that belonged to the sub-divisional officers and Divisional Officers in Boyo and Fundong (in the Northwest), snatching weapons from gendarmes in Kumba (in the Southwest), ransacking the police stations of Ikiliwindi, Mabanda Teke and Kongle, and reportedly throwing stones at police and military in Buea and Bamenda. Finally, they point out that some police officers and military personnel refused to participate in the violence, which meant that the security apparatus was understaffed [21].

The government official missions abroad to discuss with Cameroonians in the diaspora in August failed and it led to increased cases of arson and sporadic violence by unidentified splinter groups, violent repression of Anglophone activists by security forces on 22 September, bomb blasts in the Northwest, and a *de facto* state of emergency from 29 September to 3 October. Due to such murderous repression, secessionist ranks grew, and they firmly evoked the idea of an armed struggle or

“self-defense”. The crisis needed political solutions through the mediation of a credible mediator, such as the UN Regional Office for Central Africa (UNOCA) or the African Union and superficial measures and take responsibility in order to find political solutions to the crisis [26].

### **3.6 Social dynamic: the change of stance**

According to Billy A et al. [28], the Anglophone conflict has escalated since 2016 because more Anglophone movements including those that praised the decentralization of power and those which supported federalism have joined pro-independence movements. They are armed and are committing violence as well as petitioning international and regional organizations such as the United Nations and the African Union to seek for a solution to the crisis. The current spate of violence that has caused a lot of deaths, bloodshed, and the destruction of properties started when lawyers and teachers protested. How have Ambazonians changed their stance for the past four years of the crisis?

When Southern Cameroonians watched the video [28] which describes in detail the massive and pervasive protest march which took place on the 22nd September and the 1st October 2017, they did not only considered the event as one “that gave nightmare for LRC” but noticed the enormous change that had taken place so far. In 2017, they wanted a federation but presently, they are fighting for total freedom: The analyses below are based on Ambazonians’ views on the ABC (The Ambazonia Broadcasting Corporation) television programme: Remembering September 22 2017.

“This is a rebroadcast of 2017 by then we wanted a federation. We have moved on to total independence,” “No to Federation,” “They have been killing our people with no remorse on daily bases big no to federation,” etc. [29].

They gladly acknowledged their pledge to fight for a free Ambazonia because as they said it is not given but won and that the spirit of a free Ambazonia dwells in them all. And they praise Honorable Wirba who shook the House of Assembly with his declaration and considered him a true prophet when he said: “When my people will raise even if you join your forces with that of France you will not win them,” Then they affirmed that until independence is achieved, there will be no peace in Cameroon.

“Ambazonia must be free,” “Independent or no peace” “the Ambazonian spirit lives on in every Ambazonian,” “We Ambazonians in the majority have consciously chosen freedom”. This freedom, we Ambazonians shall earn and it is not given. God help us » “I wish I will be alive. The Ngoketugia Marines will be there” [29].

This shows that the crisis has taken a dynamic and dramatic change from federation: staying with la République du Cameroun and managing their own affairs to total independence, that is, having nothing to do with French-speaking Cameroon because no political solution had been sought for the crisis but superficial and martial solutions. This was seen by the war draft that the Interim Government organized that almost 2 million dollars were raised to prosecute the war for independence.

Being assured of achieving their independence, they recommended the keeping of the videos because as they said many people in the crowd had been either killed or imprisoned by the Yaoundé regime:

“God gave us leaders. Look at that young man. Hope he is still alive,” “God cover you all with his blood brothers and sisters” “Videos like this must be kept. Many in that crowd have disappeared or they are in underground prisons” [29].

They considered those who spoke contrary to their views as foreigners or francophone; “All those speakers are Bamilikes and so we don’t expect anything better

from their responses,” “They are all Bamis,” “So funny to listen to them, who the hell are these men? In who’s name are they talking?” “All francophone, federalists or unionists have no more voice in the Ambazonian revolution,”

They also question why soldiers were killing only Anglophones “Look at the protests today. No Francophone Camerounian was killed” [29].

#### **4. Protest march in French-speaking Cameroon**

The Cameroon Renaissance Movement (MRC) lawyer Emmanuel Simh told Human Rights Watch: “We have made dozens of demands for peaceful protests and, as usual, the authorities have turned them down. But we believe that we cannot arbitrarily withdraw the right to peaceful assembly, which is recognized by the constitution.” His supporters defied the ban on demonstration, and organized a two-day long anti-government protests against the presidential election results in the streets of Douala, Yaoundé, Dschang, Bafoussam and Mbouda.

As a result, Maurice Kamto was taken into custody from the house of Albert Dzungang, a party member, in the southwestern Douala city late on January 26 and was first transported to the premises of the judicial police of the Littoral region. From there, he was reportedly transferred to Yaoundé, along with around 150 demonstrators. Members of his inner circle Christian Penda Ekoka, Albert Dzungang, Celestin Djamen and Alain Fogue were also arrested for attempting to destabilize the state and for calling and organizing an unauthorized demonstrations or insurrection. Six MRC members were injured even Ndoki: a reputed lawyer. The match was violently repressed, the police used teargas and water to disperse the crowd and the police shot live bullets on the crowds. Kamto’s lawyers seized the UN about the “arbitrary” imprisonment of their client and other detained opponents, and called for their “immediate” release [30].

According to [31], the Cameroon Renaissance Movement (MRC) announced in early April that it would organize public demonstrations on April 6 and 13, 2019 to demand the immediate release of its president: Maurice Kamto who had been imprisoned for more than two months as well as to denounce “the selective modification of the electoral code” and the mismanagement of funds dedicated to the construction of stadiums for the 2019 African Nations Cup which Cameroon was to host. The Cameroonian government banned it and threatened: “The instigators and offenders, whoever they are, will come up against the rigor of the law”, and the government considered it to be a provocation and an act of insurgency. MRC was accused of destroying Cameroonian embassies in Paris and Berlin and the government threatened to suspend or ban the political party.

##### **4.1 The 22 September 2020 in French Cameroon**

Despite the restriction of protest march by the government, the coalition of opposition parties and civil society organization called Les Forces du Changement headed by Pr Maurice Kamto, president of the Cameroon Renaissance Movement expressed unhappiness through a forbidden protest march [32, 33]. The reasons for the peaceful march was to call for the revision of the electoral codes, peace in the North West and South West regions and for the president of the republic to leave power.

Early that morning, there was a strong deployment of well-armed security forces composed of policemen, gendarmes. They were positioned at all points in the towns of Douala, Yaoundé and Bafoussam in order to disperse protesters who had been manifesting. Despite the presence of the security forces, protesters

staged the march, security forces blocked Maurice Kamto at his home and they used teargas to disperse the crowd, as well as arrested and transported protesters in pick-ups.

An MRC leader said that “although it is a peaceful demonstration where the populations march with the flag of the country and tree branches, a symbol of peace, the army sprayed them with tear gas to disperse them, “ [17]. Why is it difficult to protest in Cameroon? (Figures 6 and 7).

#### **4.2 Legislation on protest march in Cameroon: the anti-terrorism law**

This part of the work examines why Cameroonians are refused the right to march peacefully and why the government represses them even when they have asked for an authorization to organize a peaceful march or when marching waving peace plants which indicate peace and not violence.

The Law No. 2014/028 of 23 December 2014 on the Suppression of Acts of Terrorism (Anti-Terrorism Law) has been making public manifestation difficult in Cameroon whether peaceful or violent. It considers terrorism to be “any act by an individual or groups of persons’ acting alone (or in group) as an accomplice or accessory, (who) commits or threatens to commit an act likely to cause death, endanger physical integrity, cause bodily injury or material damage, destroy natural resources, the environment or cultural heritage’ with the sole intention to: (a) intimidate the public or provoke a situation of terror; or (b) disrupt the national functioning of public services; or (c) create widespread insurrection. In all of these instances, the punishment is death” [36].



**Figure 6.**  
*Cameroon police used tear gas to break up protes. Source: Newvision:<https://www.newvision.co.ug/news/1527636/cameroon-police-tear-gas-break-protest> [34].*



**Figure 7.**  
*Confrontation with police. Source: Anadoulou agency [35].*



The government of Cameroon has been systemically violating fundamental human rights and freedoms since this law was enacted. The law is mostly used as a strategic framework to control the exercise and enjoyment of fundamental rights in Cameroon (whether peaceful or violent) [37]. The law is an anathema to human rights because the Military Court's interpretation and application of the law against the rights to strike and freedom of expression are wrong and unconstitutional. It is the new law on the repression of fundamental rights and the government has to amend it to reflect international human rights' commitments.

It is difficult to understand what is meant by the intent 'to intimidate the public or the intent to disrupt national functioning of public service within the normative content of section 2 that the government uses to arrest and condemn individuals with acts of terrorism. The enactment of the anti-terrorism law has disrupted the exercise and enjoyment of fundamental human rights and freedoms because people have been tagged, judged and imprisoned as terrorists by the Yaoundé Military Court [37].

In 2017, Ayah Paul Abine: a former Supreme Court Justice, was arbitrarily arrested without any warrant because he had expressed disappointment with the government's brutal treatment of English-speaking Cameroonians and suggested a return to federalism as a solution to the Anglophone crisis [38]. The powers-that-be simply instructed the police to arrest him. His arbitrary detention was because he had expressed his opinion. This was a clear indication of the violation of his right to freedom of expression and an obstacle to his physical, socio-economic and psychological development. It also indicates what the government of Cameroon is able to do to curtail the free exercise of fundamental human rights, contrary to its international commitments.

In 2017, Common Law Lawyers and the Teachers Associations of the Anglo-Saxon educational system of Cameroon carried out a peaceful strike demonstration but they were brutalized. Their arrest, detention and imprisonment were a flagrant violation of their fundamental rights which the government of Cameroon had committed to protect. According to [35], there was no possible justification for castigating the Common Law Lawyers and Anglo-Saxon teachers as terrorists, it was the government's attempt to abuse their fundamental rights instead of addressing their concerns. How did the actions and declarations of the Common Law Lawyers and Anglo-Saxon teachers, through civil disobedience against a perceived marginalization and erosion of the Anglo-Saxon system of education and Common Law legal practice, satisfied the requirements of section 2 of the anti-terrorism law?

A strike action which an administrative officer duly authorized was later considered a terrorist activity. On 28 of January 2019, the police arbitrarily arrested Maurice Kamto and 200 members of his political party, detained and charged them for sedition, rebellion, insurrection, destruction of public properties and vandalism for contesting the presidential elections, and they were likely to face the death penalty [39]. How on earth can a protest action against electoral fraud be translated into intimidation of the public, in order to qualify it as an act of terrorism? According to [37], although the destruction of public properties is an irresponsible act and should be condemned, it does not justify any charge of terrorism which is punishable by death. The government ought to have instead charged them with destruction of public properties and not terrorism. Destruction of public properties and looting are common aspects of (violent) strike actions globally and therefore they are not peculiar to Cameroon. No country in the world has considered violent strike action as an act of terrorism, as it is the case in Cameroon because the government does not want any opposition or criticism of any kind.

The anti-terrorism law has not spared the freedom of expression in journalism and the media. The police accused and arbitrarily arrested Samuel Wazizi: a local

broadcaster of CMTV in 2019 for speaking critically on the air on how the government had handled the (Anglophone) crisis [40]. Then the Motorized Infantry Battalion transferred him to Yaounde, neither his family nor his lawyer were allowed to contact him. He died in detention in 2020 because of torture. Four security forces also arbitrarily arrested Kinglsey Fumunyuy Njoka: a freelance journalist at his home and held him incommunicado for three weeks because he was accused of secessionism and collusion with pro-secessionists groups in the English-speaking part of the Cameroon [41]. On 12 June, he was placed under provisional detention for six months.

The above violations of human rights illustrate that the government of Cameroon uses the law as a political tool to quell dissent and silence political opponents instead of using it to fight against terrorism. On 24 February 2020, supporters of the ruling party protested in front of the French embassy in Yaoundé, against what they considered an insulting and unacceptable outing of President Emmanuel Macron of France on Saturday, 22 February 2020, accusing President Paul Biya for gross human rights violation [42]. Surprisingly, none of the protesters was arrested or charged with terrorism.

The anti-terrorism law has considerably abused the right to strike because any strike action is construed as a terrorist activity. Instead of promoting such democratic values and principles premised on the respect of fundamental human rights, the government has improvised (through legislative means) attempts to disallow, limit and inhibit freedom of expression, on the grounds of terrorism, just to justify restriction. The antiterrorism law has helped the administration to vehemently suppress every opinion exercised through the right to freedom of expression that does not support the regime. Any opposition or criticism of the government is deemed an outright act of terrorism or insurrection or hostility against the state.

It is impossible to understand how the government arrest and detain citizens for exercising their rights within the frame of international and African human rights law and the Constitution. Abusing freedom of expression is implicitly curtailing other linked rights-based entitlements. In the context of press freedom, the right to freedom of expression entails a free, uncensored and unhindered press to comment on public concerns and to inform public opinions on matters that relate to their fundamental rights and freedoms. It permits the media to execute their duties freely and objectively. Curtailing journalists' rights who, in principle, ought to express views and raise awareness on socio-economic, cultural, political and religious developments in the country and the world at large, is tantamount to a violation of the right to freedom of expression and press freedom [37].

Therefore, the anti-terrorism law is not meant to fight against terrorism but against every peaceful marches in Cameroon. All the repressed marches we have seen above were meant to be peaceful and not violent; and the application of this legislation was not necessary.

### **4.3 Reaction to the restriction of protest march**

Many international organizations and people have reacted to the protest march restriction in Cameroon. They have called on Cameroon to amend the law because it suppresses the expression of human rights in Cameroon.

Meeting in Geneva on the 11 December, 2018, the UN human rights experts criticized the crackdown against protesters in Cameroon and called on the government to protect freedom of expression, peaceful assembly and association. They stated that the International human rights standards give the right to everyone to take part in peaceful demonstrations. The law must not provide any restriction to

the freedoms of peaceful assembly and expression and it must be proportional. They clearly stated that: “The restrictions imposed lately by the Cameroonian authorities on the rights to peaceful assembly and expression appear to ignore such criteria, provided for by the international instruments to which Cameroon is a party.” According to them, the country’s 2014 anti-terrorism law should not be used to curtail peaceful assembly, marches or demonstrations organized by political parties during an electoral process [43].

Lewis Mudge who is the Central Africa director at Human Rights Watch said: “These steps are a thinly veiled attempt by the Cameroonian government to use the Covid-19 pandemic and the draconian anti-terror law as a pretext to quell the right to assemble,” “Cameroon’s authorities should protect and facilitate the right to assemble, not seek to curb it” [44].

The above clearly shows how the government uses the terrorism law to curtail its citizens’ human rights. We then examine below how the people in Cameroon and beyond react to such abuse of human rights. We present people’s reactions using their Facebook posts.

After the march 22 September 2020 many posts were sent and many commentaries were made but we have decided to use the post that the Togolese Activist Farida Bemba Crache sent pouring her venom on the regime in Yaoundé. The post was shared 427 times and about half a thousand commentaries were made about it. Equally; the commentaries have an international character because the commentators were both Cameroonians in the country and those in the diaspora. And it compares the situation in Cameroon to those in other French-speaking countries in Africa. In order to make sense of the feelings of people both Cameroonians and non-Cameroonians, we made an effort to categorize their responses.

The post reads: “In Cameroon, Paul Biya and his government ban the demonstrations of Maurice Kamto’s MRC, deploy soldiers everywhere to beat, gas and intimidate the populations and at the end of the day, the henchmen of this regime come back to say that Cameroonians do not want change and that the demonstration flopped in Yaoundé. But if the Biya regime really thinks that Maurice Kamto and his people have no power to mobilize, why ban the demonstrations? These are the same nonsense that is happening in Togo, Guinea, Ivory Coast and in all these colonial enclosures where criminals are installed in power.”

The commentaries expressed optimism and determination by saying that the population will triumph shortly over the government’s brutality. They thought that the time would come when the government would not contain them meaning the population had not given up hope for the fight for liberation despite the oppression. They said real people do not need any police authorization before marching peacefully. They advise the population to spontaneously go out in mass and do whatever they want. They agreed that marches should not be stopped but people should go out massively to police stations or divisional offices to ask for their compatriots. They agree that if they did not act in solidarity, they would always be threatened. They advised that the marches in Mali, Sudan were never authorized but they took place. “They will never have the last word ---- a time will come when they cannot contain us. God is in control for the speechless. Cheer up.”

What is interesting about the post was its conflicting nature because it was like a battle between those in the ruling party and those in the opposition. While those in the opposition say the people will raise, those in the ruling party retorted by saying: “Which people are you talking about??? Really the people do not support you \_ it is clear,” “Of what people it is question,” “Who are the people exactly,” “You mobilized some Bamilekes and you talk of people.” « A few Bamilekes as you say but who are making a good number afraid » This means that the people did not represent the diversity of the Cameroonian people but from a particular group

or region. It expresses a tribalistic tendency when they attach the region of those who protested to the region of the main opposition leader Maurice Kamto in order to trivialize the march protest.

“Go and win using the ballot box,” “The people of West Region or Cameroon,” which means that they do not have any population supporting them and that they should win using the ballot boxes, that is, through election and not through violence but they complained elections results were distorted. “Where have these elections results been stolen?” By so saying they meant that elections in Cameroon are well-organized: free and fair and any other reason to protest is purely out of violence.

The opposition says “if elections are free we will win, the government is a demon,” The ruling party supporter retorted by saying that

“The ruling party is a demon once people come out of the manger.” They meant that people would criticize the government whenever they were unable to benefit from it and not really that it was bad but because they did not longer benefit it. They cited: Kamto, Ekoko and Dzongang who were once in the government but are now criticizing it.

They ended up by saying that they had no other option but to protest: “What do people have to do in a country where repression and electoral fraud reign? Where peaceful marches recognized in the constitution are forbidden? Where directors of public companies embezzle public funds where the population is crying of hunger but are not listened to by the president? Where a few live in affluence while a majority live in poverty. It was because of these reasons that the population was obliged to protest peacefully for their rights and not to overthrow the government.

## **5. Theoretical implications**

Marx and Engels [45] famously argued that, in any epoch, the dominant ideas are the ruling ideas in society which has helped to maintain the dominance of the ruling classes. Those who control economic production also manipulate the production of ideas, and the class which is the material force of society is at the same time the ruling intellectual force. They rule as thinkers and producers of ideas and regulate the production and distribution of ideas of their age. Similarly, the government Cameroon has been producing ideas not just to suppress Southern Cameroonians because of their dominance over the economy, judiciary and political institutions but equally the entire country in the sense that they are in control of the judiciary and the media. They produce ideas which does benefit the general interest but to protect their interest: the anti-terrorism law for instance is to check any uprising against them and they use it not to control terrorism but to hinder the growth of the opposition party in order to maintain themselves in power.

Equally, the origin of the Ambazonia uprising is as a result of a dominant and not a consensual cultural hegemony. The Ambazonia crisis is an attempt of Southern Cameroonians to break the dominant Francophone cultural hegemony. French-speaking Cameroon has been making efforts not just to dominate them but to absorb them into the broader Francophone cultural system. They silently destroyed the statehood of Anglophones-not by the French-speaking community at large, but by the government which was led and dominated by Francophone.

What led to the Lawyers and teacher protest marches in the English-speaking part of Cameroon was their lower perceived social status as compared to the Francophone. This led to the creation of a “social identity” of the English-speaking part of Cameroon, what [46, 47] refers to as “the part of their self-concept which

derives from their knowledge of their membership of a social group (or groups) together with the value and emotional significance attached to that membership". Their self-concept (or, equivalently, self-image) is their self-evaluation in their being in union with French-speaking Cameroon. When they compare their social status to that of Francophone, they have a negative perception of themselves: that of marginalized people which is a negative or a low social identity. Accordingly, they try to change this situation of a low or negative social status by mobilizing their members for a protest march as it was on the 22nd September, 2017. This is exactly the hypothesis of SIT: "When social identity is unsatisfactory, individuals will strive to leave their existing groups and join some more positively distinct group and/or make their group more positively distinct" [48]. Since they have been unable to make their situation more favorable comparatively to the Francophone, today, they are clamoring for absolute independence to manage their own affairs.

They have therefore constructed a collective identity which is a collectivity of actors with a common goal. And the common goal for a good number is absolute independence. Their emotional bonds enable them to successfully organize lockdowns and execute the weekly ghost towns and do many other activities that can enhance their freedom from fifty year marginalization

We can also use the Ration Choice Theory (RCT) to explain Protest March participations in French-speaking Cameroon. We formulate it in the following way: Cameroonians choose the action that is least costly and most beneficial for them. "Political protest" is an action. Instead of engaging in a civil war to dislodge the system which has been ruling for nearly forty years, they prefer to choose the least costly one in terms of human lives losses in order to change the system. Maurice Kamto has even said that he would not walk on human blood before getting the presidency. Therefore, in order to explain protest, RCT prompts us to search for those costs and benefits that might instigate people to participate in protests. What are these costs and benefits? The cost of the protest march in Cameroon is that many people will die and will be arrested and imprisoned as it is the case in both parts of Cameroon and the benefits are that they will internationalize their local problem, maybe change the system and as for the Ambazonia, they may end up gaining their independence. This is the extent to which they think their action or protest makes a difference.

## **6. Conclusions**

Citizens of French-speaking Cameroon are protesting against bad governance, they want to put away the current political system which has been in power for over 38 years while those in Ambazonia on their part are seeking for secession. Whether in English or French-speaking Cameroon, the government's response to protest marches violates articles 5, 7, 9, 18, 19 and 20 of the Universal Human Rights Declaration of which Cameroon is a signatory.

Article 5 of the Universal Human Rights Declaration states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" but this is not the case in Cameroon because opposition leaders are often cruelly treated. They are either held incommunicado for months or cruelly beaten at SED. The imprisoned Ambazonia leader Julius Ayuk Tabe and his cabinet members commonly called the 'Nera 10' were held incommunicado for six months and later on condemned to life imprisonment. The militants of MRC were victims of cruel treatment by the government of Cameroon and some including journalists have died in the prison as a result.

The government of Cameroon has also failed to respect article 7 of the Universal Human Rights Declaration which states that 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.' This is not the case when it concerns protest marches in Cameroon. While the government charges opposition leaders who organize protest marches with terrorism and insurrection, arrest and imprison them, those who organize it to support the government go free.

Although article 9 of the Universal Human Rights Declaration states that "No one shall be subjected to arbitrary arrest, detention or exile," this is not the case in Cameroon where people who organize protest marches, those who criticize the government are arrested without a warrant and imprison without being judged. Hundreds of those who protested in the Anglophone crisis have been in prison now for over four years without being judged.

Article 19 of the "Universal Human Rights Declaration also states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." This seems not to be the case with the government of Cameroon which is arresting opposition leaders and journalists whose opinion differs from theirs. Therefore Cameroon is becoming a much more dictatorial than a democratic nation.

Equally, article 20 (1) of the Universal Human Rights Declaration states that: "Everyone has the right to freedom of peaceful assembly and association." This is not the case in Cameroon where there is always a strong deployment of well-armed security forces composed of policemen, gendarmes and they are positioned at all levels to disperse protesters.

For Cameroon to ameliorate its human Rights condition, we recommend that the Government of Cameroon should do the following:

- urgently organize an inclusive dialogue for a peaceful and lasting solution to the crisis in Ambazonia. The National dialogue the government organized has failed, it should then meet the separatists in a neutral ground preferably the Swiss-led process which the separatists and many leading countries in the world have endorsed.
- dialogue with the opposition outside the parliament to build consensus on electoral reform and to reduce the wide gap between them and their rivals and carry some reforms on a more independent national elections body, timelier and more transparent election results.
- trace the historical origins of the Anglophone crisis and identify the gaps and provide an answer as to why the transition from federal to unitary state brought feelings of discontent across a section of the country's population over time.
- immediately take all steps to bring an end to the violence and impunity in the country by withdrawing its military from Ambazonia for sincere dialogue to take place;
- give UN an immediate and unrestricted access to the Northwest and Southwest regions and the international community should call on the Government of Cameroon to launch independent investigations into reports of human rights abuses by state forces and urge the Government to cooperate closely with the UN.

- encourage independent civil society which is essential to uphold human rights and the rule of law and therefore uplift the ban of the activities of the Cameroon Anglophone Civil Society Consortium and ensure an open space in which civil society can operate;
- not to try civilians in military courts and to release all protesters immediately and drop all politically-motivated charges and cease all harassment and intimidation of political activists, including the ban on peaceful political gatherings, demonstrations and protests, and to take action to clamp down on instances of hate speech and not to seek the death penalty for political activists and protesters;
- stop the misuse of the 2014 anti-terrorism law which restricts peaceful assembly; therefore the Government should urgently take steps to ensure these rights are protected for all people in Cameroon including lifting the ban on opposition demonstrations and launching a review of the provisions of the anti-terrorism law;
- welcome criticisms and perceive it as a vital platform for advancing the spirit and continuum of democratic values of transparency and accountability
- build a genuine, representative and vibrant democracy; by convening all political stakeholders for a consensual review of the electoral system, with the aim of ensuring a free, transparent and credible electoral process; and this process should take place before any further elections, in order to promote peace and avoid post-electoral crises;
- help Cameroonians to reimagine a 21st century society where everybody comes with his own uniqueness, and guaranteed a means of celebrating and preserving it [49–51].

Finally for people to freely express themselves and better enjoy their human rights, the anti-terrorism law must be amended and there must be dialogue not as the government wants as it was the case with the Cameroon National dialogue but one that includes the main protagonists like the Swiss-led process which has been endorsed by many countries. Equally, the government must dialogue not only with the parties represented in the National Assembly but also with those out of the National Assembly. Finally, the electoral list must be revised and there must be transparency in voting without any manipulation by the party in power.

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# Exploring the Tension between the Rights of the Child and Parental Rights: Voices from Ghana

*Obed Adonteng-Kissi*

## Abstract

The principle of “best interests of the child” is firmly established in legal jurisprudence and has taken a firm hold on several domestic and global instruments. Generally, the courts rely on this principle in many cases of child custody, child work, child labour, and compulsory education. The norm of best interests of the child seems to be placed at the core of international law in relation to children’s rights by Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC). Nevertheless, there is no one universal “best interests of the child” norm owing to cultural variations. In Ghana, this raises issues of conflicts between expectations in the rights and duties of the parent and the right of the child as expressed in the United Nations Convention on the Rights of the Child (UNCRC) and offers a genuine opportunity for reform. The United Nations Convention on the Rights of the Child (UNCRC) adopted the rights of the child that can be classified into three groups: protection rights, provision rights, and participation rights. It appears the best interests of the child is at the centre of international children’s rights law which is articulated through Article 3(1) of the UNCRC. Presently, the advocacy of a child’s right to welfare grounded on human dignity has generated the present discussion on the rights of the child. Article 18 of the UNCRC provides that parents have a shared and core responsibility for the nurturing of their children and that in undertaking their child upbringing responsibilities, appropriate support shall be offered to parents and legal guardians by State Parties. Usually, the variation between children’s rights and parental rights, nonetheless, is not acknowledged by the UNCRC. Furthermore, the UNCRC views children to be competent individuals who should be an essential component of decision-making on issues affecting them. The parent/child contrast demonstrates that there is the need for cooperation that protects the rights of the child, the parent and defines the role of the state. There is the need to explore the best legal and judicial processes for realising this cooperation.

**Keywords:** right of the child, parental rights, protection rights, provision rights, participation rights

## 1. Introduction

This chapter explores the current interaction between the parent and the child which is viewed as a split of duties and responsibilities resulting in antagonism between parental and children’s rights. The chapter further draws on the Will/Choice

theory of rights, and the Interest/Benefit theory of rights that provide a very important structure for discussion detailing some of the discussions about cultural relativity and childhood; definition of areas in which considerations of welfare are limited; and rights as means of protecting certain individual interests to establishing norms and strategies to avert or deal with the abuse of children's capability to work. In Ghana, "best interests of the child" legal norm is used by the courts in deciding many issues regarding the welfare of the child in relation to parents or legal guardians. Therefore, guaranteeing justice and the highest opportunity for quality of life for children is a key objective of the law court [1]. An order is generally issued by the court for social workers and other child welfare professionals to undertake investigations to determine living conditions of children and their custodial and non-custodial parents to establish the best interests of the child [2]. There is the need to highlight the fact that the principle of best interests of the child depends on the value system or culture of the decision-maker if legal rules do not exist or there is no a hierarchy of values regulating the principle. A universal standard of what constitutes the best interests of the child must not be restrictive, if an accurate assessment of what best promotes the best interests of the child is to be undertaken. There is therefore no one universal "best interests of the child" norm considering cultural variations [3]. Many of the justly different judgements in varied cultures regarding children are practically defensible by the best interests standard [4]. Hence, there is the need to have understanding and adapt the best interests of the child and other legal principles to local contexts in view of the existence of cultural relativism. The unpredictability in judicial determinations and practical challenges for those trying to execute the principle of best interests of the child are because of the ambiguity of the principle which promotes litigation. Although the principle directs much decision-making about children, the principle has unspecified benchmarks devoid of straightforward conceptualisation for practice. Presently, many debates on children's law are about the indefiniteness, imprecision or open-endedness of the principle of "best interests of the child" working benchmark [5]. The vagueness of best interests of the child appears to provide an excuse for biased, whimsical and authoritarian judicial determinations [4]. The open-endedness of the benchmark can permit practices in some cultures which are regarded in other cultures as harmful to children. For example, putting children into work can be seen by the Ghanaian law courts as constructive for the social development of children and be viewed as hazardous by Western standards.

The present relationship between the parent and the child is regarded as a split of duties and responsibilities. This relationship has resulted in antagonism between parental and children's rights [6]. The United Nations Convention on the Rights of the Child (UNCRC) gives parents the primary responsibility for bringing up and developing their children, and it states that children have a right to good parents, implying that parents should exercise fully this responsibility. The UNCRC also makes provision for parental rights that are linked to this responsibility. For example, Article 18 of the UNCRC stipulates that parents have a shared fundamental responsibility for their children's upbringing and that State Parties shall provide the right assistance to parents and legal guardians in performing their child rearing responsibilities. The difference between the parental rights and children's rights, however, is not generally recognised by the UNCRC. The UNCRC presents parental rights in the form of parental responsibility to protect the rights of the child. Furthermore, State Parties have the responsibility of ensuring that the rights of the child are adhered to by all. However, State Parties' responsibility for taking care of the child is subordinated to the parents' rights to take good care of the child. It implies that parents have an irreplaceable responsibility to safeguard the rights of the child. Nonetheless, the UNCRC also considers children to be competent persons who should be a critical part of decision-making on matters that affect them [7].

## **2. Tension between Children's rights and parental rights in Ghana**

There is potential tension between the right of the child and parental rights in child-rearing patterns in Ghana. The primary responsibility for developing and nurturing the child is given to the parent by the UNCRC, and it explains that children have a right to good parents, suggesting that parents should fully exercise this responsibility [8]. Therefore, the rights of the child guaranteed under Article 12 of the UNCRC have possibly undermined parental duties to children as stipulated in Article 3(1) of the UNCRC [9]. Recognising children as rights bearers distinct from parental rights and duties means that parents are mistrusted. Pupavac [10] highlights the mistrust of “carers” since children are recognised as holders of rights distinct from their parents. The concept of rights thinking implies that a child as bearer of rights is an independent and competent person who can exercise his/her rights and accept responsibility for his/her actions. Children are viewed as independent bearers of rights while parents and government have the responsibility to safeguard the rights of the child [11]. It also implies that legitimate professional intervention can be justified in family life if there is tension between the right of the child and parental expectations of the child. The rights viewpoint is associated with focusing on the contrasting interests of those engaged in decision-making [12]. If one wants to reasonably stretch it, Article 3 of the UNCRC considers children as vulnerable objects in need of parents or other authority's protection. Therefore, the UNCRC seems to conflict with itself to some extent. This extends the possible tension between children's rights and expectations of parents in traditional child nurturing styles and obstructs discussion that encourages consensus. Focusing on rights-thinking grounded on the autonomy of the individual hinders caring teamwork amongst parents, children and the state to arrive at an agreement that has the possibility of benefiting all the parties [13]. The feminist concept of the ethics of care is consistent with this critique [14]. Therefore, the feminist movement has raised more awareness of the significance of social interactions [15]. The possibility for tension between parents and children is therefore integrated in the UNCRC itself [16].

Children's rights should be adhered to, nonetheless explaining what constitutes the right of the child will differ from culture to culture. Variations in the cultural and historical circumstances can explain this situation [17]. In Ghana, this is especially relevant since many parents view children's participation in farm and fishing work as a critical component of work socialisation that benefits children and society [18]. Also, it is an economic necessity in other situations [19]. There are variations in the styles of child-rearing in Westernised and non-Westernised societies [20]. Western principles of childhood informed the designed and application of the UNCRC and it fails to consider the cultural differences that enhance children's contribution to family income [21]. Child rearing styles in the Western world try to move children away from the workplace and offer them with a type of childhood that encourages child wellbeing according to Western norms [22]. Many countries have utilised the UNCRC to assess progress in the enhancement of the life chances and opportunities for children [23]. Nonetheless, the UNCRC might confront the prospects, aspirations, and objectives of children who may never hope to exercise the idealised rights offered in the UNCRC [21].

Child trafficking, forced labour, exploitation, and the need for children's “rights to be protected” universally are addressed by Articles 32 and 35 of the UNCRC. Different societies define children's welfare in different ways on a global scale making it hard to identify a relevant idea of rights to cover the interaction between children and parents, and to outline the treatment of children that would be generally accepted by all societies. This leads to the UNCRC being a striving and normative

text that tries to define a universal idea of rights and situation of children around the globe resulting from ten years of extensive deliberations intended to generating a universal text that would best reflect an understanding of different legal regimes and societies [24].

Expectations of parents in traditional child nurturing styles are the main family-level predictor of children's rights [25]. Traditionally, child-rearing styles do not generally acknowledge the opinions or contributions of children in the decision-making process, and parents are inclined to ignore children's rights indicating that parental rights and parental expectations override children's rights when there is tension between the two. Involving children in decision making can be affected positively or negatively by the expectations of parents in traditional nurturing styles [26]. In Ghana, parents expect children to conduct themselves in a set manner through the transmission of some values from the family. Generally, expectations of parents in traditional child nurturing styles are influenced by forebearers which may in turn have effect on the development of children [27]. Parental expectations have been associated with realistic principles and choices that parents make about the future achievement of children [28]. Generally, expectations of parents have been recognised to contribute significantly in upholding children's rights [29]. In addition, the motivation of children to exercise their right, social resilience, and children's aspirations relate to high expectations of parents [30]. Further, the interactions between family background and children's rights are mediated by high expectations of parents [31].

In preparing their children for life in the community, some parents wish to engage their children in indigenous educational methods believing that it is in the "best interests" of the child. This indicates that the "best interests of the child" is determined by persons other than children themselves [4]. Additionally, this suggests that UNCRC believed that the best interests or the welfare of children can be damaged if they exercise their rights under the UNCRC and take wrong decisions [32]. In view of this, children lose the chance to exercise their rights because power is vested in other persons to exercise their rights on their behalf. The inability of children to exercise their rights in their best interests weakens their new position as competent persons. Furthermore, Article 12 of the UNCRC provides any child who can form his/her own opinion the right of freely expressing those opinions on all issues affecting them so that the child might have a more equal role in their interactions with adults and an improved opportunity to think and act independently. Therefore, the UNCRC gives the views of the child due weight according to the age and maturity of the child.

### **3. The rights and duties of the parent**

Attitudes towards the rights and duties of parents have changed over time, reflecting shifts in the way childhood and the status of children is understood. There was the evolution of the power of *parens patriae* as the Industrial Revolution resulted in a new consciousness of childhood [33]. Children were considered to be economic assets under English common law [34], and parents had a legal right to custody of their children [35]. This principle was developed from the ancient understanding of the status of children which viewed children as chattel [36]. The idea that children were the possessions of their parents was dominant as recently as the 18th century in America and other parts of the world [37]. This crude interpretation of children's status as property paved the way for the doctrine of *parens patriae* [38]. The English Chancery Courts' guardianship over infants, idiots and lunatics developed this doctrine [39]. During the evolution of English constitutional



arrangements from the early stages of feudalism, the Monarch reserved certain duties and corresponding powers, referred to as the “royal prerogative” for him/herself. *Parens patriae* is one of these prerogative powers, which gives rise to state guardianship over children. The Monarch was believed to exercise these powers and duties as “father of the country” or *parens patriae*. These powers of the English Monarch transferred to the governments of the several American States and, in part, to the federal government after the American Revolution and the adoption of the Constitution [40]. Blackstone suggests that the Monarch was the overall guardian of all infants, idiots and lunatics in the British Empire [41].

In its contemporary application, the prerogative has remained true to its ancient interpretation that treats infants as incompetent persons but has further developed to allow the exercise of state power in private custody cases in common law systems. It allows the state to intervene in decisions that are usually made by the parent, when the state finds this necessary for the child’s welfare. In both private and public custody disagreements, American courts also applied the *parens patriae* power [39]. In conjugal proceedings in America for instance, state courts have ruled that they are not bound to apply the custody decrees of foreign countries if the minor whose custody is being contested is physically within the territory of America [42]. Theoretically, the state in its application of *parens patriae* considers the well-being of the minor at the time an inquiry is made [43]. Furthermore, in cases of abuse and neglect, the power was traditionally invoked to safeguard children from their parents. Physical and mental incapacitation of the parent was the condition under which courts applying the doctrine in private custody disagreements could terminate parental rights. However, the condition of unfitness was grounded on the certainty that the child’s interests were served. Additionally, biological parents would in normal circumstances have custody of their children because this was believed to best promote their welfare, not because parent’s right to their children was absolute.

## 4. Theory of rights

This section discusses (i) the Will/Choice theory of rights, and (ii) the Interest/Benefit theory of rights that provide a very important structure for discussion detailing some of the discussions about viewing children as competent persons; definition of areas in which considerations of welfare are limited; and rights as means of protecting certain individual interests to establishing norms and strategies to avert or deal with the abuse of children’s capability to work.

### 4.1 Will/choice theory

The Will/Choice theory of rights developed by Hart [44], is another key theoretical framework of this chapter. At the heart of this theory is the idea that any adult human being of sound mind capable of making decisions has “the right to forbearance on the part of all others from the use of coercion or restraint against him” ([44], p. 175). Thus, the Choice/Will theory suggests that rights are characterised in terms of control exercised by the right-holder over the liberty or duties of others. In Hart’s essay, “Are There Any Natural Rights?”, he argues that to have a right is to be able to justifiably restrict another person’s liberty. In this version, the right-holder can choose whether to restrict another person’s liberty. Gunderson [45] refers to this as the “liberty version” of the Choice theory. Mill [46, 47], p. 250 states in his essay, “Utilitarianism”, that “when we call anything a person’s right, we mean that he or she has a valid claim on society to protect him or her in the

possession of it, either by the force of law or by that of education and opinion.” In essence, rights are claims according to Mill.

While accepting that children have claim-rights [48], Fortin [49] imputes the challenges in enforcing these rights in light of their seeming lack of capacity. According to Fortin, this is because children usually rely on adults such as their parents. Other scholars such as Hart, also contends that rights co-relate to duties [48]. But Freeman maintains that it is not every duty that implies a correlative right. Hence, resulting from Hart’s view, to have a right would imply a corresponding duty on parents, and on the state where the parents fail to do so [48]. Consequently, Fortin [49] points out that presently many scholars would prefer to use the word “obligations” owed to children rather than “rights”. While O’Neill [50] explains that an appeal to rights has slight chance of empowering children since when they are too young, they are incapable of responding to that appeal and by the time they are old enough to respond, they are close to adulthood and free from dependence. Therefore, she notes that the key remedy for children’s incapacity is for them to grow up [50]. Fortin [49] also suggests that children can have moral rights before any correlative duties are vested in any person to fulfil them. This moral right should not be obvious about who is obliged to fulfil the right [49]. In pursuant of this, the right of the child to be educated to the level of his or her capabilities is available but it is uncertain who has the power to enforce it and who has the duty to provide it [50]. There is therefore a problem with enforcing children’s rights. Hart’s Will theory suggests that the fact that rights provide right-holders choices to have a legal right is to have a legally respected choice. However, people simply make sense of legal rights without choices. Neither toddlers nor the comatose are legally competent to make choices, but there appears no theoretical confusion in saying, for example, that young children have a legal right not to be maltreated [51]. If one has a claim-right over some land, then someone else has a duty to keep off the land. However, it is sometimes difficult to establish who exactly has this duty. This is sometimes over-simplified. For example, as far as the claim-right to land is concerned, it is believed that the bearer of the correlative duty is everyone, but it would not be easy to establish this principle in other cases.

In order to explain what is meant by a “measure of control” over a duty, it would be appropriate to again refer to Hart [44] since he is one of the leading proponents of the Will theory. According to Hart, the complete measure of control over X’s duty comprises three powers: (a) the power to waive X’s duty or not; (b) the power to enforce X’s duty or not, given that X has breached it; (c) the power to waive X’s duty to compensate, which is consequent upon his original breach [52]. It is important to note the power to enforce X’s duty in (b) includes both the power to sue X for compensation and the power to sue for an injunction against X. It may be appropriate to say that the strongest paradigm of a claim-rights are the claim-rights acknowledged in property and contract law. The Will Theory aligns itself closely with these paradigms. In effect, it indeed holds that they provide the essential and satisfactory situations for claim right holding. It therefore stands to reason that in property and contracts, the duties that correlate with claim-rights are duties over which the claim holder usually has the complete measure of control comprising of the powers from (a) to (c).

However, the Will theory is confronted with two major serious oppositions. One is in relation to inalienable rights [53]. Sometimes, a claim-rights holder is restricted from waiving the duties that correlate with his/her claim right. For example, one’s duty not to kill or torture cannot be set aside by the person’s potential victims releasing him/her from his/her duties [54]. Usually, this is done for the right holder’s own good and protection. Therefore, Hart [44] considers such incapacity as a benefit of the Choice theory. Moreover, MacCormick [53] suggests that the protective incapacity is usually seen as reinforcing the claim.

In any case, we do not likely wish to deny that children have a claim right against parents which indicate that parents would not engage children in unsafe working conditions that is a threat to their health, education or development. However, the underlying suggestion is that children lack that capacity to exercise such powers. It is worth highlighting that the critical question here relates to the possibility rather than the fact, of inalienable claims [55]. Will theory make alienable rights incoherent in principle. Hence, there is moral or conceptual inadequacy regarding the nature of claim-rights.

A second criticism relates to incompetent children. Waldron [56] notes that critics of the Will theory consider children's lack of capacity to exercise their rights as a deficit and evidence of its inadequacy. For example, children are incompetent to exercise their right to be protected from engaging in work that constitutes a threat to health, education or development and therefore lacks in the relevant sense the powers because, for instance, children are immature. Thus, the inability of children to waive or enforce their rights is an inadequacy of the Will theory. We cannot therefore say that children no longer have claim right against parents not to engage them in work that constitutes a threat to their health, education or development. The first inadequacy of the theory is that it appears to allow all rights to be waived [54].

There is a second version of the Will/Choice theory propounded by [57]. He suggests that to have a right is to have control over another person's duty. One has control over the duty of another person if he or she has the power to remove the duty or to keep it in force. Gunderson [45] refers to this as the "duty version" of the Will/Choice theory. In the duty version, the right-holder is not necessarily justified in limiting the liberty of those who would violate his/her rights. In this context, the explanation provided here varies from explanations provided by Sumner [57] and Lyons [58] according to which Mill's conceptual analysis of rights is exclusively independent of his substantive moral theory. On Mill's analysis, rights correspond with duties to offer benefits. For Mill, however, one of the most significant duties is the duty not to interfere with another person's liberty. Mill [46, 47] makes this clear in his essay, "On Liberty", when he states that the only justification for coercing a member of a civilised community is to prevent harm to others. Mill then provides exceptions in the case of children and persons who have no capacity of being improved by free and equal discussion. This principle is generally termed as "Mill's Liberty principle" or "Harm principle."

In relation to the duty version, people exercise rights by keeping the duties of others in force or by eliminating those duties. On the other hand, the liberty version enables people to exercise their rights by trying to limit the liberty of other persons. Sumner [59] contends that the choice theory has the theoretical advantage of providing a clear distinction between moral reasoning based on principles of individual autonomy or liberty and moral reasoning founded on considerations of welfare. In relation to the Will/Choice theory, rights may be utilised to simply define areas in which considerations of welfare are limited by considerations of liberty or individual autonomy, because rights establish areas of individual autonomy or liberty.

#### **4.2 Interest/benefit theory**

MacCormick [60] and Raz [61] are two of the leading proponents of the Interest/Benefit theory of rights. According to this theory, the purpose of rights is to protect certain individual interests [60]. In "Utilitarianism" JS Mill [46, 47], p. 250 indicates that "to have a right is to have something which society ought to defend me in the possession of". The most natural explanation of this sentence is that those things which I possess that society ought to defend me in the possession of are benefits. Thus, rights are benefits secured for persons by rules regulating

relationships [54]. Additionally, rules feature in the interaction between rights and children [54]. Therefore, rules regulate relations between those with responsibility to safeguard the rights of the child and the child. Although there are various types of the Interest theory, they are all inclined to reach the same objective. One type suggests that “X has a right whenever he/she stands to benefit from the performance of a duty”. There is another type of the theory by MacCormick [60] and Raz [61]. This type of theory suggests that a child can have a right whether in moral theory or within a legal system [60, 61]. This right is also applicable whenever the safeguarding or advancing the interests of the child is acknowledged by moral theory or the legal system as a basis for imposing obligations. Thus, children have inherent rights regardless of the performance of a duty [54].

The Interest theory largely encompasses all types of rights, but it is unable to explain why rights should be tied to benefits. Furthermore, the rule restraining children from entering contracts can advance a parent’s interests. However, no rights are essentially given to the parent by that rule [54]. The Interest theory offers a very compelling interpretation of rights despite these limitations. Hohfeld and Cook [62] suggest that there is a difference between “X” has a book and “X” has a right to “R”. The former is described as a normative statement (which means a rule, legal or otherwise) while the latter is descriptive. “X” has a right to “R” is confusing since it may be used to express numerous ideas. This is because such a statement is used in everyday discussion including legal discourse. Consequently, applying the statement, “child ‘A’ has a right to education” can imply that anybody has a duty to let Child “A” enjoy education so that Child “A” can claim that right against that person. This implies that Child “A” is free to do or refrain from doing something. Even though rights relate to a duty, not every duty will mean that there shall be a correlative right [63]. For example, a parent’s duty to advance the best interests of a child would not constitute a right. This is because this duty differs from one culture to the other in the sense that what one culture will regard as adequate for a child cannot always be the same standard in another culture.

The Interest theory is, however, associated with numerous challenges that need to be discussed. Firstly, the right is enforced by someone else rather than the child. This is because interests recognised as giving rise to rights are principally protective rights. These protective rights go further to demonstrate the child’s incompetence. There is also lack of certainty in the Interest theory since someone else needs to enforce the rights of the child. Thus, there is no guarantee that the adult who enforces the right will do so in a manner that would serve the best interests of the child [64].

There is also the paternalistic approach which means that the needs of the child are an important factor in the adult’s decision [49]. This approach may come with some difficulties such as paternalistic coercion to limit the liberty of the child while accepting the need to promote the capacity of the child for decision-making and responsibility at the same time [49]. Breen [65] criticises the use of *the best interests of the child* standard on grounds of its indeterminacy. Thus, it is difficult to identify exactly what the best interests of the child are.

## **5. Cultural understanding of the rights of the child and the duties of the parents**

In Ghana, many parents want their children go through traditional child nurturing systems which they believe are in the best interests of the child. Parents believe it is the right and duty of the parent to nurture their children based on the traditional child nurturing norms and it is also the right of children to be nurtured according to their cultural traditions. For example, children need to follow their

parents to the farms or fishing. This forms part of the indigenous educational approaches which attempt to nurture children for life. Socialising children is viewed as a normal way of life. Children are engaged in work such as household tasks, farming activities and other tasks. This has persisted for generations and many parents consider engaging children in work as positively moulding the broad development of children as they acquire critical skills in life. Hence, indigenous educational approaches can be articulated in the best interests of the child principle. Since best interest of the child is expressed in its Article 3(1), the UNCRC is committed to safeguarding the principle. Disapproval elsewhere of traditional child nurturing system in Ghana is based on the idea of making sure that children enjoy a reasonable standard of living, secure and complete access to proper education, guaranteed protection from all forms of exploitation, cruelty and abuse, and protection from a social environment that is detrimental to their health and well-being which they believe traditional child nurturing system do not provide for children [6]. Articles 32 and 35 of the UNCRC makes provision for the protection of the right of the child universally and combat exploitation, forced labour, and child trafficking. Child welfare is explained differently by varied societies globally making it challenging to identify an expressive idea of rights to cover the interaction between the parents and the child, and to describe treatment of the child that would be generally accepted by all societies.

There is potential conflict between cultural understanding of the rights of the child and the rights and duties of the parents as articulated in the UNCRC. Generally, the traditional child nurturing system does not acknowledge views or contribution of the child in the decision-making process. Further, parents are inclined to ignore aspect of the Western definition of the right of the child suggesting that parental rights surpass the right of the child whenever conflict emerges. This indicates that best interests of the child is determined by parties other than the child [4]. In view of this, children lose the chance of exercising their rights because power is vested in other parties in exercising those rights on their behalf. The incapacity of children in exercising their rights in their best interests weakens their new position as competent persons. However, children who can form their own opinions are granted the right to express those views freely in all issues affecting them by Article 12 of the UNCRC. Therefore, in accordance with the age and maturity of the child, the views of the child are given due weight. Furthermore, the child is given the right to take part in all processes of decision-making. This is geared towards giving the child a more equal role in his/her interactions with adults and offer an improved opportunity to autonomously reason and act. Therefore, the rights of the child guaranteed under Article 12 of the UNCRC have possibly weakened parental duties to children as articulated in Article 3(1) [66].

The meaning of the idea of rights thinking is that a holder of rights is independent and competent persons with the capacity to exercise his/her rights and by accepting responsibility for his or her actions. Interest theory recognises that the source of rights originates from the fundamental interests of their bearers. Nevertheless, it is contended that there is over-generalisation by the Interest theory regarding the idea of children's rights. It can be improper to contend that children possess rights when they do not have the capacity in claiming those rights or relinquish them. One may challenge the view that children possess interests that are needed to be defended. The idea of rights does not need to be restricted to those who may claim or waive them, in accordance with the Interest theorists since the Interest theory places other persons under the duty to honour those rights on behalf of children. The theorists' position is adopted by Wenar [51], O'Neill [50] and Fortin [49]. This is because children generally depend on adults such as their parents [49].

There are general and different opinions on what aligning traditional child nurturing systems with Article 12 would involve. Researchers contend whether the right of participation as articulated in Article 12 would enhance the welfare of children and whether they present a serious risk to such valued systems in traditional child nurturing in Ghana. Advocates on the right of the child argue that adopting the UNCRC into traditional child nurturing system would enhance child welfare and further respect the right of the child and to empower the child under the national law [24]. Greater representation for children in a broad array of proceedings would be offered by Article 12, while other provisions of the UNCRC would help protect and support children who are vulnerable to exploitation and abuse [67, 68].

## **6. The way forward**

The most effective judicial procedure for legal understanding of participation rights of the child in relation to authority of the parent as expressed in the UNCRC needs to be explored to ensure consistency. This would lead to the protection of the right of the child and the parent as well as description of the role of the state with regard to the discussion on the child–parent dichotomy [7]. The potentials of resolving social issues in the legal setting is explored by a system founded on rights-thinking philosophy and this depends on the use of judicial systems and legal instruments [69]. The motivation of the discussion should be on consensus building rather than winners or losers [70]. The interaction between the right of the child and the parent requires the formulation of a judicial decision for a clear-cut a definite interpretation of the right of the child and the parent [71]. The result of the legal discussion in determining the right of the child relating to participation, health care, freedom of religion, information, privacy and description of age-related boundaries is to give capacity to the child to autonomously exercise his/her right. Additionally, the discussion incorrectly privileges rights [70]. The main difficulty regarding the rights-based viewpoint is the over-emphasis on rights. Economic difficulties relating to deprivation which have a huge effect on the lives of children are usually overlooked in view of the over-emphasis on the right of the child in international law [72]. The viewpoint that recommends a legal solution as the most effective way of averting the violation of the right of the child has been criticised several academics [13]. The UNCRC expresses a change in how the interaction between children and parental rights and expectations in traditional child-rearing styles is considered even though the doctrine of *parens patriae* remains critical in child welfare. Ghana cannot refuse to comply with the provisions of participation rights in Article 12 of the UNCRC because, in February 1990, it was the first country to ratify the UNCRC which was just three months after the adoption of the UNCRC [23]. Extensive and different views exist on the consequence of making traditional child-rearing styles consistent with Article 12. Academics contend whether participation rights as provided in Article 12 can enhance the welfare of children and whether they present a danger to such valued styles in traditional child-rearing. Advocates of children's rights argue that bringing provisions of the UNCRC into traditional childrearing styles can enhance the welfare of children and their rights will be respected which can empower them under the domestic law [24]. Greater representation for children in a broad range of accounts would be offered by Article 12, while other provisions of the UNCRC would help protect and support children who are vulnerable to abuse [26].

The dimension of parental rights vis-a-vis children's rights needs to be determined in order to harmonise the contrast between children's rights and parental rights and expectations in traditional child nurturing patterns [73]. The UNCRC

deals with this matter by constructing the child's changing capabilities [16]. Hence, parental rights and expectations in traditional child nurturing patterns need to consider children's rights. The right of the child as expressed in the UNCRC makes provision for parental prerogatives [73]. Children and parental rights and duties are functional rights and possibly serve children's rights. The UNCRC has been effective in establishing a legal frameworks and standards that in turn promote pre-existing children's laws, and it could have the same stimulating effect to traditional child nurturing patterns [24]. The UNCRC is a norm-changing text which is a purposely modern and comprehensive declaration of the rights of the child.

The establishment of regional agreements and national laws utilising the UNCRC as a standard around the world shows the effect of the UNCRC to inform norms and laws by establishing a global standard for respecting all children's human dignity [74]. Adopting the UNCRC into traditional child nurturing patterns in Ghana can subsequently lead to sweeping changes in family law jurisprudence by establishing a national legal framework with clear and recognisable aims better suited in meeting the needs of children and their families [24]. The adoption the UNCRC into traditional child nurturing patterns would especially assist in unravelling and updating the extensive definition that currently arises in national legal framework in relation to children's rights vis-à-vis parental rights and duties. Additionally, countries may recognise children's personhood by incorporating their new status into every government policy relating to childhood. This chapter suggests that the discrepancies between children's rights under Article 12 of UNCRC and parental rights and expectations in traditional child nurturing patterns may be harmonised and offer a genuine opportunity to undertake reforms. The seeming inconsistencies, uncertainties and flaws between children's rights to participation and parental rights and expectations in Ghana can be resolved. Article 12 can provide the avenue or serve as a tool for highlighting and re-inspiring engagement with children and parents on their rights and expectations. The UNCRC reflects the past and provides a blueprint for the future. Ghana is provided by the UNCRC with a right opportunity to re-assess the situation of children in modern society and the suitable parental duties and responsibilities in the nurturing of children. The UNCRC expresses a present-day attempt to achieve the right balance between valued traditional child nurturing styles and respecting children's rights.

## **7. Conclusion**

This chapter has examined the current interaction between the parent and the child viewing it as a split of duties and responsibilities. The chapter has provided background to the issue alluding to the possible conflict between the right of the child and parental rights in child nurturing patterns in Ghana. Using two major theories of rights -- Will theory and Interest theory, which have dominated the debate in the last two decades, this chapter suggests that although these theories are rivals both have a role to play. This chapter also captures the advantages of both the benefit and choice theories. The chapter further presented each theory's main difficulties. The first analysis is the interest/benefit theory according to which rights are characterised in the context of benefits secured for the right-holder by others' duties. The second is the choice theory according to which rights are characterised in terms of control exercised by the right-holder over the liberty or duties of others. The benefit theory accounts for the usually held opinion that children have rights although they cannot take decisions needed by competing analyses of rights. Benefit theory can also account for inalienable rights. Inalienable rights are rights which the right-holder cannot eliminate. On the other hand, choice theory accounts

for the fact that rights can be exercised. Thus, to refrain from exercising such a right is simply to refrain from acting. It has been noted that, the relationship between children rights and parental rights has resulted in antagonism between the two. This chapter has proposed cooperation that protects the rights of the child, the parent and defines the role of the state in view of the parent/child dichotomy. Further, there is the need to examine the most effective way of designing legal and judicial procedures for achieving this cooperation.

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## **Conflict of interest**

The authors declare no conflict of interest.

## **Acronyms and abbreviations**

United Nations Convention on the Right of the Child (UNCRC).


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# Death Penalty: A Human Rights Issue for South Africa

*Chris Jones*

## Abstract

In South Africa, the death penalty has been repealed just after the arrival of democracy in 1994. At present, due to numerous daily murders, especially farm murders, this issue is being debated once again seriously – by ordinary citizens, politicians, theologians, and others. In the media, in particular, it gets a lot of attention and in view of the extent of violent crime in our country, the reinstatement of the death penalty is again supported by many. The death penalty as such will always be contentious because it is about the reasoned termination of someone's life – which is a radical act. Between 2009 and 2013 I did research on the death penalty in South African prisons (the first of its kind as far as we could determine), in all 9 of our country's provinces. The content of this study, gathered from 467 convicted murderers, and several other core aspects of why the reinstatement of the death penalty particularly in South Africa, should not be an option, will be discussed with reference to supporting international and authoritative research.

**Keywords:** death penalty, (effective) deterrence, convicted murderers, restorative justice, South Africa

## 1. Introduction

From 2009 to 2013 I did research on the death penalty among convicted murderers in South African prisons<sup>1</sup>. The reason? There were so many South Africans who believed that the number of murders in our country would drastically decrease if the death penalty were reinstated. 467 convicted murderers in 18 prisons (urban and rural) in all 9 provinces of our country, located by the South African Department of Correctional Services (DCS), completed a questionnaire, approved by this department. 392 men and 75 women were interviewed before completing their questionnaires. The latter consisted of questions regarding general information such as age, race group, gender, and length of sentence. The first question focussed on: (1.a.1) What was your motive for committing murder (jealousy, spite, anger, thoughtlessness, money, or anything else - that had to be indicated)? (1.a.2) Were you exposed to violence shortly before committing murder (electronic media, or any other type of violence – that had to be indicated)? (1.b) Which of the following contributing factors played a role in the commitment of the murder (drugs, alcohol, or both)? (1.c) Was the murder premeditated or committed impulsively? The second question focussed on: (2.a) Do you think capital punishment would be a deterrent

<sup>1</sup> Jones, C. 2013. *Capital Punishment: Convicted murderers' views in 18 South African prisons, 2009–2013*. Unpublished research document. Stellenbosch University. Stellenbosch [1].

to committing serious crimes? (2.b) And in your specific case: Do you think capital punishment would have been a deterrent to committing murder? Question three (3) asked: Was the victim known to you? By name, sight, or not at all? Question four was interested in: (4.a) Are you currently involved in a rehabilitation program. And (4.b): If you are currently involved in a rehabilitation program, do you think this program is helpful, and if yes, in which ways? The last question (5) focussed on: Will you murder again? In gail or after you have been released?

All the information was accurately interpreted, and the results are discussed in the next section. This is followed by a brief discussion of South Africa's history regarding the death penalty. Thereafter relevant, supportive, and authoritative international research of why the death penalty should not be an option, is discussed. The article ends with some very brief remarks on South Africa's criminal justice system, the importance of restorative justice, and the death penalty as an important human rights issue not only for South Africa, but globally.

## **2. Research findings**

The data gained from this research met the necessary ethical standards. The respondents were well informed about the purpose of the research and their confidentiality, privacy and anonymity were guaranteed. They were fairly selected by the DCS, informed about how the research results would be disseminated, and they provided consent not only to participate, but also for the data to be used for this study.

### **2.1 Men**

15 of these participating men were under the age of 15 years; 206 between 15 and 29 years; 117 between 30 and 40 years and 54 older than 40 years. 193 were black; 168 Coloured; 22 white and 9 Indian.

Among the motives put forward for the murders committed, 5.9% of persons indicated jealousy; 4% spite; 41.7% anger; 13.4% thoughtlessness and 16.4% money. 18.6% did so for reasons other than those mentioned.

17.9% indicated that they had been exposed to violence in the media shortly before the murder; 2.8% were exposed to serious assault; 4.3% to gang violence; 7.9% to (other) violence within the community; 2.8% to domestic violence, and 12.8% to other forms of violence. 47.2% were not exposed to any violence before the murder

The following contributing factors played a role in the murders: 8.9% of people were under the influence of drugs; 41.6% under the influence of alcohol and 20.1% under the influence of both. 29.3% were sober.

19.1% of men planned the murder in advance, while 80.9% committed it impulsively. Four men indicated that they would commit murder again, depending on the circumstances. Among the reasons why the rest will not commit murder again are: I have discovered how high the value of life is and that every human being has the right to life and human dignity; murder is an inhuman act; it's bad in prison; I want to be free; it was a huge mistake; crime does not pay; it's no solution to problems; it causes tremendous emotional pain for everyone involved; I do not want to disappoint my family again; I am not in my inner nature a murderer; children must grow up with the presence and guidance of a father; restorative justice helped me find myself as well as with reconciliation with my family and the victim; God changed my life; it is a guilt that you carry with you for the rest of your life; I will

talk about my problems in the future; I learned to respect the law; one throws away ones future.

56.4% of the victims were known by name to the murderer and 9.1% indicated that he has seen the person before. 34.5% were completely unknown to the murderer.

315 of these men were engaged in a rehabilitation program of which 96.8% testified that it was valuable to them at that time. 5.3% of these murderers did not undergo any schooling; 80.7% did not complete their schooling; and 14% passed matric.

## **2.2 Women**

Of the 75 women who were interviewed and completed the questionnaire, four were younger than 15 years; 28 between 15 and 29 years; 24 between 30 and 40 years and 19 older than 40. 43 were black; 26 Coloured; 6 white and no Indian.

3.5% of women cited jealousy as the motive for their murder; 2.3% spite; 43% anger; 12.8% thoughtlessness; 17.4% money and 20.9% other motives.

12.7% experienced violence in the media shortly before they committed the murder; 7.6% were exposed to serious assault; 1.3% to violence in the community; no one experienced gang-related violence; 16.5% domestic violence; 5.1% experienced other forms of violence and 55.7% did not experience any form of violence before they committed the murder.

5.3% indicated that they committed the murder under the influence of drugs; 37.3% under the influence of alcohol and in 10.7% of women both these drugs played a role as contributing factors to the murder. 46.7% were not under the “influence” at all.

18.3% planned the murder in advance and 81.7% committed it impulsively. None of these women indicated that they would commit murder again. Some of the reasons they gave for this are: I learned new ways to master difficult circumstances; frightening experience; I met God; I am not inherently a bad person; I never want to end up in prison again; I hurt the people closest to me terribly; I'm very sorry; no one deserves to be hurt like that; such an act follows you for the rest of your life; crime does not pay; I am much wiser now; I will contact a family member, social worker or police member to help me if I find myself in such a situation again.

72% of the victims were known by name to the murderer and 13.3% by sight. 14.7% were completely unknown to the murderer.

58 of these women were engaged in a rehabilitation program and it was valuable to 89.7% at that time. 7.6% of these women had no schooling; 78.8% did not complete their schooling, while 13.6% passed matric.

## **2.3 Main findings (referred to only – not discussed)**

In the light of this research, which also included many personal conversations with prisoners, I am convinced that the reinstatement of the death penalty in South Africa will not reduce murders (significantly). Of course, every murder is one too many. About 70% of men and 54% of women commit murder under the influence of alcohol and/or drugs. They are therefore not liable for their actions. One of the prisoners put it this way: “The death penalty will not help, because drugs and alcohol make you lose control over your life. When you are under ‘influence’ or addicted you do not care about anything or think clearly” [1]. Furthermore, 80.9% of men and 81.7% of women committed murder on the spur of the moment, without clearly planning it ahead and thinking about the consequences.

Rehabilitation programs are valuable. Many people are products of broken families and communities. The moment they are exposed to value-driven rehabilitation programs, their behaviour begins to change. People can heal. There is a saying among prisoners that goes: “Liberate yourself through education [in prison] and you will be liberated long before you are released from prison” [1].

There must be a shift away from punitive justice to restorative justice (which does not deny punishment – see concluding remarks).

Programs with the view to release, as well as support by the community and the DCS after release, are essential. Much more can be done in this regard.

The further one progresses in school, the smaller the chance of getting involved in crime. Children should be encouraged and helped as much as possible to complete their schooling and further equip themselves. “The lower group of dysfunctional schools produces the highest percentage of criminals” [1] one of the murderers said.

Something will have to be done about alcohol and substance abuse, (such as the National Drug Master Plan<sup>2</sup> recently launched (26/06/2020) by Minister Lindiwe Zulu – Department of Social Development) and anger (such as the structured programmes by psychological services<sup>3</sup> in the DCS for inmates as well as their families). The causes of violence, crime, poverty, and hopelessness will have to be addressed better in a holistic way.

65.5% men and 85.3% women knew their victim by name or have seen him/her before. It is the so called “social fabric crimes” and has primarily to do with a lack of moral values as well as assets for healthy development.

The fact that 99% of men and 100% of women have indicated that they will not commit murder again indicates that they have learned important lessons. Many of these murderers are inherently not bad people.

The role of faith communities in rebuilding prisoners’ lives should not be underestimated.

Severe psychiatric cases must be permanently removed from society. These people are dangerous.

76.6% of the convicted murderers who participated in the abovementioned research were convinced that the death penalty would not have deterred them from committing murder. Of the remaining 23.4%, a huge number tended to think so too, but they were reluctant to indicate it with certainty.

### **3. Discussion – why South Africa should not consider reinstating the death penalty**

#### **3.1 Brief history**

This session begins with a brief reference to the history of the death penalty in South Africa. Until the use of the death penalty was suspended in February 1990, our country had “one of the highest records of judicial executions in the world” [4, 5]. Just over the period 1979–1989 “the annual total of executions exceeded 100 in every year except for 1983” [4]. Professor Cora Hoexter (1990) confirmed the extremely high number of people executed in South Africa by stating that “[i]n 1987, for example, hangings averaged almost one every two days” [6]. Judge Dennis Davis (1990) said that “[a]llegations of racial bias in sentencing practices in capital cases have been made, most prominently by the late Prof. Barend van

<sup>2</sup> For more information see [2].

<sup>3</sup> For more information see [3].



Niekerk, whose research suggested that black defendants stand a greater chance than white defendants of receiving the death penalty, particularly when the victim is white” [4]. Davis continued by saying that although Prof. van Niekerk “has been criticized for being unscientific, differences in capital sentences between the races continue to exist and are difficult to explain” [4]. There was also

*evidence to show that there are significant differences in sentencing practices of different judges. A retired Supreme Court judge and a retired magistrate have both confirmed recently that judges do have different philosophies regarding punishment and that some judges go out of their way to find reasons which will allow them to impose a punishment other than death [4].*

Davis argued that once sentenced to death “a person is imprisoned on ‘death row’. The rigid conditions on death row and the fact that all prisoners there are waiting to be executed creates a traumatic, terrifying environment which causes terrible anguish and pain” [4]. A penal system such as this “which has been described as a ‘factory which produces corpses’, is arguably one which creates conditions of inhuman punishment” [4]. Davis concluded his thoughts on capital punishment by saying that “the execution itself is a barbaric event” [4] and referred to the late South African cardiac surgeon Prof. Chris Barnard<sup>4</sup> who described execution as follows:

*The man’s spiral cord will rupture at the point where it enters the skull, electro-chemical discharges will send his limbs flailing in a grotesque dance, eyes and tongues will start from the facial apertures under the assault of the rope and his bowels and bladder may simultaneously void themselves to soil the legs and drip onto the floor [4].*

Davis quoted in this regard the then report on the death penalty by Amnesty International which argued “that the death penalty, like torture, constitutes an extreme physical and mental assault on a person who has already been made helpless by government authority” [4].

### 3.2 Current debate

Fortunately, with the dawn of democracy in South Africa (1994), the death penalty was abolished on 6 June 1995 by the Constitutional Court. “The court ruled that capital punishment, as provided for under the [then] Criminal Procedure Act, was in conflict with the country’s 1994 constitution” [5].

At present, seven years after the abovementioned research has been completed, there are still serious pleas in South Africa that the death penalty must be reinstated, because the cases of so many brutal and senseless murders leave many people speechless. Anton van Niekerk, distinguished professor of philosophy at Stellenbosch University, gives three reasons why the reinstatement of the death penalty should be avoided in South Africa [8]. The first is a pragmatic argument. According to him, enough studies have been done that show that the death penalty does not deter potential murderers (and rapists). The second is a political argument. South Africa is too complex and politicised to reinstate the death penalty. We know that the Constitutional Court interprets the death penalty as a violation of the most fundamental right, namely the right to life [9]. Before the 1990s, when the death

<sup>4</sup> He performed the world’s first human-to-human heart transplant operation and the first one in which the patient regained consciousness. For more information see [7].

penalty was still enforced in South Africa, more than 90% of those executed were black. It does not help to argue that the latter merely reflects the population composition in South Africa. The death penalty in South Africa, especially the memories of the time before the 1990s, is political dynamite [8]. The third and (probably) strongest argument is a moral one. We cannot morally justify incorporating the worst form of retribution, namely an eye for an eye, in our already “inadequate toolbox for conflict management”. This will only make conflict management more difficult than it already is [8].

Linked to this is the question how we as a South African society see ourselves and how we want to think about ourselves. According to van Niekerk, one can argue, as the philosopher Immanuel Kant, who “exemplifies a pure retributivism about capital punishment: murderers must die for their offense, social consequences are wholly irrelevant, and the basis for linking the death penalty to the crime is ‘the Law of Retribution,’ the ancient maxim”, the law of retaliation (an eye for an eye), “rooted in ‘the principle of equality’” [10]. However, this argument is not convincing. The respect we have for all people implies that we as a society must continue to refuse to descend to the level of the murderer as well as the brutality that accompanies this act. We do not owe the murderer much, according to Van Niekerk, but we owe ourselves under the worst provocation, the preservation of humanity, morality and spiritual preparedness and resilience - the freedom to never allow the insanity of the murderer to become prescriptive for how we act towards him (or her) and others [8].

Judge Johann van der Westhuizen, former judge of the South African Constitutional Court, confirms that the death penalty does not deter potential murderers from committing murder. No statistics prove that the death penalty is an effective deterrent. He argues that, although retribution is one purpose of punishment, we do not steal from thieves, we do not rob robbers, and we do not rape rapists. Why then kill murderers? [11]. He then asks: what does the death penalty do to a community’s view of violence and death? Should the state act at the level of the criminal? Is killing an acceptable solution - almost like war for peace or sex for virginity? Blunt communities accept the death penalty as part of their life. In South Africa, on average, more than 50 murders take place per day, but fortunately our constitution prevents us from executing these people. Van der Westhuizen continues to say that murders in South Africa are not racially motivated, as some (many?) people believe. Farm and house murders are sometimes horribly cruel but according to him he has never encountered a clear racial motive in court. For him, murderers kill mostly out of greed, jealousy, passion, and during gang wars. Also because of poverty and the despondency and drunkenness that accompany it, but not because of racial hatred [11].

Currently Amnesty International unequivocally states that “the death penalty is the ultimate cruel, inhuman and degrading punishment” [12]. Amnesty “opposes the death penalty in all cases without exception - regardless of who is accused, the nature or circumstances of the crime, guilt or innocence or method of execution” [12]. It further holds “that the death penalty breaches human rights, in particular the right to life and the right to live free from torture or cruel, inhuman or degrading treatment or punishment” [12]. Both these rights are protected in the Universal Declaration of Human Rights, adopted by the UN in 1948<sup>5</sup> [13].

According to Amnesty International “[t]he death penalty is a symptom of a culture of violence, not a solution to it” [12]. It provides the following five reasons why the death penalty should be abolished (and which should also apply

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<sup>5</sup> See: United Nations. Universal Declaration of Human Rights, in particular articles 3 and 5 [13].

to South Africa). The first (1) has to do with the fact that it is irreversible, and mistakes happen:

*Execution is the ultimate, irrevocable punishment: the risk of executing an innocent person can never be eliminated. Since 1973, for example, more than 160 prisoners sent to death row in the USA have later been exonerated or released from death row on grounds of innocence. Others have been executed despite serious doubts about their guilt [12].*

Secondly (2) it says that the death penalty does not deter crime: “Countries who execute commonly cite the death penalty as a way to deter people from committing crime. This claim has been repeatedly discredited, and there is no evidence that the death penalty is any more effective in reducing crime than life imprisonment” [12].

Thirdly (3) it states that the death penalty is often used within skewed justice systems:

*In many cases recorded by Amnesty International, people were executed after being convicted in grossly unfair trials, on the basis of torture-tainted evidence and with inadequate legal representation. In some countries, death sentences are imposed as the mandatory punishment for certain offences, meaning that judges are not able to consider the circumstances of the crime or of the defendant before sentencing [12].*

Fourthly (4), the death penalty is discriminatory: “The weight of the death penalty is disproportionately carried by those with less advantaged socio-economic backgrounds or belonging to a racial, ethnic or religious minority. This includes having limited access to legal representation, for example, or being at greater disadvantage in their experience of the criminal justice system” [12].

Fifthly (5), it is used as a political tool. “The authorities in some countries, for example Iran and Sudan, use the death penalty to punish political opponents” [12].

According to Amnesty, people are executed daily and “sentenced to death by the state as punishment for a variety of crimes – sometimes for acts that should not be criminalized. In some countries, it can be for drug-related offences, in others it is reserved for terrorism-related acts and murder” [12]. In some countries people under the age of 18 are executed,<sup>6</sup>

*others use the death penalty against people with mental and intellectual disabilities and several others apply the death penalty after unfair trials – in clear violation of international law and standards. People can spend years on death row, not knowing when their time is up, or whether they will see their families one last time [12].*

When Amnesty International “started its work in 1977, only 16 countries had totally abolished the death penalty” [12]. By the end of 2019 “that number has risen to 106” [12]. Furthermore, “at least 657 executions [were recorded] in 20 countries in 2019, down by 5% from 2018 (at least 690 executions). This figure represents the lowest number of executions that Amnesty International has recorded in at least a decade” [12]. It further states that “1 000s of people were likely executed in China, but the numbers remain classified” [12]. If China is excluded, “86% of all reported executions took place in just four countries – Iran, Saudi Arabia, Iraq and Egypt” [12]. With regards to death sentences per year, “Amnesty International recorded at least 2,307 death sentences in 56 countries in 2019, a slight decrease from the total of 2,531 reported in 2018. At least 26,604 people were known to be under sentence

<sup>6</sup> To read more about juvenile execution, see [14].

of death globally at the end of 2019” [12]. This is morally unacceptable, and several instruments have been adopted internationally, banning the use of the death penalty. They are:

- The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty [15].
- Protocol No. 6 to the European Convention on Human Rights, concerning the abolition of the death penalty [16], and Protocol No. 13 to the European Convention on Human Rights, concerning the abolition of the death penalty in all circumstances [17].
- The Protocol to the American Convention on Human Rights to Abolish the Death Penalty [18].

Back to the South African context. It is in the light of so many farm murders (as referred to earlier) and violent crime in South Africa that there is currently a strong plea from various quarters for the reinstatement of the death penalty. Amanda Gouws, distinguished professor of political science at Stellenbosch University, refers to a study by Dr. Johan Burger, senior researcher at the Institute for Security Studies (SA). From 1990 to 2017 there were 1938 murders on farms (of which 137 were farm workers). Of the victims, 88% were white and 12% black. If we look at the period 1991–2001 there were 6 122 farm attacks and 1 254 murders. Of the victims, 62% were white. 62 out of 800 000 farm dwellers are killed annually - that is 7,75 out of 100 000 while the national murder rate is 36 out of 100 000 citizens. Thus, although the incidence of farm murders is lower than murders in general, it is not an insignificant statistic. Farm attacks must be seen against the background of very high crime rates and general lawlessness in South Africa, Gouws reasons [19, 20]. But do these facts justify the reinstatement of the death penalty in order to ensure a more orderly society, as many people reason?

If it could be shown that the death penalty serves as a deterrent, there would be a case for it. But Ronald Preston’s arguments (late professor of social and pastoral Theology - University of Manchester) are in line with Van Niekerk, Van der Westhuizen, Amnesty International and others, namely that “exhaustive investigations in Europe and North America have shown that there is no such evidence, but rather that the number of murders varies little whether there is a death penalty or not” [21]. According to the Death Penalty Information Center (DPIC, Washington DC) “a survey of the former and present presidents of [America’s] top academic criminological societies, 88% of these experts rejected the notion that the death penalty acts as a deterrent to murder” [22]. Only 5% of them said “yes”, in other words were convinced that the death penalty acts as a deterrent, while 7% had no opinion [22]. This Center furthermore refers to a

*report by the National Research Council, titled Deterrence and the Death Penalty ... that studies claiming that the death penalty has a deterrent effect on murder rates are ‘fundamentally flawed’ and should not be used when making policy decisions (2012). A DPIC study of 30 years of FBI Uniform Crime Report homicide data found that the South has consistently had by far the highest murder rate. The South accounts for more than 80% of executions. The Northeast, which has fewer than 0.5% of all executions, has consistently had the lowest murder rate [22].*

In the South the murder rate was 6 per 100 000 (2018) while in the Northeast it was 3.4 per 100 000 – noticeably less [22].

In fact, according to Stassen and Gushee, the death penalty has a paradoxical “imitative effect” on potential murderers: “It sets an official governmental example that killing someone is a proper way to resolve feelings of resentment and to slake the desire for revenge” [18]. The imitative effect according to them implies that after the government had executed someone in America, the number of murders in that area of the execution tends to increase, and the murder rates, as already indicated, are higher in states where the death penalty is still legal. When a nation goes to war, that government inevitably sends out the message that killing one’s enemies is acceptable. Murders within such a nation usually increase during these times. Among returning war veterans, there is a higher murder rate [18].

To impose the death penalty on someone is to say that such a person’s image as a human being has become so obscured that nothing can be done about his (or her) “salvation”, and that he therefore has no right to exist anymore. Is it ethical to impose such a judgement on someone? May one allow such a destructive verdict to be made about another person’s life? Of course, strict action must be taken against people who commit murder, especially where it took place premeditatedly and without extenuating circumstances, but, should one not place a much higher value on every human being’s life and try to protect it at all costs? Should we not overcome evil with good (to use a biblical metaphor)? Is rehabilitation and restorative justice, despite the costs involved, not more important and less costly than the eradication of life by the execution of the death penalty?

The Death Penalty Information Center provides the following facts to illustrate how costly the death penalty actually is:

*Oklahoma capital cases cost, on average, 3.2 times more than non-capital cases (Study prepared by Peter A. Collins, Matthew J. Hickman, and Robert C. Boruchowitz, with research support by Alexa D. O’Brien, for the Oklahoma Death Penalty Review Commission, 2017.) Defence costs for death penalty trials in Kansas averaged about \$400,000 per case, compared to \$100,000 per case when the death penalty was not sought (Kansas Judicial Council, 2014). A study in California revealed that the cost of the death penalty in the state has been over \$4 billion since 1978. The study considered pre-trial and trial costs, costs of automatic appeals and state habeas corpus petitions, costs of federal habeas corpus appeals, and costs of incarceration on death row (Alarcon & Mitchell, 2011). Enforcing the death penalty costs Florida \$51 million a year above what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida had carried out since 1976, that amounts to a cost of \$24 million for each execution (Palm Beach Post, January 4, 2000). The most comprehensive study in the country found that the death penalty costs North Carolina \$2.16 million per execution over the costs of sentencing murderers to life imprisonment. The majority of those costs occur at the trial level (Duke University, May 1993). In Texas, a death penalty case costs an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years (Dallas Morning News, March 8, 1992) [18].*

In South Africa, not only because of its current devastating poverty, huge unemployment, and income inequality – but also with its inhumane past of racial discrimination and how it has affected our judicial system including death sentencing, the death penalty should not be reconsidered. From the practice of slavery, when black people were considered the property of others, to this day, racial discrimination undoubtedly plays a role in the application of the death penalty. According to Stassen and Gushee “[r]ace is more likely to affect death sentencing than smoking

affects the likelihood of dying from heart disease” [23]. This is also confirmed by the following statistics from the Death Penalty Information Center [22]:

*Jurors in Washington state are three times more likely to recommend a death sentence for a black defendant than for a white defendant in a similar case (Prof. K. Beckett, Univ. of Washington, 2014). In Louisiana, the odds of a death sentence were 97% higher for those whose victim was white than for those whose victim was black (Pierce & Radelet, Louisiana Law Review, 2011). A study in California found that those convicted of killing whites were more than 3 times as likely to be sentenced to death as those convicted of killing blacks and more than 4 times more likely as those convicted of killing Latinos (Pierce & Radelet, Santa Clara Law Review, 2005). A comprehensive study of the death penalty in North Carolina found that the odds of receiving a death sentence rose by 3.5 times among those defendants whose victims were white (Prof. Jack Boger and Dr. Isaac Unah, University of North Carolina, 2001). In 96% of states where there have been reviews of race and the death penalty, there was a pattern of either race-of-victim or race-of-defendant discrimination, or both (Prof. Baldus report to the ABA, 1998).*

Another important reason why a country should stay away from the death penalty has to do with the fact, as already referred to, that too many people are sentenced to death innocently [22].

*Since 1973, more than 170 people [in the USA] have been released from death row with evidence of their innocence (Staff Report, House Judiciary Subcommittee on Civil & Constitutional Rights, 1993, with updates by DPIC). An average of 3.5 wrongly convicted death-row prisoners have been exonerated each year since 1973, peaking at 7.6 per year between 1999 and 2004.*

According to American researchers Liebman et al. [24]

*[n]ationally, the overall rate of serious reversible error in capital cases is 68% - nearly seven out of every ten cases ... The most common errors, prompting the most reversals at the state post-convictions stage, are (a) egregiously incompetent defence lawyers, mostly court appointed, who did not even look for - and demonstrably missed - important evidence that the defendant was innocent or did not deserve to die. 82% of those convictions overturned at the state level were found to deserve less than death when errors were corrected on re-trial; 7% were found innocent of the capital crime. Only 11% of those capital convictions reversed on state review were still found to deserve death on retrial ... These high error rates exist all over the nation. 24 states with the death penalty have overall error rates of 52% or higher. 22 of the states have overall error rates of 60% or higher. 15 states have error rates of 70% or higher ...*

This study concludes by stating that “the capital trial process is so error-ridden as to be not only unfair but also irrational” [24].

“To err is human, to forgive is divine” (this saying is from “An Essay on Criticism,” by Alexander Pope) [25]. We need more forgiveness, not only in South Africa, but across the world. I know that the pain associated with murder for the nearest relatives (on both sides) is unbearable, but forgiveness is an important component if we want to progress in our thinking beyond the death penalty. If you cannot forgive, you are killing your own spirit. Then you remain a victim. Forgiveness, on the other hand, brings liberation and healing. In South Africa there

are many gripping stories of forgiveness. One such story is about Ginn Fourie's 23-year-old daughter, Lindi, who died on New Year's Eve 1993 in the Helderberg Tavern (Western Cape, South Africa) bomb blast – still a turmoil political time in South Africa. She and some friends went for a drink when the bomb exploded, and Lindi lost her life. Lethlapa, PAC (Pan Africanist Congress of Azania) leader at that time, was responsible for these blasts. Long after this tragic happening, Ginn was driving in her car when she heard on the radio that Lethlapa (who received amnesty) was going to launch his book. She decided to attend the event. She met him and they began a journey together because of her forgiveness and his acceptance of her forgiveness. Since then, for many years, they have hosted seminars on forgiveness and reconciliation worldwide. Both were liberated by forgiveness [26].

We will have to transform the vicious cycles of murder, revenge and resentment with initiatives and actions that combat and cure its causes. "Forgiveness, depending on individual tolerance and level of wrong-doing, comes easier for some than it does for others. However, it is difficult to find a more selfless, modern-day message of forgiveness" [23] than that of former South African president, Nelson Mandela, who said: "Forgiveness liberates the soul, it removes fear. That's why it's such a powerful weapon" [27].

#### 4. Concluding remarks

For a criminal justice system to effectively deter criminals, competence, credibility, and effective communication are crucial. Such a system must be able to identify, arrest, prosecute, sentence, and rehabilitate most criminals. There is a certain chain of activities in a criminal justice system and the fight against crime. The whole system is just as strong as the weakest link in it. The fact that a criminal justice system warns potential offenders that they will be punished must be credible. The political will, especially among the country's leading politicians, must proclaim and achieve this in an urgent manner. These two important aspects need to be communicated effectively to all potential criminals. They need to know that the vast majority of offenders are not going to get away. South Africa is currently failing in all three these aspects. An effective criminal justice system, furthermore, must be coupled with restorative justice to effectively curb crime and murder. This can be done without the death penalty. The latter is based on revenge, but justice cannot be based on revenge. It must restore.

Punishment (excluding the death penalty) is important and needed for offences, but on its own it "is not effective in changing behaviour and is disruptive to community harmony and good relationships" [28].

*Exploring traditional African models of justice, one finds the Sotho practices of the 'lekhota'. If an offence is reported to a traditional leader, he may call a lekhota to session. The lekhota is normally attended by the victim, the offender, family members and support people ... of both the offender and the victim and community members. Anyone may however attend. Everyone attending enjoys full participation and all decisions are taken by consensus. The aim is to restore what has been lost through the offence [28].*

This age-old African system with its restorative roots provides a stark contrast to our current criminal justice system which *inter alia* controls crime, while restorative justice places crime control largely in the hands of the community and Ubuntu. The current criminal justice system defines offender accountability as taking punishment, while restorative justice defines it as assuming responsibility and taking

action to repair harm. With restorative justice the offender is not defined by deficits as in the current criminal justice system, but by his/her capacity to make reparation. This process focusses on problem solving, emphasising dialogue and negotiation, as well as restitution as a means of restoring both parties (victim and offender) and to bring about reconciliation [28].

The death penalty is not only in total contrast to restorative justice, but also to the South African Bill of Rights, enshrined in our Constitution, which says: “Everyone has the right to life” (Chapter 2, Article 11) [9]. “Because of its basic importance, the right to life appears in virtually every international and regional human rights instrument ...” [6]. According to Hoexter, “the right to life” has an abstract character and is a very general concept. Therefore, it is “difficult to translate it into concrete terms or to give it specific meaning” [6]. Although important, it would be more realistic “to speak of a right not to be deprived of one’s life, and of corresponding duties on the government to take all the necessary steps to prevent untimely death” [6]. Interpreted, it means that the state should abolish the death penalty (where applicable) and never consider its reinstatement. We have seen that the death penalty does not help to uphold the right to life or serves as “an effective deterrent to other would-be murderers” [6].

Our Bill of Rights (Chapter 2, Article 12) further states that everyone has the right “not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way” [9]. According to Davis “a number of organisations and legal authorities have argued that the death penalty is a cruel and inhuman punishment” [4]. Amnesty International “argue that the death penalty, like torture, constitutes an extreme physical and mental assault on a person who has already been made helpless by government authority” [4]. The African Charter on Human and People’s Rights (Article 5) also contains a specific provision prohibiting “Torture and Cruel, Inhuman and Degrading Treatment” [29].

We must work hard in South Africa and globally to uphold a political climate in which politicians and courts maximise the protection of human rights, among others, these referred to above.

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# Queer/Disabled Existence: Human Rights of People with Disability

*Deepak Basumatary*

## Abstract

The literature has sometimes portrayed queer/disabled people as the “Other.” People with disabilities and queer sexualities are frequently subject to ridicule and abuse. Historically, the literature has aided in the social constructionism of disability phenomena in society by depicting the disabled as someone harmful and undesirable. Furthermore, traditional representations of queer and/or disabled existence have frequently been biased and are usually about how the “able-bodied” or the so-called normal people perceive people with diverse bodies and queer sexualities. However, it has been conspicuously silent regarding the plight of people with disabilities and queer sexualities. In a departure from traditional representations of queer and/or disabled existence, Firdaus Kanga presents a first-hand account of the lived experiences of his precarious life in the Indian sociocultural context and beyond. He has to his credit a series of critically acclaimed books such as *Trying to Grow* (1990), *Heaven on Wheels* (1991), *The Godmen* (1995), and *The Surprise Ending* (1996). As a severely disabled individual suffering from a crippling disease called osteogenesis imperfecta (brittle bones disease), *Trying to Grow* (1990), a semiautobiographical novel, is a narrative of his lived experiences of disability and tryst with queer sexuality. While his other work, *Heaven on Wheels* (1991), is a discourse on queer sexuality and disability from the perspective of queer and disabled existence. Kanga critiques the ableist society’s treatment of the queer and the disabled, which is tantamount to human rights abuse.

**Keywords:** alienation, alterity, ableist gaze, governmentality, homophobia, precarity, somatocentrism, teratophobia

## 1. Introduction

Firdaus Kanga is a marginalized writer and the stereotypical “Other.” Kanga’s semiautobiographical novel *Trying to Grow* (1990) is an unusual novel. It is a narrative of the lived experiences of Brit (Kanga), a severely disabled person (due to osteogenesis imperfecta) with rich and vivacious (queer) sexual desires and appetite. In a world dominated by abled and heterosexual people, Kanga as an individual and as a writer is a departure from the “norms,” literally and figuratively. His physicality does not belong to or fall under the category of the accepted norms of what is considered to be the “normal body” or “able-bodied,” and for this reason, in every aspect of life, he faces discrimination. His sexual orientation further alienates him from mainstream society. The extant customs and traditions of society imbue binarism among the general populace, and this process begins in the early stage of life. Therefore, people usually see and think

from the perspective of the binary “normal”–abnormal” paradigm. This engenders an *othering* process that ostracizes people who do not conform to the socially accepted norm. [Consequently, sexualities and bodies are pressured to conform to an ideal, and when peoples’ functioning or biological composition does not fall within these standards, they are deemed inferior or “Other” and are conveniently excluded from mainstream society [1]. As a victim of a crippling disease called osteogenesis imperfecta (brittle bones disease), Kanga is confined to life in a wheelchair, placing him outside of the category of the normal body or able-bodied. It is interesting to note that in his writings Kanga has never expressed remorse for his crippled condition and he is proud and open with his queer sexuality. Kanga reflects on the prevailing attitudes toward queer sexuality and disability and the exclusionary processes at work that keep people with nonnormal bodies and sexualities away from mainstream society, which is a clear violation of human rights. Kanga reiterates that it is the society which queers and disables them and not the physicality of their bodies or sexual orientation. In this regard, Lennard J. Davis’ *Enforcing Normalcy: Disability, Deafness, and the Body* is a significant theoretical intervention that sheds light on the existence of a restrictive regime in society in the form of norms, normal, and normality that creates the phenomena of queerness and disability in society [2]. This restrictive regime is an exclusionary process alienating people with disabilities from everyday life and violates their basic human rights.

Kanga has challenged several assumptions and myths associated with the queer and disabled, foremost of them being the notion of “sexlessness” of disabled individuals. By portraying disabled people as healthy and rich in sexual desires and appetites, Kanga demystifies the phenomena of queerness and disability. He shows that disabled people can have rich and satisfying (sexual) lives, but it is the “ableist society” that is not able to see, understand, and accept the queer and/or disabled. Everywhere, there is a system and design of segregation to exclude the queer and/or disabled from society through the usage of anti-queer/and anti-disabled language, discourses, narratives as well as in the design of spatiality that is generally designed or structured without taking into consideration the needs of the specially abled or the sensibilities of queer people, which can be called “design apartheid” [3]. Firdaus Kanga’s major works, therefore, present a rich and varied area of exploration on the intersection of disability, sexuality, and human rights from an interdisciplinary theoretical framework. In this chapter, an attempt has been made to (re)read Kanga’s works from the lens of the intersectionality of human rights, disability, and queer sexuality in the literature by focusing on alienation, precarity, and alterity in the lived experiences of Kanga.

## **2. Compulsory able-bodied heterosexuality**

Robert McRuer in his essay “Compulsory Able-Bodiedness and Queer/Disabled Existence” has elaborated at length on a society’s predilection toward people with what is called “normal body” or “able-bodied” [4]. Arguing that our society is an “ableist society,” McRuer emphasizes that society has space and tolerance only for able-bodied people. For this purpose, society has devised a mechanism to ostracize people who do not belong to the accepted norms. Therefore, even though our society abounds with differently abled people, they are NOT accepted as equal members of society. Thus, the disabled are sometimes marginalized and treated as the “Other,” as freakish and exotic people [5]. Usually, the disabled are treated as deviant, evil, ugly, and abhorrent in popular lore. The hostility toward disabled people makes it evident that the human body is a subject of

harsh scrutiny where the body is ascribed symbols and meanings that stigmatize those that are beyond the scope of the conventional methods of categorization.

Butler's concept of "performativity" enunciated in her groundbreaking book on gender studies *Bodies that Matter: On the Discursive Limits of 'Sex'* (1993) expounds that "gender" is a question of "performativity" where a particular sex is assigned roles that need to be performed throughout life [6]. It emerges that the inferior status assigned to women is essentially a case of "social constructionism," as society has traditionally and historically regarded them as "mutilated"/"deformed" bodies compared to men [7]. Likewise, disability is a case of "social construction" as different dimensions of the body became deviant/deformed bodies in the cultural narratives and were seen as grotesques, or worse as nonhuman "Others" [8]. Assuming that the disabled are an exception and not the norm [emphasis added], they were regarded as individuals beyond definition and the sphere of "performativity." Here, "performativity" of the body is the benchmark of social acceptance/recognition.

The ambiguity of deviant/deformed bodies presented a challenge in assigning the "normal" either/or male–female gender binary because of which the disabled-bodied were assumed to be "sexless," in other words, lacking libido, sexual desire, or sexual attraction and sexual attractiveness. In a way, both women and disabled are clubbed together under the same rubric as mutilated/deviant/deformed bodies whose "ability" is in question and whose sexuality needs to be regulated for a proper/healthy procreation for the sustenance of humankind through the tried and tested patriarchal heteronormativity.

In disability studies, McRuer, borrowing his idea from Rich's theory of "Compulsory Heterosexuality and Lesbian Existence," [9] broadens the concept to highlight the presence of a similar kind in the form of "Compulsory Ablebodiedness" in society because social institutions, cultural systems, and physical infrastructures are mainly designed and attuned for the able-bodied. For this reason, individuals with different bodily dimensions and abilities are deprived of equality, which violates their human rights. The disability phenomena in society are largely a social construction. As feminists have argued all along that masculinity is all about the jingoist social construction of power, disability is also a similar product of jingoism and hostile treatment of the disable-bodied in society. It is such an overbearing normalizing mechanism that reserves sexuality, and in this case, heterosexuality, as an exclusive preserve of the able-bodied or normates creating the norm of compulsory able-bodied heterosexuality. This norm has entrenched in the sociocultural values and beliefs constructing the myths of sexlessness (devoid of libido and sexual desire) of the disabled-bodied and the existence of heteronormativity. This social constructionism of compulsory able-bodied heterosexuality is discriminatory, segregating the people on false and artificially created difference of the "Other." Stigmatization of the disabled people occurs as a result of this normalizing practice that characterizes the disabled people as the "Other," and the disabled human subjects are given less human dignity and place in society. The "Otherness" is due less to the difference of the sexuality/corporality of the queer/disable bodied than to the point of view and the discourse endorsed by society. The classification of people into regimes of compulsory able-bodied heterosexuality is not just a symbolic or semiotic practice but is an oppressive and marginalizing practice that reconfigures the differently disabled as lesser humans. Article 5 of the United Nations Organization's (UNO) Universal Declaration of Human Rights 1948 states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" [10]. However, the letter and spirit of Article 5 have been regularly violated by the ableist society without any remorse. What is even worse is the fact that for the ableist society, disabled people are simply objects to be judged and manipulated.

### **3. The personal is political: homosexuality in India**

Homosexuality was extant in precolonial India, where heteronormativity was NOT the norm and homosexuality was widely accepted through social sanctions. Dasgupta states, “[t]he polyvalence of sexuality prevalent till precolonialism was disciplined through social sanctions” [11]. This is contrary to the commonly held notion that homosexuality is a foreign (Western) import. Vanita and Kidwai explain, “An unbiased excavation into the ancient and modern Indian cultures and traditions surely proves that same-sex love is not alien to India; it is not a foreign import” [12, 13]. Modern Indian critics guided by nationalist fervor were uncomfortable with the idea of a homosexual India and attacked the nonnormative sexuality as “Western import,” conveniently discarding the available historical and literary facts that presented a complexly different picture. In this respect, there was a convenient “internalizing of colonialism,” as it suited the politico-cultural discourses of the time. In the words of Dasgupta, “Through internalizing colonialism, the new elites of postindependence India attacked nonnormative sexuality as nationalist critique” [11].

It is fascinating to note that the stigmatization of homosexuality is a colonial legacy. The British colonial administrators (guided by their Victorian Puritanism) zealously regulated sexuality and minoritized queer sexualities in India through anti-sodomy law, i.e., Section 377 of the Indian Penal Code 1860, a law that continues to be enforced to this day [14]. The politico-juridical regulation of sexuality, solely guided by the vested interests of the dominant heterosexuality, has imbibed an intolerant spirit in society. For this reason, society has become intolerant of non-normative sex; this is particularly true of Indian society, where borrowing Adrienne Rich’s conceptual term, “Compulsory Heterosexuality,” is imposed by social norms and enforced through the enactment of laws by the state to this effect.

Section 377 is not merely a law against homosexuality, it is also a regulation of sexuality in general by criminalizing certain forms of sexual activity that digress from the accepted majoritarian norms. Sexuality is strictly controlled (even policed) in Indian society and its institutions (governmental, legal, educational, familial), and heteronormativity is scripted and imposed. The punitive measures indicate the hostility toward the different, those who do not conform to the norms. What is personal is treated as political. This arbitrarily encroaches upon the privacy of an individual, damaging their honor and reputation. The UNO has made an effort to ensure that this basic human right of an individual is respected and upheld by enshrining in the Universal Declaration of Human Rights 1948 a specific Article, i.e., Article 12, which states: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks” [10]. Nonetheless, homosexuality continues to be criminalized in India to this day and regulated by the dominant heteronormative society and its institutions. Furthermore, an inaccessible justice system (too expensive) and an endemic democracy deficit ensure that there is neither a legal recourse nor a process through which this violation of human rights can be adequately addressed. The continued hostility or intolerance in India toward the queer and disabled-bodied indicates the overbearing nature of the State as well as that of the dominant ableist and heteronormative Indian society’s intrusion into the personal space of peoples’ lives violating all forms of decency and human rights. An observation of this aspect reinforces the merit in the statement, “the personal is political,” [15] as far as the regulation of sexuality is concerned. What is essentially a personal matter has been conveniently turned into a political issue, as unbridled sexual conduct is seen as a threat to dominant heterosexuality, masculinity, and the structures of power. In the

regimes of the normal, queer and/or disabled human subjects are given little or less value and human dignity, ensuring a subordinate position and lesser (social and political) power [16–18].

The regulation of sexuality marginalized queer sexualities and queer individuals, which had a tremendous bearing on the sociocultural sphere of India. First, it served to cement the dominant heterosexual ableism; and second, it stigmatized and marginalized the lives of queer individuals as abnormal and criminals, forcing them to live in the margins of the society in abject poverty without any voice, political or literary, to raise their concerns, thus making them vulnerable to violence and abuse. Society is unequal to the different or the nonnormative. The cultural narratives underwent a sea change by the discriminatory politics of norms that allow humanity to be divided into two binary opposing groups: one that embodies the norms and whose identity is valued and cherished, and another that is regarded/treated as the “Other,” conveniently defined by its faults, devalued, ostracized, and discriminated, or in other terms dehumanized. Dehumanizing certain sections of society that do not conform to majoritarian norms is a clear violation of basic human rights, as it transgresses the ideals of justice, equality, and fraternity.

#### **4. Alienation of people with disabilities**

“Enforcing normalcy” is a mechanism of categorization and segregation based on an assumed difference of forms of the body. This system is arbitrary and, at its best, is a politicization of identity based on an assumed difference. Disabled people or people with disabilities such as Kanga are thus considered “deformed,” lacking in some vital aspects of the body. As a result, disabled people are considered mutilated, incomplete, or deformed humans, implying the tacit understanding that they do not deserve to enjoy the rights and privileges of human rights. Essaka Joshua says, “Deformity was most commonly conceptualized as a set of characteristics that are the opposite of beauty. Philosophers of the period usually characterize deformity negatively, and standardize it as something that exhibits irregularity, disproportion, disharmony, asymmetry, peculiarity, sickness, and decay” [19]. This esthetic philosophy plays a significant role in the stereotyping of disabled people as deviant, evil, ugly, deformed, incomplete, and so on. A negative image is created and problematic phenomena, such as marginalization, discrimination, prejudice, and so on, segregate people with disabilities creating inequalities. One basic principle of human rights is that “all are equal before the law” and “all are entitled to equal protection against any discrimination.” This principle has been clearly stated and spelled out in Article 7 of the UNO’s Universal Declaration of Human Right 1948, which states that “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” According to McRuer, the dominant ableist society deems this difference deviant and attempts to enforce its able-bodied norms onto marginalized, disabled identities. The alienation of people with disabilities from mainstream society and culture is a consequence of the effects of “compulsory able-bodiedness.”

The focus of this categorization and segregation of people with disabilities is on the visible difference between the forms of the body. For that reason, the visible difference in the body of Kanga becomes a hallmark of his identity. From an early age, he is made to feel that he is different. The opening sentence of *Trying to Grow* begins with these lines: “‘His teeth are like windows,’ said Father to the old Parsee with droopy white moustache, sitting next to us on the bus. ‘You can look through

them—see?’ Father tried to hold open my mouth” [20]. Even Brit’s (Kanga) father looked at him as an odd and bizarre creature. He is not seen as a normal person. These lines, “‘Sam, Brit is a normal person. He’s just got a problem. Can’t you see it that way?’ ‘Normal? You call everything I told you normal?’” [20] suffices to say that the system of normality and compulsory able-bodiedness is overwhelming and deeply entrenched in the somatic psyche of the ableist society. In the collective unconscious of the dominant ableist society, the concept of compulsory able-bodiedness has an overpowering influence so much so that it blurs the capacity to perceive beyond the normal. The fact that Brit (Kanga) suffers from a medical condition is not understood in its proper context; there is not even an attempt to do so. He is simply assumed to be abnormal, and this is dehumanizing. As Brit (Kanga) grows (or tries to grow), he experiences systemic discrimination at work against the disabled. Here, the systemic compulsory able-bodiedness segregates Brit (Kanga) from the able-bodied like chaff separated from the grain. As a consequence of this endemic compulsory able-bodiedness, people with disabilities such as Kanga face alienation and (human rights) abuses.

Sociologist Melvin Seeman in “On the Meaning of Alienation” [21] identified five attributes that cause alienation, viz., powerlessness, meaninglessness, normlessness, isolation, and self-estrangement. The notion of “sexlessness” of the people with disabilities can be added to this list of attributes identified as causing alienation of disabled people. “I wasn’t male. Not to them. The magic mirrors of their minds had invented a formula: osteo = sexlessness” writes Kanga in *Trying to Grow*. Furthermore, in *Heaven on Wheels*, Kanga writes, “‘Who will marry you also — you cannot have children?’” [22]. The assumption that “osteo = sexlessness” and “cannot have children” is a failure to recognize Kanga as a human being. Kanga has revealed that for twenty-nine years, he was told by society that he was not a person. This stereotyping is not an exception but a rule cutting across the diverse cultural narratives of India. The embodiment of the disabled human body as sexless and incapable of having children is a form of oppression because it reads the disabled body sans: (i) libido, (ii) sexual desire, (iii) sexual attraction, and correspondingly (iv) human feelings/emotions. This can be termed one of the worst forms of human rights abuses. This stereotyping is disempowering and isolationist, violating the basic human rights of people with disabilities because “everyone has the right to recognition everywhere as a person before the law,” as stated and emphasized in Article 6 of the UNO’s Universal Declaration of Human Rights 1948. It is interesting to note that through these myths and prejudices, zones of seclusion are created to insulate the nondisabled people from the threat of disruption of the established and institutionalized able-bodied and heterosexual norms of the ableist society. Jenny Morris in *Pride against Prejudice: Transforming Attitudes to Disability* [23] argues that being kind and generous to people with disabilities by remaining within zones of seclusion offers a comforting feeling and satisfaction to the nondisabled people as regards their altruism to the disabled.

## **5. Somatocentrism: precarity of disabled people**

The privileging of able-bodied people over the disabled-bodied in the cultural value system denotes pervasive social constructionism in the social organization of the dominant ableist society. The preoccupation with body image and the physical appearance of the body shows the extent of cultural values and meanings attached to select phenotypical traits. A hegemonic discourse confers recognizability on subjects that sufficiently conform to the norms. Marginalization, abjection, exclusion, and the attribution of cultural values and meanings on divergent bodies, whether positive or negative, is rampant and a result of somatocentrism.



In *Heaven on Wheels* Kanga writes, “I could open my door and the salesman would say, ‘Poor thing you, to be like this’. A passer-by would stop a friend who was wheeling me and exclaim, ‘Well done! This is the true spirit of service!’ A mustachioed man would block my way and stare in horrified fascination as they did at Victor Hugo’s boy who laughed” [22]. These lines reveal the extent of “violence” that colors the perception and treatment of people whose bodies do not sufficiently conform to the norms. A complex convergence of norms, myths, and prejudices prevents the divergent bodies from being recognized as worthy of respect and space in the social organization. Unfortunately, this is not an aberration but a norm, a regular feature faced by disabled people such as Kanga in everyday life, which takes a toll on their psyche. As he grows (or tries to grow), Kanga experiences the extent of his abjection, isolation, and exclusion from mainstream society, which segregates disabled bodies forcefully with violence violating his basic human rights.

According to Judith Butler, “‘precarity’ designates that politically induced condition in which certain populations suffer from failing social and economic networks ... becoming differentially exposed to injury, violence, and death” [24]. The concept of the social constructionism of disability infers that disability is largely a “politically induced condition” by the dominant ableist society, which regards the disabled as deviant that is in direct conflict with the dominant social norms. In the zeal to protect its domain, the dominant ableist society induces a hostile condition to the point that it becomes suffocating for disabled people to live a normal life. The existence of disabled people such as Kanga becomes precarious. For much of his life, Kanga had to live a life on the margins of society, hassled and “robbed” of his basic human rights. The precarity of Kanga’s disabled existence can be gauged from these lines: “To be robbed is rarely painful for what you lose; it’s the thought of what has been done to you that keeps you trembling and awake into the night. Being open to plundering of your personality at almost any time lends a subtle terror to your life that lies sulking beneath the surface of your smile” [22]. Taking part in everyday life turns out to be a traumatic experience for Kanga as his body becomes a subject (and an object) of intense scrutiny and a violent ableist gaze. This treatment of Kanga by the ableist society violates the letter and spirit of Article 5 of the UNO’s Universal Declaration of Human Rights 1948, which states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” [10].

The somatocentric perspective sees the disabled body of Kanga as a lesser human, and stigmas are attached to it. An invisible barrier crops up in every space confining or ghettoizing people with disabilities. In this way, people with disabilities are expunged from mainstream society. This renders people with disabilities invisible and silent, although they are everywhere in society. What society sees is the able-bodied or the normal body; the existence of disabled people is often taken simply as a fairytale, not a reality, and vanishes from society. Kanga quips, “... to most people, in Bombay, I was Cinderella” [22]. Kanga’s queer and disabled existence does not matter essentially because in the somatocentric worldview, disabled bodies do not matter [7].

## **6. Alterity: the otherness of the other**

It is the able-bodied that matters, the rest are simply the “Other.” In “Compulsory Able-Bodiedness and Queer/Disabled Existence,” Robert McRuer shows the pervasiveness of this notion/prejudice in society, which leaves no scope for a choice, to the point that this compulsory able-bodiedness creates disability. A web of discourses and narratives leaves no room for different forms of the body in the social organization creating a binary opposite of Us (the Self) versus Them

(the “Other”). In this dichotomy, the able-bodied is upheld as an embodiment of normality, an identity that is valued, while on the other hand, the disabled-bodied is taken as gross, defined by faults, and is devalued and discriminated as abnormal, the “Other.”

The history of disability and queer sexualities are interspersed with discourses of “Otherness.” Otherness is an endemic process of the subjection of the disabled as abject and gross. Since the 1970s, several models of disability, including the medical model, expert/professional care model, tragedy and/or charity model, moral model, economic model, and social (justice) model, have undergone revisions and changes. However, these models share a common essence: Otherness. In reinforcing the Otherness paradigm, discourses play a significant role by characterizing difference as divergent. According to McRuer [5], the dominant identities enforce their able-bodied norms onto marginalized, disabled identities, rendering the disabled-bodied as the perennial “Others,” the Otherness differing only in degree and not in essence.

Kanga experienced the process of the subjection of queer and disabled-bodied people in its severest form due to the severity of his deformity and queer sexuality. Kanga says that his deformity reduced him into “four feet nothingness” and photos made him “look like a demon” [22]. In *Heaven on Wheels*, he writes, “To be gay, in India, was to surrender your claim to be a man, to slide into self-parody of make-up and earrings, neither of which quite tempted me.... The fact that I couldn’t walk automatically disqualified me, in the Indian mind, from marriage – or, for that matter, any romantic relationship” [22]. Kanga is twice marginalized because of his disability and queer sexuality. However, he is unabashedly proud of his disabled and queer identity. Kanga remarks that India is essentially an “uncomprehending culture” of teratophobia and homophobia [22]. There exists a heightened version of normality in the Indian sociocultural context, and Kanga challenges this orthodoxy by accepting his disabled body and homosexuality as normal. Kanga can comprehend the existence of an alternative system that exists outside of the purview of normality and embraces it wholeheartedly. Ableism is a denial of an alternative system, or for that matter, alternative bodies and sexualities. When Kanga quipped, “The good thing was, I was at everyone’s crotch-level getting the best view of my life ... ..” [20], what he meant was that his deformity and disability bestowed him the ability or power to see and comprehend the world in different, often multiple, and alternate perspectives. It is, however, a different story that the dominant ableist society could neither see nor comprehend the world as a multiplicity of forms and systems used as they were to a system of a unidimensional model. The Otherness of the Other is NOT a consequence of an essential difference of the Other, but an outcome of a rigid unidimensional point of view of the ableist society violating Article 1 of the UNO’s Universal Declaration of Human Rights, which states that: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood” [10].

## **7. Conclusion**

Discourses of disability, (queer) sexuality, and human rights issues related to queer and/or disabled people have remained neglected in literary narratives. Kanga’s narrative of his lived experience, the experience of living inside a disabled body, and that of his experience of queer sexuality, is a unique expression of reality. He has shed light on the human complexities, the myths and assumptions that construct disability, the imposition of heteronormativity, and the rampant human rights abuses that the disabled face in everyday life. In his literary narrative,

disability and queer sexuality are at the center of the discourse. In *Trying to Grow and Heaven on Wheels*, he takes the readers on a detour of his life, presenting the lived experiences of his disabled and queer existence. In the process, Kanga challenges the myth of sexlessness of disabled people, decries the notion that the disabled are devoid of human emotions/feelings, and critiques the pervasiveness of the “Othering” process that abjects and abuses the human rights of people with disability. Kanga has affirmed the experiences of disability and queer sexuality, paving the way for a kind of disability and queer pride. Using a humorous language in his literary narrative, he has revisited and resisted discourses that present a prejudiced way of thinking and social practices as well as the rigidity and oppressiveness of normal subject positions. His writings gain an added significance because he shows that the novel (literature in general), as an important cultural form, plays a crucial role in normalizing discourses about what counts as a normal human being and how it shapes the popular perceptions and representations of the queer and/or disabled.

Normalizing discourse like “compulsory able-bodied heterosexuality” is entertained and superimposed by the ableist society upon the queer and/or disabled individuals in society like Kanga. In his writings, Kanga has shed light on the everyday struggles of queer and/or disabled individuals, and the rampant human rights abuses suffered by them. Kanga’s narratives of the lived experiences of queer and/or disabled existence form a space–time continuum as the silences and gaps in mainstream literary and other cultural narratives are filled with liminal voices of the queer and/or disabled. Kanga reconciles the dominant ableist society with the reality of queer and/or disabled existence. Denied space in society, the queer and/or disabled individual’s life is a story of the struggle for survival of the weakest and the marginalized in an unequal and malevolent world. Kanga challenges the dominant discourses of norms and normality in his narratives to provide an objective perspective to the rarely and seldom understood issues of queer sexuality and disability and gives a new hope to the most marginalized and deprived section of society in terms of human rights. His writings explore (and expose) the culture of “normal” and question the structural barriers in the social organization that Others and dehumanizes the disabled people. Kanga’s writings are not just any regular narrative on disability but are a considered and authentic voice from marginalized people with disabilities and queer sexualities. By questioning the myths, assumptions, and discourses of the ableist society, he has sought to build an equal and just society that is inclusive of different and diverse members. He situates the queer/disabled existence as the “new normal” in society.

*Kanga, through the medium of literature, has made it clear that the much vaunted UNO’s Universal Declaration of Human Rights 1948 has remained simply a declaration (in the paper) and not a practice (it has been practiced neither in letter nor spirit) as far as the rights and privileges of the disabled and the queer people are concerned, at least in the sociocultural and political narratives and practices in India. The human rights of queer and/or disabled people are violated with impunity, as normalizing discourses such as compulsory able-bodied heterosexuality regulate discrimination and oppression as normal and receive it as an accepted practice. The queer and/or disabled people are treated as objects to be judged, segregated, discriminated against, and abjected by those able to exercise power insofar as the discursive practices, cultural narratives, and political will of India are concerned. Furthermore, what can be called the “democracy deficit” in India acts as a stumbling block toward legal, political, social, and cultural remedies in the struggle for the basic human rights by queer and/or disabled people, as they are generally poor, marginalized, and powerless. With the rise of disability studies and queer sexuality studies in the 1960s and 1970s, there has come about some*


*perceptible change in the treatment of queer and/or disabled people, especially in Western societies; even then, they are stuck in “governmentality,” borrowing Foucault’s terminology, as it sees/perceives queer sexuality and disability as a “problem” displaying the prevalent attitudes toward queer and/or disabled people. In such a scenario, it becomes increasingly evident that the UNO’s Universal Declaration of Human Rights 1948 is ostensibly out of tune with the change of times as it has failed to incorporate and guarantee the human rights of the queer and/or disabled people through its various Articles in unambiguous terms.*

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# The Use of Criminal Law on Abortion: A Structural Barrier that Limits Women's Rights

*Ana Cristina González-Vélez and Laura Castro González*

## Abstract

The use of criminal law to limit abortion rights still prevails in most of the legal regimes around Latin America. This particular law reveals the lower value assigned to women's lives in modern societies and how much the state interferes in women's freedom and reproductive autonomy. This situation has had an impact on women's ability to access safe and timely abortion services due to the numerous barriers they face, among other things the criminalization of abortion. This paper develops the arguments that support a recent constitutional claim submitted to the Constitutional Court in Colombia by the Just Cause Movement, demonstrating that abortion crime violates several human rights including equality and freedom and compromises women's citizenship by undermining their ability to make free decisions about their bodies and their lives.

**Keywords:** criminal law, abortion, freedom, citizenship, human rights, autonomy, Colombia, Causa Justa, Constitutional Court

## 1. Introduction

In September of 2020 the Just Cause Movement filed a lawsuit before the Constitutional Court of Colombia to declare the illegality of abortions unconstitutional.<sup>1</sup> This movement started taking shape in 2018 when La Mesa por la Vida y la Salud de las Mujeres (la Mesa),<sup>2</sup> a Colombian feminist organization, called on a wide group of women's, feminist and human rights organizations, and other actors such as activists, healthcare service providers, academics, and members of research centers together to promote the idea through pedagogical work with diverse audiences of eliminating the crime of abortion from the Penal Code so that no woman

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<sup>1</sup> The lawsuit was filed on September 16 by La Mesa por la Vida y la Salud de las Mujeres, Women's Link Worldwide, Católicas por el Derecho a Decidir, the Centro de Derechos Reproductivos and the Grupo Médico por el Derecho a Decidir. It was accepted on October 19th by the Selection Chamber, and is currently being studied by the Court for an approximate period of six months. The file documents can be reviewed here: <https://www.corteconstitucional.gov.co/secretaria/actuacion.php?proceso=1&palabra=D0013956&mostrar=ver>.

<sup>2</sup> A collective of organizations and people that has worked for the sexual and reproductive rights of women since 1998, especially towards the free choice to maternity, the free exercise of sexuality and the decriminalization of abortion. Link: <https://despenalizaciondelaborto.org.co>.

and no provider would have to or suffer the threat of serving prison time for having performed an abortion [1].<sup>3</sup>

For the pedagogical work, La Mesa formulated numerous arguments that support the need to eliminate the illegality of abortions.<sup>4</sup> These arguments encompass issues such as the inefficacy of the crime of abortion, the failures regarding service provision within the context of abortion as a crime, its impact on women's freedom, critique to the indications regime (or legal grounds) and the time-limit model,<sup>5</sup> and the lesser value assigned to women's lives when they have an abortion or refuse maternity as their destiny, which causes restrictive abortion regulations [4].

Along with this petition and an action strategy on several fronts [5],<sup>6</sup> the Just Cause Movement moreover seeks to stop the State's punitive power being applied in issues regarding abortion, so that women can freely be the protagonists of their lives and thus be equals in society. Furthermore, the movement endeavors to eliminate the stigma surrounding abortion, to reduce inequality among groups of women, and to create an environment of legitimacy around the decision to have an abortion, in order to keep criminalization from forcing women to be mothers and taking away their autonomy [3].

"As for punitive power, the interpretation of authors such as Douglas Husak (2008) who has been endorsed by the Inter American Human Rights Court, considers that there is a wide group of restrictive measures which are punitive, and *not only those that apply to criminal law*: [ ...] administrative penalties are, as much as criminal ones, an expression of the State's punitive power and, occasionally, have a similar nature. Both imply the undermining, privation or alteration of people's rights, as a consequence of *illicit* behavior" [4, 6].

## 2. The problem

In 2006, Colombia ceased to be one of the few countries that have fully restrictive legislation regarding abortion in Latin America, and became one which adopted the indications regime through a judicial decision [7].<sup>7</sup> In decision C-355 of 2006, the Constitutional Court conditioned the enforceability of article 122, stating

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<sup>3</sup> The pedagogical strategy has shaped La Mesa's work since 2006, when abortion was decriminalized, and its purpose was precisely to construct arguments and disseminate them in order to produce change in the operators of healthcare services and legal administrators, and in the public opinion. For more information consult reference [2].

<sup>4</sup> These arguments can be reviewed in reference [3].

<sup>5</sup> Both the indication regime and time-limit model are built on arbitrary notions about reasons (the first one) or time limits (the second one), by which or within which the woman can or "must" interrupt a pregnancy. Both are supported by legal paternalism that grants third parties, physicians and judges among others, the power to share in or directly make the decision of when to abort for women. These are a part of a spectrum of restrictive norms that, both in Latin America and other parts of the world, have applied the punitive power of the State to limit the reproductive self-determination of women. It must be said, however, that the term model is wider and offers more guarantees because it offers a gestation period within which the woman can have an abortion at will. See references [3, 4].

<sup>6</sup> Some of the strategic dimensions include: the production of expert knowledge, pedagogical work with diverse audiences, including opinion leaders, legal action, new research, and social mobilization, among others. To learn more about Just Cause and social mobilization go to: <https://causajustaporelaborto.com>.

<sup>7</sup> See: <https://reproductiverights.org/worldabortionlaws>.



that: “the crime of abortion cannot be incurred in when, with the woman’s consent, the interruption of pregnancy is produced in the following cases: (1) When the continuation of pregnancy constitutes a danger for the life or health of the woman, certified by a physician; (2) when there is a fetal impairment of the fetus that makes life inviable, certified by a physician; and, (3) when pregnancy is the result of a properly reported behavior, that constitutes abusive, non-consensual carnal abuse or sexual intercourse, or artificial insemination or transference of fertilized ovum without consent, or incest” [8].

Since then, 14 years have passed, and more than 22 legal decisions prove that there is a true fundamental right to abortion in Colombia. That is the status the Constitutional Court itself has given it. However, since it coexists with the crime of abortion in the Penal Code, a deep ambiguity has been created for those who provide abortion services, those who need abortions and even for the public opinion and society.<sup>8</sup>

“Since Decision C-355 of 2006, a large number of norms, both legal (3 regular laws and 1 statutory) and regulatory, public policy documents, and constitutional (there are more than 20 decisions of the Court regarding VOLUNTARY TERMINATION OF PREGNANCY) and administrative jurisprudence, all of them later than 2006, now coexist with the criminal norm object of our claim, and are part of the legal regime under which it is subscribed, that being the regime that regulates voluntary termination of pregnancy, both the one that constitutes a fundamental rights, and the one that constitutes a crime” (Public action for the unconstitutionality of article 122 of La 599 of 2000, File D-0013956).<sup>9</sup>

This situation, as has been mentioned, has persisted for these past 14 years and has created a series of circumstances that show that the indications regime, adopted in 2006, is insufficient, deepens inequalities among women, upholds the lesser value assigned to their lives, particularly their biographical dimension, and is the source of uncountable barriers, where the most important structural barrier is the crime of abortion, as we will demonstrate in the following pages.<sup>10</sup>

Although there is much variation in the indication regime as applied in Latin America, from some places that only recognize one indication (save women’s lives, Paraguay) to others, such as Colombia that recognize three, it is a regime that betrays at least three limitations [4]. Firstly, indications are variable and not always consistent with the reasons or needs of women who seek abortions. For example, in Colombia, there is a non-consensual artificial insemination indication, but fertility

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<sup>8</sup> See the decisions of the Colombian Constitutional Court: i) Decision T-636 of 2007, ii) Decision T-171 of 2007, iii) Decision T-988 of 2007, iv) Decision T-209 of 2008, v) Decision T-946 of 2008, vi) Decision T-009 of 2009, vii) Decision T-388 of 2009, viii) Decision T-585 of 2010, ix) Decision T-841 of 2011, x) Decision T-636 of 2011, xi) Decision T-959 of 2011, xii) Decision T-627 of 2012, xiii) Decision T-532 of 2014, xiv) Decision C-754 of 2015, xv) Decision C-274 of 2016, xvi) Decision T-301 of 2016, xvii) Decision C-327 of 2016, xviii) Decision T-694 of 2016, xix) Decision T-697 of 2016, xx) Decision T-731 of 2016, xxi) Decision C-341 of 2017, xxii) Decision SU-096 of 2018.

<sup>9</sup> Public action for the unconstitutionality of article 122 of Law 599 of 2000 (Penal Code) presented by Just Cause on September 16th 2020.

<sup>10</sup> We know from previous studies that the indication regime had existed for decades in many countries in the region without it translating into real access to legal abortion for women. For this reason, the first years of La Mesa were dedicated to creating frameworks that could serve health operators and judicial authorities to interpret the indications established by the Court in 2006 widely and consistently with human rights. See references [9] y [10].

treatments are not even covered by the healthcare system. Secondly, the requirements to access abortion vary between countries and, even though in Colombia they only include a medical certificate for risk to health, risk to life, fetal malformation cases or a complaint for rape cases in practice, these often function as authorizations that legitimized the reasons of women. Thirdly, the indication regime is subject to interpretation problems, as its application, for instance, depends on a professional's opinion of how much the situation poses a risk to health.<sup>11</sup> However, the current interpretation has also allowed advancements in the proper application of indications [11, 12].<sup>12</sup>

Regarding the inequalities between groups of women it should be pointed out that the indications regime implemented in Colombia has not changed the realities of abortion, as most abortions are still illegal (between 1% and 9%, according to the reviewed source) [13], and their consequences are still felt in certain groups of women, particularly poorer rural women, who have a 70% higher risk of suffering complications as a result of unsafe abortion or of not receiving timely care than women who inhabit urban areas or who have more means [14].<sup>13</sup> At the same time, availability and accessibility problems persist in the more remote areas of the country [3].

Regulations such as the ones that constitute the indication regime are based on the State's punitive power and also reflect, as has been discussed in past works, that legal systems assign greater value to biological life, hence why indications are mainly associated with health and harm. This promotes those system's interests of protecting fetal life as a primordial duty [15], subordinating the life of women to intrauterine life. Following this same logic, the dimension of women's life which is protected is the biological, and not the biographical. This latter one alludes to the life project that each individual creates for itself, and is the most ignored by abortion regulations, and ultimately explains how women are dispossessed of their autonomy and freedom through norms such as the crime of abortion [4].

All of these aspects explain why, 14 years after the partial decriminalization of abortion in Colombia, women are still facing multiple barriers, gathered through several studies, and widely documented in the 1360 cases of women that La Mesa has given accompaniment to since 2006, offering legal assistance and ensuring that they receive legal abortion services; a goal that has been very successful during these years [16]. Three different types of barriers exist: (1) lack of knowledge of the legal framework which happens when service providers, medical professionals, or legal administrators lack the information or ignore the administrative and judicial decisions about legal abortion, (2) a restrictive interpretation of the indications established in decision C-355 of 2006 that manifests when, for instance, an unconstitutional use of the objection of conscience is attempted, and (3) the failures in

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<sup>11</sup> Notions such as health, or the idea of how much risk a woman must endure before her abortion is legal under risk to health reflect to what extent the application of indications is subject to interpretation by third parties [9].

<sup>12</sup> The interpretation, however, is not always a problematic element, as showcased by the case of La Mesa por la Vida y la Salud de las Mujeres in Colombia that, in conjunction with other organizations and groups in Latin America, "made the political decision to promote a wide and plural discussion about the scope of the health indication, thanks to which a legal interpretation of the indication could be promoted and, at the same time, guarantee access to legal interruption of pregnancy services and generate elements to ensure the certitude for professionals that must apply it".

<sup>13</sup> This report includes data from Colombia.

service provision, be it during the process of direct assistance with a professional, or as the result of inaction or obstruction derived from administrative decisions taken in hospitals. As an example, this last barrier happens when professionals deny the medical certifications necessary for access to voluntary interruption of pregnancy [17].<sup>14</sup>

Additionally, these barriers are more severe for migrant women, the assistance to whom increased by 51% during the pandemic compared to the immediately preceding year, and from whom, for instance, additional documents are often required.<sup>15</sup> During confinement related to the Covid-19 pandemic, they have also faced the impossibility of access to service, discontinuity in care, and lack of intimacy at home to access abortion information and services [19].

Compounding the barriers already mentioned, the criminalization of abortion in Colombia is another element which generates and worsens inequality among women and reflects the stigma that surrounds it. According to data from the Colombian Attorney General's Office, during the 2010–2017 period, 97% of women who reported having had an abortion inhabited rural areas and only 3% lived in urban zones.<sup>16</sup> As of 2019 there were 5833 abortion cases reported to the authorities in the country, of which 4834 are active cases in some stage of the criminal process, and that 340 people have been sentenced to the crime of abortion even though abortion is a fundamental human right in Colombia, and legal in three circumstances [20]. Additionally, almost 73% of the abortion cases that reach the Attorney General's Office are reported by hospital staff which violates professional secrecy and confidentiality, revealing the stigma that persists in healthcare institutions, particularly against those who provide abortion services [21].<sup>17</sup> Women under the age of 18 are the most prosecuted for this crime: 12,5% of the reports for abortion involve minors and 25% of women found guilty of this crime are minors [20]. Finally, at least 30% of the women who reported having had an abortion between 1998 and 2019 were victims of domestic violence, sexual violence, or assault.<sup>18</sup> In other words, one out of 3 women who have abortions and are reported for doing so has been the victim of violence.<sup>19</sup>

Thus, the crime of abortion is revealed as a key element that underlies the production of barriers and the reproduction of inequality acting as a structural barrier.

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<sup>14</sup> Currently, la Mesa in Alliance with Women's Link, the Center of Reproductive Rights, the Red Nacional de Mujeres y the Oriéntame Foundation are working on the development and publication of a technical report on barriers to voluntary termination of Pregnancy Access during COVID-19.

<sup>15</sup> The report on migrant women can be reviewed in reference [18].

<sup>16</sup> These numbers are from the Colombia Attorney General's Office and were obtained by la Mesa through a right of petition. The data correspond to cases initiated after the issuance of Law 906 of 2004 (Criminal Procedure Code), that is, between the years 2004 and 2017.

<sup>17</sup> Colombia Attorney General's Office. Report on abortion prosecution in Colombia. Technical opinion sent to the Constitutional Court in the process with filing number D0013255, p. 12.

<sup>18</sup> These numbers are from the Colombia Attorney General's Office and were obtained by la Mesa through a right of petition. The data corresponds to cases initiated after the issuance of Law 906 of 2004 (Criminal Procedure Code), that is, between the years 2004 and 2017.

<sup>19</sup> 61% of the population state that they disagree with women going to jail for voluntarily terminating their pregnancy, 26% neither agree nor disagree and 36.1% of the people surveyed agree with sending a woman who has decided to interrupt her pregnancy to jail. The majority of the population considers that voluntary termination of pregnancy decision should be free and that women should be able to abort under certain circumstances [22].

### 3. Action undertaken: the arguments for the claim

Facing this complex situation and in order to protect women's freedom<sup>20</sup> and ensure their full citizenship, in September 2020 the Just Cause Movement filed an unconstitutionality lawsuit which was accepted in October of the same year by the Colombian Constitutional Court for review, and is expected to be resolved in a term of approximately six months.<sup>21</sup> This lawsuit, a text more than 150 pages long, is structured around a wide ranging set of arguments or charges of unconstitutionality that mainly cover: the violation of the right to voluntary termination of pregnancy, created by the Court itself in 2006, the violation of the right to health, the violation of the right of freedom of profession and trade, the violation of the right to equality for migrant women, the violation of the right of freedom of conscience and the principle of a secular State, and the violation of several constitutional principles through the use of criminal law.<sup>22</sup>

The lawsuit also explains at length that the request to eliminate the crime of abortion leaves no legal or regulatory vacuums in Colombia because both the ample jurisprudence of the Court and the administrative norms regarding abortion issued in the past 14 years will still be in effect and constitute an ample body of guarantees. Likewise, no service coverage issues are created since all healthcare service provision necessary for an abortion has been integrated into the Colombian healthcare system [3].<sup>23</sup>

In the following, some of the aforementioned arguments will be illustrated. The lawsuit explains to the Court that since 2006 the goal of allowing women to access abortion without jeopardizing their lives has not been achieved because the crime of abortion persists which generates stigma and stigma does not differentiate between what is and what is not allowed by law, and affects the exercise of the fundamental right to the voluntary termination of pregnancy.<sup>24</sup> This can

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<sup>20</sup> Support of the arguments explained in this section can be found in the lawsuit filed by Just Cause, which can be reviewed in the link referenced in footnote 1. These arguments are also widely discussed in the texts produced by la Mesa, although they have been expanded on, adapted and discussed with more depth in the lawsuit. To review publications and reports by la Mesa see: <https://despenalizaciondelaborto.org.co/biblioteca/>.

<sup>21</sup> During the period immediately following the admission of the lawsuit, the Constitutional Court has received more than 114 amicus and technical opinions from national and international experts that support the elimination of the crime of abortion from the Penal Code. Among them are international organizations and think tanks such as Doctors Without Borders, Doctors of the World, DeJusticia, the National University's School of Gender Studies, and IPAS – Mexico, as well as interventions by academics, researchers and experts such as Alejandro Gaviria (former Health Minister and President of the Los Andes University), Johana Erdman (U. Dalhousie), Rebecca Cook (U. of Toronto), Line Bareiro, among others.

<sup>22</sup> The lawsuit also contains an extensive discussion about the existence of *res iudicata* and explains that there are now new arguments and situations that were not considered in 2006, when the same article of the Penal Code was studied. For example, 14 years ago the protection of medical staff from threat and stigma was not considered, it was not known that the establishment of the indication regime would worsen barriers and criminalization, affecting the situation of the most vulnerable women, or that both national (Commission on Criminal Policy) and international organizations would recommend eliminating the use of criminal law to regulate abortion.

<sup>23</sup> See footnote 1.

<sup>24</sup> In the text, especially in this section, the terms abortion and voluntary termination of pregnancy are alternated, the latter one is the one the Court has used since Decision C-355 de 2006 to refer to consensual legal abortion.

be observed, for instance, in the disproportionate way in which barriers affect the most vulnerable women and girls, those inhabiting rural and remote areas, or those who have the least economic resources, including those who live in situations of armed conflict or other forms of gender based violence, e.g. sexual or physical.

The lawsuit also shows how regardless of the three indications, the mortality rates and specially the maternal morbidity through abortion are evidence of the ways in which abortion as a crime negatively impacts women's right to health. Similarly, it is also argued that the health protection offered by the indication regime is relative, as it is only valid for those who fall under one of the indications and then are able to overcome the barriers to access. All other women are exposed to unsafe abortions due to their criminalization, which also aggravates inequalities among women. It is also argued that criminalization outside of the indications ignores the decisions, mandates and recommendations of diverse international human rights organizations that, after 2006, have recommended wider decriminalization.<sup>25</sup>

Moreover, the freedom of profession and trade for healthcare staff and the violation of the right to equality of migrant woman must be highlighted among the more innovative arguments in the lawsuit. In the first case, and taking into account that healthcare professionals and particularly physicians are the people most responsible for voluntary termination of pregnancy services, it is both problematic and paradoxical that they too should be susceptible to criminal penalties, including jail time, if they act outside existing indications.<sup>26</sup> As has been mentioned, these can be interpreted widely or more narrowly by different professionals and by judicial authorities, leading to the strange paradox of those who must ensure timely access to voluntary termination of pregnancy and who are themselves at constant risk of criminal penalties. Adding to this already complex situation, service providers are frequently victims of stigma when they ensure timely access to voluntary termination of pregnancy services which often leads them to self-censorship or marginalization from societies of healthcare professionals, causes them psychological stress, emotional fatigue, and leads to them being overworked due to the low availability of professionals willing to offer a service which is a right and a crime at the same time. All of this affects not only their freedom of profession and trade, but also the number of professionals willing to carry out this duty, reinforcing the vicious cycle which leads the most vulnerable women or those who live in the most remote areas to resort to unsafe abortions because they cannot find a safe service nearby.

As for migrant women, particularly those in an irregular migratory situation, who as we have seen, face not only the same barriers as Colombian women when attempting to access a voluntary termination of pregnancy, but also some of their own, caused by their migration status, and often end up being victims of different forms of sexual violence, even human trafficking. In their case, healthcare service provision is mediated by xenophobia, the threat of deportation or the initiation of criminal proceedings, and cruel and inhuman treatment in healthcare services which violate their right to equality.

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<sup>25</sup> Human Rights Committee, CEDAW Committee (Convention on the elimination of all forms of discrimination against women), Committee on the rights of Children, Committee on the rights of disabled persons, Rapporteur on the Right to Health (Mr. Danilo Puras).

<sup>26</sup> According to the Colombian Penal Code, art. 122, "the woman who causes abortion or allows another to cause it, will be subject to 16 to 54 months of prison time".

Nevertheless, the argument that we are most interested in highlighting here is precisely the one that explains in which ways the use of criminal law on abortion is ineffective, counterproductive and violates several constitutional principles, not to mention that being a behavior that should be considered private, it should be outside the purview of criminal law [23, 24]. On the one hand, it is an ineffective measure since it does not prevent the behavior in the case of unplanned or unwanted pregnancies in which women decide to abort, since “the use of the States punitive power as a moral instrument of the patriarchal stamp is challenged by the moral resistance of women who have abortions even when it is totally prohibited. Even when they are prosecuted, condemned and humiliated. Even when they must pay with their lives” [4].

On the other hand, it generates a counterproductive situation, since women get abortions under unsafe conditions that lead to an increase in deaths and maternal morbidity and produce costs for the healthcare system that must provide care for complications of unsafe abortions [3].<sup>27</sup> This is the reason why countries such as Canada, the Netherlands and England, where the use of criminal law has decreased and regulation is enacted through the health sector, show a gradual reduction in both abortions, death and complications from unsafe abortions. This is compounded, as has already been mentioned, by the fact that the effects of criminal law are felt disproportionately and almost exclusively by the most vulnerable women, who in Colombia’s case are rural women, victims of violence, girls, and adolescents. This affirms that “the decision to keep abortion as a crime is not founded in empirical data nor does it value either the financial costs, or those to rights, of criminalization.” “According to the Advisory Commission of Criminal Policy (Colombia), empirical research and informed decision making are indispensable elements for the design, execution and evaluation of criminal policy.” Incipient data suggests that “severe penalization of abortion leads to clandestine abortions which gravely affect women’s health, causing death in a significant number of cases.” The main victims are those with fewer economic resources and a greater rate of unwanted pregnancy, easy prey to illegal markets (Public action for the unconstitutionality of article 122 of La 599 of 2000, File D-0013956) [25].

The crime of abortion also raises important questions about the retributive end of penalties because it objectifies women, using them as vessels forced to continue gestation under threat of going to jail if they interrupt according to their own will. What harm must a woman who aborts compensate society for? Should a woman who has had an abortion become a mother at a later date, or is the only recourse to continue the pregnancy forcibly? [3]. All of these questions and more are opened by the existence of the crime of abortion, which additionally does not constitute the *ultima ratio* of criminal law, as it ignores the use of “other paths of public action, better suited to protect the judicial interest that involves gestating life.” “The state has at its disposal innumerable policy tools to ensure life expectancy without having to annul the fundamental rights of women. As was established by the Advisory Commission of Criminal Policy, the best way to reduce abortion is to adopt a public health perspective, using educational campaigns in sexual and reproductive rights and access to quality healthcare services [...] To the contrary, severe penalization of abortion, especially when not in tandem with campaigns to prevent unwanted pregnancies, does not prevent abortions and generates clandestine abortion practices that affect women’s health, particularly poorer women, who suffer the most from unwanted pregnancies and must abort in the worst sanitary conditions” [25].

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<sup>27</sup> It is known that in contexts with greater prohibition unsafe abortions increase. See reference [14].

#### **4. Citizenship and women's freedom in Colombia: the right to a lawful existence**

The lawsuit filed by the Just Cause Movement makes an in depth case about how the rule that creates the crime of abortion (article 122 of the Penal Code) violates several minimum constitutional standards for the use of criminal law and criminal policy. This situation is made even more critical by the fact that the Constitutional Court itself has made clear since its decision C-355 of 2006 that criminal law was neither the only nor the most suitable mechanism to regulate voluntary abortion in Colombia. It is a lawsuit with a strong and wide-ranging argumentation for why, after 14 years, the Court can and must reopen the discussion about the criminalization of abortion in Colombia in order to move forward.

This petition is even more urgent considering the inaction of Congress during this period, when Colombian women face serious problems of access to voluntary termination of pregnancy, and appeals to the Court's obligation to protect fundamental rights and the constitution, two essential tasks to maintain a strong democracy.<sup>28</sup> It bears highlighting that in 14 years of partial decriminalization of abortion in the country, Congress has not regulated or advanced the fundamental right to voluntary termination of pregnancy, even though the Constitutional Court has requested they do so in three instances, while it has considered approximately 27 law proposals that threaten the guarantee of this right.<sup>29</sup>

The overwhelming evidence contained in the lawsuit makes it possible to assert that the existence of the crime of abortion is the main structural barrier that forces women, especially women in the most vulnerable situations, to opt for abortion, even within the indications permitted in Colombia. As a result, women still live a strange paradox, being at the same time entitled to a fundamental right and under threat of going to prison for exercising it.

In order to grant women full citizen status, they must be made free and equal. In order to be free and equal, it is necessary to recognize their reproductive freedom, since the freedom of women is intimately bound to their bodies—a body that is biologically constructed for reproduction—making it so their freedom will only be complete when they can make decisions about their bodies and life projects [4, 26]. That means when they can live fully and build their biography without the existence of the crime of abortion. Only then will they be equal before the law. Only then will they be fully free.

#### **Conflict of interest**

The authors declare no conflict of interest.

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<sup>28</sup> To expand on the inaction of Congress, see reference [5].

<sup>29</sup> The requests to Congress have been recorded in the Constitutional Court's Decisions: C-355/2006, T-532/ 2014 and SU-096/ 2018.

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# Digital Children's Right: Human Right Perspective

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## Abstract

The utilisation of digital devices and technologies is an integral part of children's daily lives. Besides the multiple opportunities associated to online environment, like education entertainment and communication, it has also been associated with various risks like grooming and cyber bullying. It is therefore important to assess the level of risk, mediation and digital literacy among children as they form the most vulnerable part of the society. We therefore in this chapter introduce a novel approach to analysing digital children's right by viewing it from the human right perspectives, where we focus and extensively discuss on digital child rights as they relate to digital divide, technological access, gender issues, internet opportunities and risks, previous studies, policies and rights, frameworks as well as rights of children as a human right.

**Keywords:** children, digital children's right, digital literacy, human right, internet mediation, online risk

## 1. Introduction

Children nowadays spend considerable amount of time online at a young age. Estimates have shown that 26% of the global population is under 15 years of age (Source: Statista.com), and is relishing in the opportunities provided by digital technologies.

Undoubtedly, digital technologies play a vital role in the lives of most children around the world, technological access is rapidly increasing among children and its integration is affecting their lives [1] in both positive and negative ways. By estimate, one in every three digital technology users worldwide is a child [2] and every activity from child protection, governance, economic, health to educational is being significantly changed as a result of technological penetration [3].

Digital devices provide children with levels of access to communication, entertainment and information while also providing an opportunity for self-expression, learning and participation [4, 5]. Digital devices also present a means to communicate, learn and publish to billions of individuals in an extraordinary way [6] that was unthinkable only twenty-five years ago. With all these unparalleled benefits come risks, for example, digital devices have made the creation and distribution of abusive images of children easier and have also presented new opportunities for abusers to contact children. Notwithstanding, multiple intertwining occurring in the lives of children can improve or discourage the use of digital technologies.

The spread of these technologies, specifically the internet, in almost all parts of the world, has been subjected to powerful critical reviews and scrutiny with regards to the

opportunities and challenges brought about by this technological usage and integration. This discussion covers issues such as digital divide, infrastructure, intellectual property, opportunities, quality of information and, risk which are observed at both international, national and local levels (Urs [7]). An area that attracts much interest is the influence of digital technology and its massive adaptation among children considering that a lot of children are vulnerable when accessing digital environment [8, 9].

Despite all the attention given, children's digital right is hardly viewed from the human rights dimension and being an encompassing construct, the declaration of human right needs to be associated with digital right of children across the world. Digital access to technology for children is a human right issue on the premise that they are humans too, and the digital access for them is satisfying an appetite by choice, leading to a bounty of legitimate benefits within the realm of their liberty, yet protecting them from possible harm is a rightful necessity. The use of digital technology is a human right in general as suggested by Karppinen [10], so it would not be different in the case of children.

A novel approach to analysing children's digital right is employed in this study by viewing it from the human right perspectives.

## **2. Global North, Global South and the Digital Divide**

The Global North is home to a quarter of the world's population and controls four-fifths of the global income. It encompasses countries like New Zealand, Australia, Israel, United States, Canada, Western Europe, some developed parts of Asia namely Japan, Taiwan, South Korea, Singapore and Hong Kong. It is home to all the members of the G8 and four-fifths of the permanent members of the United Nations Security Council. It is characterised as the more developed and richer region of the world [11].

The Global South comprises of Africa, Latin America, Middle East and developing parts of Asia. It is home to three quarters of the world's populations and controls one-fifth of the world income. The Global South is the poorer and less developed region [11].

Since the 1960s, the world has been divided between the wealthy and developed nations of the north and the poor developing and underdeveloped nations of the south. It is evident that digital divides can enhance the already existing social divides between the rich and the poor, rural and urban, children and adults, and between boys and girls [12, 13].

The digital divide is a metaphor used to describe the disadvantage of those who choose not or are unable to make use of the digital technologies [14]. Income is the greatest determining factor of the digital divide globally [15], while other factors such as the telecommunications gap and the quality of regulation also contribute, including behavioural and cultural attitude towards digital technology. Digital divides also exist between genders in both the Global North and Global South. For instance, in most countries in the Global South, girls would normally go directly to their home after school (with the possibility of completely missing school during festive periods) thereby missing after school computer classes. Similarly, boys in the United States are given better opportunities to interact with digital devices than girls [16].

## **3. Technological access**

When digital technologies were first introduced they were perceived as a Global North phenomenon and the expectation was that the users are going to

be adults, however, even though reality has proven otherwise, the perception remains to a certain extent unchanged among regulators, legislators and internet governance [17].

Many children have now integrated technology as part of their daily lives across very diverse geographical and cultural settings in both the Global North and Global South. Children's activities are currently built around mobile phones and the internet to the point where differentiating between the online and offline worlds is very difficult [18].

Multiple organisations have cited the importance of internet access with regards to economic growth and civil right awareness [19] and are currently researching ways to provide internet access to every corner of the globe. Children should be integral component of this activity, not just because of their widespread usage of the internet, but because of the bidirectional process of shaping that occurs between the children and the internet. As at 2009, 75% of children aged 6-17 in some Global North countries are reported to have access to the internet while some underperforming economies like Cyprus and Greece reported 50%, which is less than some Global Southern countries like Brazil with 63% [5].

Internet penetration in Sub-Saharan Africa remains at about 11.5%, which might be attributed to some obstacles that may hinder internet access, including social or traditional factors that may marginalise certain groups (e.g. people with disabilities or girls). Additional factors such as affordability, language and political instability also hamper internet access [16]. About 48% of people around the world use the internet and 70.6% of youth between the age of 15 and 24 are actively online. Approximately 81% of the people in developed countries use the internet, compared to 17.5% of the least developed countries and 41.3% of the developing countries. About 95.7% of youths in Europe access the internet, which far exceeds the level in Africa, which only has a total of 21.8% [6].

Children's access to the internet in the Global South is often community based (e.g. cafes) or through mobile phones with erratic power supply, ethnic challenges, gender and socio-economic issues along with exploitation or harmful consequences, unlike the North where the sources of internet access for children are home and school based plus mobile phones [20]. The most common device children use to go online in the Global South is the mobile phone, which gives by privacy and flexibility but has reduced potential for parental mediation.

The UNCRC guarantees children from both the Global South and Global North equal political, civic, cultural, social and economic rights comprising the right to digital access. Nevertheless, the percentage of technological access is higher in the Global North, although countries in the Global South are catching up. Social imbalance has a significant influence on both access and usage. For instance, rich children in both the Global South and North have better access and usage of digital technologies than their poor counterparts [21].

Problems associated with the internet which are mostly related to the Global North include cyber bullying, grooming and solicitation. It would be a mistake to think that the issue is related to the Global North alone, since the rapid increase in internet access propelled by the penetration of smartphones and increase of broadband is indeed a worldwide phenomenon. Also in most Global South countries, the IFs and HOWs of internet access are not well understood, regardless of knowing what the resultant consequence may be, therefore, bolstering digital technological access to all children around the globe without exclusion and discrimination and at the same time enhancing digital citizenship and responsibility should be the main aim for policymakers interested in promoting opportunities for children.

#### **4. Gender issues**

Equal opportunity and gender parity are part of the problems majority of the local and international organisations wish to address, despite the fact that some groups get leeway compared to others. For instance, boys in Indonesia, the Philippines, Ghana and Bolivia have a more secure feeling while utilising internet cafes and probably get more resources to use digital devices than girls [22]. Additionally, the work of Goulds [23] presented to Plan International indicates that 79% of girls in China have unsecure feeling while utilising the web, which is assumed to be restraining their participation online and limit their development.

Various researches have proven that girls below the age of 10 are majorly targeted for actual or potential abuse, where in abusive images girls appear four times more than boys [24]. Wolak et al. [25] state that almost all sexual crimes that occur against kids online are conducted by males, even though in 2009, it was found that ladies in the United Kingdom were abusing boys too. Kleine et al. [12] discover that in a few communities, majorly in the Global South, girls are viewed as women, therefore are married off at an early age. In those communities, a dad can grant technological access to his son but denies his daughter, despite the fact that when presented with technological devices girls utilise the opportunity for education whereas boys mostly indulge in game playing [26, 27]. It was also found that a few families in Pakistan and India do not permit girls to utilise smartphones even for learning purposes while boys are permitted to utilise them to play [8, 9], which is restricting the opportunities that come with technology and at the same time denying the girl child her rights.

The degree to which girls are short-changed has resulted in eventual collapse of a few ventures being produced for girls. For example, a South African project (mobile4girls) that was meant to venture focus on girls could not succeed based on the fact that it never considered the needs or focused on the girls [3]. The gender disparity is almost everywhere. A study in the United States discovers that boys are preferentially trained to be innovative and explore through the use of digital technologies, which present an edge for them over the girls [24].

#### **5. Internet opportunities and risk**

The instant internet growth joined with readily as well as cheaply accessible information have presented large portion of children to utilise the internet, to either search through multiple documents as well as databases or browsing. The convenience and ease to access the immense accumulated data and information is integrating the internet and the World Wide Web in to an integral part of common individuals' daily activities. Freedom of expression and speech brought by the internet has given courage to populace, to the extent that even the marginalised individuals can freely conduct different types of business as well as publish various contents [28, 29].

One can find every sort of stuff on the internet, all the user needs is the appropriate searching methodology. It provides conducive atmosphere for all kinds of marketable from activist to terrorist agenda, from buyers of products or ideas to infatuations [30], this inherent strength has already turned the internet into an avenue of training terrorists, extremists as well as criminal organisations [31]. Our lives have been assimilated by the internet producing a noteworthy shift in the manner in which we form communities or associate [1]. All geographical boundaries have been eliminated by the internet, to the degree that your roommate or office colleague is a click away, likewise a person in another country or city.

A number of children view the internet as a source of learning & playing [32]. Therefore, numerous kids search the internet looking for experience [33] and friendship [34, 35]. There is an increase of 5.7% in the world internet users from 2016 taking the total to approximately 3.6 billion, [36] of which substantial percentage is assumed to be children.

As the internet availability increases, access to images and videos that are questionable and also misuse among children is progressively expanding [37] and turning into a matter that worries numerous guardians and parents [35, 38]. A case of inappropriate use of the internet is surely cyber-bullying, where laptops and smartphones are utilised to harass and intimidate children [39, 40]. Contrary to conventional bullying, cyber-bullying follows casualties anytime, anywhere [41].

The worst problem associated with the internet is its age-blindness, regards children and adults as equivalent, and only occasionally treating children in conformity with their "evolving capacity" as required by the CRC in Article 14 [42]. While the internet provides chances to learn as well as communicate via means that just were impracticable just a decade ago, it additionally has some costs that few parents as well as certain groups think are useless. For example, the presence of numerous online risks like, many forms of manipulation and exploitation, misinformation, grooming, hate speech, cyber-bullying and child trafficking are sections that attract great worry [38]. The greatest confounding element is how to mark a boundary as to what constitutes a risk online, a typical instance is when a child is exposed to pornography as it presents a discussion regarding whether this is in connection to the child getting knowledge about sex early or maybe other elements. Subsequently, making both defining and measuring the accompanying harm a difficult task [43]. Additional confounding issue is in connection with the procedure children figure out when a message online from an outsider is an initial step toward grooming or a cordial move. This has made drawing an unmistakable line between risk and opportunity extremely difficult, as it can obviously take away the "risky opportunities". Another issue is that of clarity with respect to who is at fault if children experience online harm, especially at sites that are multi-owned.

Risks online encountered by children are often classified based on content, conduct and contact [5]. Content risks are used to explain those risks linked to illegal item viewing such as pornography. Conduct is related to online children's behaviour, for instance downloading contents that are illegal. Contact refers to the risks linked to harmful communication or harassment like grooming or bullying. During the design phase of these classifications, researchers plainly state that children do not always occur as the victims, they may likewise be the offenders and that exposure to online risks does not necessarily imply harm, since kids have a method to develop shield that may lead to risk elimination [5].

Drawing a line between the activities that lead to risks and those that lead to opportunities on the internet is not easy [44], therefore, making effort towards understanding the difference between risk and harm is clearly necessary. Initially, researchers focused more on probable harm and technologically aided risks associated to children's privacy, safety and information overload but this focus more recently shifted to opportunities related to children's digital technology utilisation [45]. It is in this regard that children's digital right was reviewed.

Children from the Global South can rarely access the internet at home, and are more likely to go online via cybercafés where the possibility of encountering inappropriate content, and offline/online solicitation are high. Economic conditions, parental knowledge and awareness and weak regulatory procedure can further aggravate the risk and the possibility of harm. Another area of concern is that children do not consider the people they contact as strangers but rather as virtual or online friends [46, 47].

As stated by the European Union, the more parents use the internet, the more internet skills they acquire and the better opportunities they have to mediate their children's internet usage [48]. This is largely because of the increased tendency that children will report more upsetting or unwanted content or contact to guardians or parents who understand the internet, since parental mediation has consistently been depicted as very effective method of risk reduction, enhancing resilience and improving digital literacy among children [49].

Many victims of internet crime find it hard to disclose due to complicity and shame until images are discovered by law even in the Global North [37], which might have led to the implementation of strict measures and a reduction in the level of risk or even protection for those whom have later become victims.

Different types of risk exist for different societies; for example, children in Kenya are willing to meet strangers if they will give them some minutes on their phones [50] or the use of internet cafes which are deemed to be hazardous and expose children to adults who use pornography or drugs [48]. Nevertheless, it is the second most used source of internet in the Global South. The weak state structure in many Global South countries and wide-spread poverty can cripple children's legal and social protection, which will therefore increase their vulnerability [24].

The borderless nature of technologies like the internet makes it difficult for agencies or government to address what has now become a highly integrated and broadly scattered set of interests, similarly, its global nature has made imposing highly restrictive internet regulation a difficult task. As active agents, children will continue to indulge in risky behaviour online despite the awareness of the risks because of their exploratory nature, misplaced confidence and self-belief.

It is of vital importance that governments develop child friendly and accessible reporting systems as strongly recommended by the Committee on the right of a child and there is a need for awareness programs in most of the Global South countries [51]. For example, the Research Institution Plan India [52] in their report stated that over 90% of the participants are unaware of where to report online sexual exploitation and abuse.

The utilisation, vulnerabilities and conduct of children online vary with age. While ICT cannot be seen as a creator of crimes, it has given all forms of old crimes a new dimension [24]. It would consequently be a mistake to believe that all children are comfortable or equally proficient in the digital environment [48].

There is limited research on children's digital rights. Among the little number of researches, very few attempted to present a common view into children's view on risk and privacy in the digital settings and the usage procedure as well as knowledge of online protection apparatus [53]. A cross-section of studies has proposed ways in which children's well-being as well as the risk of harm have been extended by the internet [54].

## **6. Previous studies**

The OECD [55] noted that most researches on ICT and digital right were conducted in and on the Global North, with lots of projection with regards to the way children use the digital environment in Global North and how they use them in the Global South. The impediments to children gaining access to digital technologies are completely different, most of the legislations and policies come from the Global North, therefore missing the explicitness needed in research and hence leading to problems during the adoption process in the Global South. SaferNet Brazil, thinkuknow website, the Slovak Safer Internet Centre and Hands for Children



Venezuela are examples of initiatives in countries in the Global North and Global South that are now trying to secure their children online.

Given that most researches on risk and usage have been conducted in the Global North, the transfer of findings to other cultural and socio-economic settings must be approached with discretion. Nevertheless, there is sufficient research fact in the Global South to predict potential dangers and patterns [50]. No research evidence has been found to support the assertion that the internet endangers children. Nonetheless, genuine risks can be associated with the internet. However, there exist adequate scientific facts to suggest a pattern for potential problems in the Global South. Encouraging studies on the rights of children's in the digital world in the Global South requires genuine thought, as it will enable the scholars in the Global North with an avenue to comprehend their very own characteristics, albeit studies presently emerging in the South [56].

End Child Prostitution in Asian Tourism (ECPAT), in their work with children in some Global South countries to create awareness on safety and the responsibilities of internet service providers and also governments in ensuring better online protection for children, noticed that children have a unique perspective in planning and skills as well as in support mobilisation and are more up-to-date when it comes to the latest technology. This assertion is corroborated by other initiatives in Africa [16].

'Early Adopter' are those countries who were first to encounter the problem and tried to solve it long before others had access to ICT. However, adopting their best practice might be hazardous because of the difference in usage (due to culture and language) and adoption (like landline before mobile in the North and mobile before landline in the South). Another question is related to the extent that policies and research designed for Global North in relation to the Global South. For example, Livingstone and Haddon [5] propose a "ladder of opportunities" which raised the question as to whether the ladder takes a different pattern when implemented in different cultural settings.

## **7. Policies and rights**

The UNCRC was the first treaty that viewed children as right holders [57]; it was also the first to perceive children's right to privacy as a fundamental right [58]. Nevertheless, UNCRC is a less active mechanism to turn to with regard to children's digital technology preventive practices.

It may not be rational to assume that all children are confident or proficient in the digital world [48] and the rapidly evolving and transnational nature of the internet providers and online services is limiting the powers of states to establish online children's right under their area of jurisdiction [8, 9]. Hence most responsibilities for children's digital right fall on companies and intermediaries.

While designing policies for the rights and well-being of children in the digital world, skills, risks and access should be kept in mind. Additionally, children are not a homogeneous entity therefore the risks and opportunities of internet usage can be categorised according to their place of access, digital skill level and age; in addition to the special considerations to the most vulnerable children such as ethnic minorities, rural or poor, migrants, those with physical disabilities and others with special needs [37]. Numerous actors responsible for children's positive internet usage and safety (civil societies, private and public) have an imperative undertaking to formulate policies that are balanced, inclusive and factual. Be that as it may, the facts on which these policies base are very rare, particularly in the Global South.

Going by the consistent frame of reference, an overall framework as well as assessment of the issues linked to technologies as they correspond to children's rights is always confounding when we view that the lives of children rely upon confusing and conflicting government strategies and legal principles [59]. For example, to protect children against pornography and hate speech, a few countries have embraced harsh regulatory practice like blocking, monitoring and filtering some internet contents. Nevertheless, these nations ought to be careful about the probability of unforeseen outcomes; for example, in Kenya where pornography punishment extends to children and high percentage of the children were seen to search, view and download pornographic videos and images [50].

The freedom attached to the internet has had an important positive political and social effect in most parts of the world, which has led to authoritarian and conservative governments mostly from the Global South perceiving the internet as something they need to control, unlike countries like the UK who are allowing the ICT industry to self-regulate, or the USA which relies on cooperate social responsibility.

While policy frameworks such as the EU Agenda for the Right of the Child, the Council of Europe Recommendation on Empowering Children in the New Information, the European Commission's Strategy for a Better Internet for Children, and Communication Environment and so on are ever present in the Global North, the same cannot be said in the Global South.

To cope with the ever-increasing technological developments, Europe has adopted a multi-stakeholder approach with a strong dependence on self-regulation by the international regulatory bodies and forms of governance to tackle the global and complex nature of the internet. On the other hand, the US depends strongly on the Federal Trade Commission (and, to a lesser extent the Federal Communication Commission). Most of the countries in the Global South have embraced rigid regulatory practices like filtering, blocking and monitoring public access to online contents.

Various policies have been designed like the Optional Protocol to the Convention on the Right of the Child on the Sales of Children, Child Prostitution and Child Pornography which defines child pornography and insists on governments creating child friendly legal proceedings and was ratified by all but 43 UN members with 42 of them from the Global South [60]. The Protocol to Prevent Suppress and Punish Trafficking in Persons, especially women and children, supplements the Convention against Transnational Organised Crime (The UN trafficking protocol), which also defines trafficking and that children or their parents cannot consent to being trafficked. The Council of European Convention on Cybercrime first treaty was designed to address crimes committed via the internet encouraging a common criminal policy as its main goal to globally tackle computer related crime. Although designed by Europe, other non-European Global North countries are members, whereas South Africa is the only country from the Global South. The Council of European Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse's (Lanzarote Convention) first international instrument that addressed all forms of sexual violence against children, which may occur within or outside the family, like grooming. The convention was aimed at preventing and tackling the sexual exploitation and abuse of children [61]. All the conventions were either designed by the United Nations with various states of implementation or by Global North countries, which makes the adaptation of these policies by Global South countries vulnerable to failure.

In 2006, the UN Secretary-General study on violence against children recommended the strengthening of efforts to tackle the use of ICT for the sexual exploitation of children, by educating parents and children with regards to the dangers involved, punishing the perpetrators, distributors and consumers of the online child

pornographic content and at the same time, encouraging the ICT industry to implement global standards for child protection. However, the final communiqué of the G8 meeting in 2011 made reference to children as potential victims of exploitation, sexual abuse and trafficking, therefore calling the international fora to enhance their cooperation while tackling internet governance [62]. Nevertheless, numerous legal jurisdictions mostly from the Global South failed to criminalise grooming or tackle child pornography [22], while the European parliament and council adopted a directive on combating sexual abuse and sexual exploitation, which replaced the council's 2014 framework to criminalise any form of child exploitation and abuse and also mandated the removal and optional blocking of those website hosting contents among member countries. Singapore, Australia, Canada, UK and US introduced legal actions against grooming [63]. In 2008, Brazil also amended the statute of children and adolescents [64]. Japan passed series of laws on digital child protection and example of other legislation includes the Philippines Cybercrime Prevention Act 2012, South Africa's Protection against Harassment Act 2011 and Argentina's grooming law.

The European Commission's Safer Internet (now Better Internet for Kids) implementation of child digital rights not only requires adherence to the rights and values, but also children's empowerment and participation so that their societal engagement innovation and creativity can be encouraged. Countries that adopted the EU safer internet policies now teach internet safety to children in schools [65].

It should be noted that international treaties can only provide an action framework, but states have to implement them at national levels, which may require the development of policy appropriate laws, preventive strategies, child protection measures and victim support for children. According to Chinn and Fairlie [15], one third of the internet penetration will be closed if Global South countries employ the same regulatory practices as the US.

## **8. Frameworks**

To promote the benefits of the internet at insignificant risk for children, there is a need for a global framework and internal response and there is the need for policy makers to understand that for a reduction in digital child abuse and a boost in benefits, a harmonised international action and global policy framework is required. The framework should encompass an ethical inspiration and a strategic vision for public empowerment.

When it comes to children's digital world protection, the private sector has to play an important role of designing a framework that will be global, given its fundamental nature. And, as stipulated by the business and human rights guiding principles implemented in the United Nations framework [24], this sector has the authority to implement new instrument as well as design program for safer internet utilisation among children. Nonetheless, the private sector till date has not designed any global framework [24].

As indicated by Asthana [59], adding as a new category "participation right" (act and be heard), and expanding the rights to "provision" (access to food, clean water, shelter and health care) and "protection" (against exploitation, violence and harm), to the existing children's rights, UNICEF has designed a system currently referred to as 3P's.

Gasser & Cortesi [7] propose actors' perspectives as well as issues to be the themes for debate when it comes to the design of children's digital rights framework. They proceed with further explanation that perspectives can be split into different parts: political, which involves political parties integrating digital children's rights

into their respective campaign; intellectual, which draws researchers from diverse fields researching on the link within digital technology as well as social perception among children for them to gestate the right framework [8, 9]; legal, which involves enacting policies and creating laws; children's perspective which involves seeking children's opinions.

A report on Child Safety Online by the UNICEF Innocenti Research Centre [24] on the other hand, proposed the accompanying key approaches for legislation framework and law enforcement design, having four primary objectives of promotion of rehabilitation and recovery procedures for exposed or abused children, reduction in access to online harmful material, abolishing all impunity tendencies from the abuser and promoting children's resilience and empowerment.

In a government survey conducted by the International Telecommunication Union (ITU), it was found that the primary problem is associated protecting children online, which prompted the design of statistical framework for online child protection for digital child protection measurement [55]. Similarly, the Internet Governance Forum (IGF) within its national framework has created a means for multi-actor policy debate, with child protection issues discussed frequently and various stakeholders as participants from national, regional and global level [2].

Notwithstanding, the framework chosen by either the children or the researchers, effective or right focused or alternative viewpoint, the things that should attract attention are the political as well as intellectual engagement to go after the compliance and implementation of the framework.

## **9. Right of the child**

Previous years have seen an array of laws, policies and practices, frameworks and comprehensive strategies focusing on the rights of children in the digital world established, analysed as well as recommended in few instances [7]. Nonetheless, children's digital rights significance was not limited to international but national, and with the shift in focus by previous research to opportunities as the core from risk and protection [8, 9] with digital participation recently included, children's digital right is currently part of numerous internet bills which are part of the international rights [66]. Moreover, even though children are not particularly specified by some bills, but instead utilise universal phrases like "a person" or "every-human", some particularly focus on children, for instance iRight [66].

With the current online risks faced by children, concern from the public, policy makers and researchers are now entrusted with obligations of remodelling children's rights, especially the ones certified to cater for the "digital age" by the UNCRC, which include rights to provision and participation. Generally, among the maiden laws centred on internet drafted by a country was in the United States, where they aim to protect children against improper exposure to online contents [67]. The 1996 Communication Decency Act is an obvious example, which focused on reducing exposure to internet contents that are indecent for children.

According to the European Union General Data Protection Regulation (GDPR) (2016/679), children now require more online protection than ever before, hence the need for a data approach for subjects that are not age-blind. Consequently, the GDPR in its attempt to bring forth the desired protection, provide a wide range of changes while operating on personal but appropriate data of children [68]. Nevertheless, the absence of apparent interpretation of the concept is a serious challenge even in the nations of the Global North. For example, the lack of clear definition to children data consent, as even directive 95/46/EC does not plainly spell the required consent age for the children [68].

The association of different multi-partner children's digital rights methodologies has expanded over the years. The Internet Governance Forum has evidently turned into a basic platform for developing as well as discussing accepted procedures with respect to children's digital technology access and utilisation. Moreover, the Committee on the Rights of a Child in 2014 shows commitment at the international level, by dedicating a complete day to discuss child rights and digital media, amid which they focused on online children engagement [7].

Pundits have examined the regularisation as well as the all-inclusive terminologies backing the UNCRC, describing the ideas and debate on harmful effects of capitalism and children's rights on the lives of the Global South children [69]. Studies have shown that the idea of a right-bearing free autonomous person is not synonymous with the way of life of children in underdeveloped nations [59]. Kids in the underdeveloped countries largely live in extended families, villages as well as in communities, rather than in nuclear family as it is in the developed countries [50]. Accordingly, the 2013 – 2014 suggest plans that place rights, flexibility as well as value as core part of the UNICEF agenda [22] in the least developed nations.

As depicted in the existing studies, children's digital rights are a long way from accomplishment in spite of the striking development in both access and digital literacy. Kids are for the most part mentioned in terms of protection, whereas provision and participation rights are excluded. All the same, utilisation of children's digital rights ought not to be limited only to the values and rights of kids as people, but empowerment and participation of users that are children as well. Scientists keep on demonstrating that numerous educational, interactive and participatory aspects are still utilised [56], and at the same time, thought for framework development as well as techniques focusing on the advancement of children's rights in the present-day world and endeavours be made by various sectors to implement and equally advocate the guidelines set around by the Committee for the Rights of a Child (CRC), such as Ombudsmen.

## **10. Digital right of children is human right**

The Universal Declaration of Human Rights' (UDHR) adopted (as sacrosanct) document composed by the United Nations General Assembly on the 10<sup>th</sup> day of December 1948 in Paris is the basis for subsequent proclamations of human rights globally and locally by member states and their territories, upon which the contemporary matters of human rights are being approached. The 30-article document makes explicit the right every human being is entitled to, which should not for any reason be deprived or violated by any individual or government [70]. Article 1 of the declaration clearly states that "all human beings are born free and equal in dignity and rights". This captures children as human beings with full rights, digital right inclusive. Article 2 goes on to pronounce that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The last part of the article rules out any ground for discrimination, hence the alignment of children's digital right to the general human rights. Article 3 clarifies, that, "everyone has the right to life, liberty and security of person". The right to digital access for human beings including children is one of the many things required by human life, at the same time a catchment area of liberty that ought to be prioritised [8, 9].

As rationally argued by Hospers [71], right being a moral principle sanctioning man's freedom of action based on choice, only right to life is fundamental, all other rights are its affixed subordinates. The right to engage in self-generated action for

self-sustenance and all that is required by the nature of every rational being for the support, fulfilment and enjoyment of the life are also rights, of which right to digital access is one. Human rights issues have multidimensional faces but all lead to realisation of the ultimate right to life.

For the avoidance of ambiguity, the United Nations in 1989 convened the Convention on the Rights of the Child (CRC), an iconic landmark in the history of children's right. It was clearly defined that rights of the child are legitimate sector of universal human rights. It was a celebrated treaty that emphasised on the idea that children are human beings with their own rights, and must be allowed to grow, learn, develop and flourish with dignity like every other adult. Against this background, children are equally members of family and community with appropriate rights and responsibilities independent of any individual's pleasure [72]. This follows their being humans and subject of their own rights. In addition, children have some peculiar rights as demanded by their special needs [73]. By the convention, the right of children is equally human right, because they belong to human family and with special needs, so they deserve more considerations as rights than adults. Digital right of children is most rationally therefore closely aligned to general human rights as declared by the United Nations.

## **11. Conclusion**

Although information age has brought forward different types of citizens with distributed responsibilities and different perspectives as stated by Hermes [74], the accompanying challenges are worrisome especially to children, hence the necessity to protect them. However, restricting online time as a means of preventing cyber victimisation and cyber bullying is practically infeasible because of the digital nature of the children. This makes the development of means that will attract the interest of the children very important.

Right denotes obligation and vice versa. The fact that society is obliged to cater for the children's needs necessarily warrants that those needs are human rights indeed which therefore makes it paramount that policy makers, researchers and societies at large develop how to moderate these online activities and at the same time striking a balance where children are allowed to go online to satisfy their needs without engaging in harmful activities. It would therefore be safe to claim that the digital right of children is a human rights issue, not because it is specifically mentioned in the United Nations declaration, but because it is depicted by inference. It is one of the fragments that constitute the wholesome human rights. Children are humans, and therefore their right, of any sort, makes list of the general human rights [75]. The mention of "human" does not preclude children as it connotes only the specie, not age.

There is a paucity of research on parental internet mediation with special reference to those that tried to evaluate its effectiveness even in the Global North [76]. So also parental mediation as the act of parents interacting with children on media use but little is known on how certain factors like neighbourhood or cultural norms affect children's internet usage habits and resultant risks.

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# Human Rights and Land in Africa: Highlighting the Need for Democratic Land Governance

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## Abstract

Human rights principles form the foundation for the move towards responsible land administration. They are embedded in such international treaties as the Sustainable Development Goals, New Urban Agenda, and Voluntary Guidelines on the Responsible Governance of Tenure, among others. These treaties provide the backdrop to the development of land policies and administration systems that seek to secure land tenure and land rights for all through adherence to human rights principles such as non-discrimination, equity and justice, gender responsiveness, transparency and accountability. Yet the human rights tradition is built on Western values and biases, and there is some contention as to the universal acceptance of this. In discussing land rights in Africa, assumptions about the universality of human rights should be weighed against such contentions if land reform programmes are to sustainably succeed. In this chapter, the arguments around human rights are presented in the context of African land reform, and a model of democratic land governance is proposed.

**Keywords:** land rights, land governance, land administration, land tenure, land reform, broadly African worldviews, *ubuntu*

## 1. Introduction

In this chapter we explore the implications on land rights of a human rights-based approach (HRBA) to development, with a focus on African land rights and administration. We note that the modern trend towards *responsible* land administration [1] is underscored by the obligation of states to ensure the human rights of their citizens. The guiding principles for achieving responsible land administration are thus based on many of the principles of human rights and good governance frameworks. The rallying cry of ‘Land rights for all’ [2] is likewise rooted in several international human rights treaties that reinforce and expand on the right to own property and the right to adequate housing [3]. The realisation of ‘land rights for all’ places the onus on governments to recognise, respect and protect a wide range of land rights and land tenures, some of which may be based on perceptions that do not accord with Western-based notions of rights. This may place tension on the realisation of responsible and effective land administration in such contexts.

In this chapter, the idea of a HRBA to development of land is explored, with focus on Africa. We discuss tensions between the human rights tradition and

cultural norms that may impact on land reform and land administration programmes. Following that, we present a pro-poor perspective on land and expound on the idea of democratic land governance [4, 5].

## 2. Human rights principles

The fundamental principles of human rights are identified in **Table 1**. A distinction can be made between *structural* and *operational* principles [9]. The structural principles describe legal aspects of human rights and include universality, inalienability, indivisibility, interdependence, and interrelatedness of human rights. Operational principles apply more to the application of human rights within their context. Participation, accountability, non-discrimination, transparency and the rule of law are operational principles.

Human rights may be nationally or internationally framed in a Bill of Rights, which further elaborates on the principles and makes them relevant for a particular context. As an example, the Bill of Rights ('the Bill') as set forth in the Constitution

Structural principles	<b>Universality</b>	Human rights apply to everyone, regardless of race, gender, religion, or any other means of classification, without exception. All people everywhere have human rights by virtue of being human [6–8].
	<b>Inalienability</b>	Human rights may not be taken away from anyone, although the enjoyment of some rights might be restricted for a time or purpose, usually for the greater good [6, 7].
	<b>Indivisibility</b>	All human rights have equal status and cannot be ordered hierarchically. The fulfilment of one right depends wholly or in part on the fulfilment of other rights, and the improvement of one right facilitates the advancement of other rights [6–8].
	<b>Interdependence &amp; interrelatedness</b>	Whether economic, social, cultural, political, or civil, all human rights are inherent to the dignity of every person, and all human rights are interrelated and interdependent [6, 7].
Operational principles	<b>Non-discrimination &amp; equality</b>	Purposeful discrimination (e.g. apartheid) as well as the unintended consequences of policies and practices that may have a discriminatory effect are precluded. Non-discrimination is complemented by the principle of equality [6–8].
	<b>Participation</b>	People have the right to participate in how decisions are made regarding protection, enforcement and fulfilment of their rights. They also have the right to access information relating to the decision-making process [6, 8].
	<b>Accountability</b>	Governments should be held accountable if human rights are not enforced. It is not enough for rights to be recognised in law or policy – there must be real and practical means of checking that these obligations are being met [6, 8].
	<b>Rule of law</b>	States should also comply with the legal norms and standards, both international and national, which ratify the protection and fulfilment of human rights. Aggrieved rights-holders should be able to seek compensation or appropriate redress in accordance with the rules and procedures provided by law [6, 8].
	<b>Transparency</b>	Governments should be open about decision-making processes and people should be able to know and understand how major decisions affecting their rights are made [8].

**Table 1.**  
*Human rights principles.*

of the Republic of South Africa, 1996 ('the Constitution') [10] may be compared to the Universal Declaration of Human Rights [3]. While the Articles of the Declaration and the Sections of the Bill overlap considerably, there are *inter se* additions and omissions in both documents. The Bill, being far more context specific (for the nation of South Africa) than the Declaration (international relevance), holds more detail.

The Declaration is supported by Covenants and Conventions. Two notable covenants are the International Covenants on Civil and Political Rights – CPRs [11] – and on Economic, Social, and Cultural Rights – ESCRs [12]. The CPRs include rights to life, the prohibition of slavery, freedom of movement, equality before the law, freedom of religion and expression, and the right to democratic governance. ESCRs include the right to employment and trade unions, social security, food, water, basic education, and health. These were initially intended to be equally promoted, following the principle of indivisibility, but this was met with resistance from some UN member nations [13]. So, while the United Nations recognises CPRs and ESCRs as equal, it is left to signatory states to decide how these Covenants are to be interpreted and applied in their specific contexts. This has led to “internal contradictions concerning both how to promote human rights and who should be endowed with equal human rights” [14]. It is worth noting that the Constitution includes aspects of both groups of rights in its Bill of Rights, suggesting that CPRs and ESCRs may be identified as equal, at least in South Africa.

One last distinction needs to be made, and that is between horizontal and vertical relationships with respect to rights, duties and obligations. Again, the Constitution is referred to as an example. Section 8 of the Constitution refers to the application of the Bill of Rights. In the first instance, the State is obligated to respect, protect, promote, and fulfil human rights (see also Section 7 (2)) – this is the vertical relationship between the State and rights-holders. In the second instance, rights-holders – be they natural or juristic persons – are equally obligated to uphold the rights as laid out in the Bill of Rights. This is the horizontal relationship.

### **3. A human rights-based approach to development of land in Africa**

A HRBA to development provides the conceptual and practical framework for realising human rights throughout the process of development [15] and puts human rights at the heart of development [16]. A rights-based approach to development puts power in the hands of the beneficiaries of development, as rights-holders, and obligates states to fulfil their duties and obligations towards citizens. This means “empowering marginalised groups, challenging oppression and exclusion, and changing power relations” [17]. But empowering causes power differentials and possibly also disempowerment - there are winners, but possibly also losers, in development processes. For example, an emphasis on gender *equality* changes the power dynamic and differential between men and women within a household or community. This can have negative and unintended consequences, especially in traditionally patriarchal societies [18]. The question is whether such consequences should be allowed to detract from the long-term goal of having a more equal, morally just society? We return to this question later in the chapter.

Notwithstanding the principle of universality, it is thus recognised that human rights principles are an *ideal* and are not recognised by, enforced by, nor even appropriate for, all peoples and cultures in the world. Different worldviews may yield different conceptualisations of human rights principles [19]. For example, from a broadly African worldview, the right to own land extends to the living, the unborn, and the (deceased) ancestors as well [20]. This understanding demands

that, for African contexts, land rights are interpreted cross-generationally. Such an understanding has implications on the application of human rights principles in land administration because this cross-generational understanding challenges the fundamental definition of a human as understood in Western culture.

With cognisance taken of these concerns, the human rights tradition is presented hereafter along with the potential benefits and challenges of a HRBA to development. The concerns mentioned above are explored in more detail and the implications for land administration and land reform are then discussed.

### **3.1 The human rights tradition**

According to the United Nations Common Understanding (UNCU) on a HRBA [9, 21], the following three requirements should be met in a HRBA:

1. Development programmes should further the realisation of human rights;
2. Every development initiative should be guided by human rights principles;
3. Development initiatives should contribute to improving the capacity of duty-bearers to uphold their obligations and rights-holders to claim their rights.

The idea of states being duty-bearers draws from the human rights tradition, which is summarised [22, 23] as follows:

- People are not mere beneficiaries; they are *rights-holders*;
- States are not only service providers, they are *duty-bearers* obligated to “respect, protect and fulfil people’s human rights” [23]. To this list, the Constitution adds the obligation to *promote* human rights (see Section 7 (2)). The obligation to *respect* means to avoid interfering directly or indirectly with the enjoyment of a right [13, 24]. To *protect* means to take the necessary measures to make sure that other parties do not interfere with one’s enjoyment of a right. The obligation to *fulfil* may be broken into two parts [13]: facilitation and provision. To *facilitate* means that duty-bearers need to put in place the necessary structures for rights-holders to be able to claim their rights, which is equivalent to the Constitution’s obligation to promote (see e.g. Section 9 (2)), while *provision* relates to an obligation to make services available to assist rights-holders to claim their rights.
- States should be *held to account* if they fail to meet their obligations in this regard. These obligations are as follows:
  - Guaranteeing that all rights may be exercised without discrimination;
  - Taking steps towards the full realisation of ESCRs without undue delay;
  - Not taking any measures that would hinder the full realisation of ESCRs;
  - Using the maximum available resources to fulfil obligations;
  - Prioritising actions towards assisting the most vulnerable groups; and
  - Guaranteeing delivery on a minimum core obligation that satisfies the minimum essential levels of each right.



The extent to which rights are claimed, and obligations are fulfilled is a function of capacity, which we link to governance in a later section (see [25]). “A person can only be held accountable if that person feels that he/she *should* act, that he/she *may* act; and that he/she *can* act” [13]. To elaborate, accountability in this regard depends on the fulfilment of these three conditions:<sup>1</sup>

1. **Responsibility:** a person must accept that it is their responsibility to fulfil an obligation.
2. **Authority:** a person must possess the authority to carry out the obligation.
3. **Resources:** a person must have the necessary resources required to fulfil an obligation.

Practically, this means that if governments follow a HRBA to development, they will employ an accountable and participatory approach that includes stakeholders in the process. There will be a consequent shift from assessing the needs of beneficiaries of development, to empowering citizens to recognise and claim their rights while also ensuring that duty-bearers honour their responsibilities [15] – the vertical obligation. This shift from charity (the optional exercise of concern for the needy) to obligation [26] avoids the pitfall of failure to consult adequately, which leads to “imposed policies which lack popular support and understanding” [27]. But if the horizontal application of human rights is enabled, as in the Constitution, then communities are already empowered to take responsibility for the realisation of human rights. Their participation in the development process is hence more effective in terms of putting pressure on the State to fulfil its (vertical) obligations.

### 3.2 Benefits and challenges

The following are potential benefits to following a HRBA to development [16]:

1. **Empowerment:** By adopting a HRBA to development, needs can become claims and charity can become justice. Such empowerment is likely to raise the self-esteem of the disadvantaged, poor, and marginalised and enable them to take ownership of their role in the development process.
2. **Accountability:** This is the key to improved transparency and effectiveness regarding the fulfilment of state obligations.
3. **Participation:** There should be opportunity for all stakeholders to participate at all levels and stages of the development process in a way that is active, free and meaningful. This includes enabling the poor and marginalised to identify their own development objectives and their active engagement in designing and implementing projects to meet their needs. It also means that developers need to be aware of societal power relations in this regard and how these may limit or promote the ability of some groups to participate.
4. **Integration:** A HRBA to development allows for the integration of laws, social practices, policies and institutions, and exposes societal power relations that may disadvantage certain groups.

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<sup>1</sup> Note that references to ‘a person’ include the state.

5. *Protecting and promoting ESC rights*: The legitimacy of ESC rights as human rights is contested by many governments, but a HRBA enforces the equality and indivisibility of all human rights.

Adopting a HRBA to development is challenging [16]. The first challenge is putting it on the official agenda of governments; the next challenge is implementation [22]. The *context* of development (political, institutional, cultural, and social factors) influences implementation, with the result that there is no one-size-fits-all approach. Consequently, development needs to be tailored for a particular context to make it suitable to circumstances [28] or fit-for-purpose [29]. There is also a presumption of a *level of organisation and opportunity* for participation that might not be present, especially among the poor and marginalised who may feel culturally intimidated into not sharing their views. This is especially relevant if we consider the caution raised at the beginning of this chapter: human rights are perceived by some to be culturally Western [26, 30]. There is an air of superiority about human rights that are based in Western liberal cultural norms [30] – participants who do not share those views may feel intimidated into not sharing theirs. Also, the principle of equality is not universally accepted, leading some people to feel culturally intimidated. Law and practice are not always aligned, so, although Sections 9 and 30 of the Constitution respectively affirm the equality of everyone and protect their rights to language and culture, discrimination still happens. Where participation is free and fair, it can be *time-consuming* as service providers engage in listening, educating and training, organising, conflict resolution, and empowerment. From an evaluation perspective, human rights goals are *long-term*, so assessing the impact of development that is cognisant of a HRBA is difficult (see also [9]). Adopting a HRBA to development pushes development organisations into a politicised arena where power imbalances are directly challenged. This also makes the approach unpopular with states and donors.

Thus, for a HRBA to work effectively “it needs the very conditions it is there to create” [16]. Successful implementation of a HRBA requires developers to follow its core principles, take up the mantle of facilitation, and in so doing empower rights-holders to claim and exercise their rights effectively while ensuring that duty-bearers meet their obligations.

The final and more concerning challenge for adoption of a HRBA is the issue of universal acceptance of human rights. As mentioned above, not everyone accepts the notion of human rights as being internationally recognised and universally applicable. This challenge is presented in the next section.

### **3.3 Human rights in Africa**

*“Human rights are currently recognised worldwide as ideals to be pursued by human societies. A growing number of instruments, organisations and mechanisms have been established at national and international levels to implement and protect them. The concept of human rights is grounded on the idea that people have rights owing to their being human... The United Nations (UN) has described human rights as those rights which are inherent in our nature and without which we cannot live as human beings ... Human rights are therefore understood as rights which belong to an individual as a consequence of being a human being – and for no other reason. One need not possess any other qualification to enjoy human rights.” [31]*

The quotation above highlights the principle of universality, which is a fundamental notion of human rights: to enjoy human rights, all that is required is for you to be human. Yet the universality of human rights is contested:

*“The more troubling questions facing Westerners and non-Westerners alike pertain to whether contemporary international human rights instruments, given their Western biases, can be said to apply to peoples from non-Western cultures.” [26]*

Some authors contend that international human rights standards were built on Western values [14] without consideration of different value systems [31, 32]. “There seems to be some consensus ... that the concept of human rights as generally understood is historically a *Western* concept” ([26], emphasis added). Mutua [30] calls human rights “fundamentally Eurocentric”, adding that they serve to promote Western ideals/culture over non-Western ideals/culture (which he refers to as the *Saviour* and the *Savage* respectively, which metaphor is further explained below). Murithi [33] asks “whether human rights are truly universal or do they merely represent the historically dominant Western civilisations’ world view?” He further notes that the Universal Declaration of Human Rights [3] was drafted with no representation from sub-Saharan African countries and argues for a more inclusive understanding of human rights. Although the modern notion of human rights may have been introduced and imposed in Africa through colonialism [26, 30, 31], there are “rich traditions on the African continent founded on the notion of human dignity and ‘humanness’” [33]. This “African indigenous conceptualisation of human rights” may be linked to the “African philosophy and principles of *Ubuntu* and African Indigenous Knowledge Systems” [31]. *Ubuntu* is noted to be difficult to define [34, 35]. It may be described as:

*“... a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that ... a person can only be a person through others.”<sup>2</sup> [35]*

The tension, therefore, arises because international human rights treaties are grounded in liberal democracy, which is individualistically based [36], whereas the notion of *ubuntu* that informs an ‘African view of human rights’ is embedded in communalism [35, 37]. Yet Mokgoro [35] notes that the values on which the Constitution and Bill of Rights are based (drawing as they do from international human rights treaties) are in accord with the values of *ubuntu*. Thus we see, in the Constitution, the horizontal obligation referred to earlier.

There is a tendency to dichotomise “the West and the Rest” [36], which Mutua [30] expounds on in his Savages, Victims, Saviours metaphor of human rights. Within the context of human rights, he claims that non-European or Third World culture that deviates from the human rights norm is the Savage. Human rights proponents claim that the Savage needs to be civilised. The Victims are people whose dignity and worth have been ‘violated’ by the Savage. Victims are generally portrayed in the media and human rights discourses as powerless, nameless, dispirited masses. But help is at hand: Victims can appeal to international organisations like the United Nations and NGOs or Western states for help. These institutions are not the Saviour, however, but merely the vehicle of salvation. The Saviour “is ultimately a set of culturally based norms and practices” that are aligned with the human rights norm [30]. This Savages, Victims, Saviours metaphor of human rights entrenches the Eurocentrism of the human rights tradition and is condescending towards non-Western cultures.

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<sup>2</sup> In Sesotho: *motho ke motho ba batho ba bangwe*; or in isiXhosa: *umuntu ngumuntu ngabantu*

In response to such a damning metaphor, the qualities of African and Asian cultural norms are lauded as equal to, if not superior to, Western notions of human rights [26, 31, 32]. But Sewpaul [36] cautions against idealising communalism over individualism and asserts that, even in cultures that embrace the spirit of *ubuntu*, human rights violations perpetuate. On the other hand, the United States of America (as the prime example of a Western state), “which sets itself as the moral authority on human rights, has a deplorable record of human rights abuses” [36]. It seems that “there is none righteous, no, not one” (Romans 3:10 NKJV – cf. Eccl 7:20) and neither an individualistic nor a communal view of human rights is faultless.

But Nagengast [37] presents something of a silver lining, claiming that there has been a decrease in human rights violations in Africa over the past few decades. This is attributed to a general shift from communalism towards liberalism and good governance. This does not imply that Africans have discarded the notion of *ubuntu*. The claim is that human rights are being understood as political and legal safeguards of individual autonomy, both from the citizen and community perspective as rights-holders and from the state’s perspective as duty-bearer. It is impossible to say whether this is because of the imposition of Western ideals on the Rest, as is claimed by [26, 30] (see also [15], quoting [38]), or due to the natural “vernacularization” of transnational ideas like human rights [32].

What is important to note is that there is resistance to the adoption of human rights as applying universally and equally to everyone everywhere, and cultural norms must be taken into account. There are many cultures in the world in which some people – due to their position in society, gender, wealth, genetics, lineage, or some other inherent or acquired trait – are afforded more respect and more rights than others. This teaches us that, no matter how good the intentions are, caution should be exercised when applying Western notions in African contexts, because while some rights are fairly universally accepted (for example, the right to citizenship), others are contested (such as equality with respect to gender, or freedom of religion).

## **4. The implications for land administration**

### **4.1 Some definitions and discussions of pertinent terms**

Land governance is fundamentally concerned with a government’s ability to make and administer the rules, mechanisms, policies, processes, and institutions by which land, property and natural resources are accessed, used, controlled, transferred, and managed [39, 40]. A critical dimension of governance is “a government’s ability to make and enforce rules, and to deliver services” [25]. When we consider land governance, the issue of state capacity is very important.

Land administration can be conceived of as the operational component of land governance in pursuance of national land policy goals, plans and strategies. It involves processes of determining, recording and disseminating information about the relationship between people and land [41, 42].

Land rights may be defined as rights to occupy, use and transact in land, including rights to exclude others from exercising such rights, and rights to enforce protection of the rights-holder. “A right refers to what the holder can do with the thing or what the holder can prevent others from doing” [43]. Thus, we say a land right determines *what can be done with land*. This includes rights to [44, 45]:

- access, occupy, enjoy and use land and resources while restricting and/or excluding others from enjoying the same benefit;

- deal in land through a land market as well as inherit and bequeath land;
- develop or improve land and benefit from the associated improved land values or rental income.

Land rights *per se* are not recognised as human rights under international law, yet they constitute the basis for access to food, housing and development [44]. For example, security of tenure underpinned by legal registration is identified as a key factor in the realisation of the right to adequate housing, along with the obligation of states to ensure such security [46]. The onus rests on country-specific land administrators, as duty-bearers, to ensure that land tenure is protected and enforced so that land rights may be realised.

A HRBA to land rights draws attention away from the purely economic value of land and instead highlights the social and cultural importance of land (see e.g. [47]). In the development of a new conceptual model for the continuum of land rights [48], land (*terra firma*) is seen as a human right common to all levels of land value complexity. Land rights are seen as essential to the realisation of other fundamental rights, particularly the rights to food and housing [49]. Yet they do not have the international recognition they warrant [45]: “there is no global instrument to protect property rights” [50] and “no human rights treaty has recognised land rights as being a core human rights issue” [45].

Land tenure refers to *how the right is held* and may be defined as “the terms and conditions on which land is held, used and transacted” [51]. Some examples are freehold, leasehold, and customary tenure. These determine “the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land” [44]. This definition identifies land tenure in terms of relations *between* people *about* things, i.e. as a social or property relationship. It is worth noting that this relationship is often defined by legislative provisions but may also be defined by customary law. Legislated land tenure forms imply a suite of land rights appropriate to that type of landholding. Legislated tenure forms deliver strong land tenure security through surveying the boundaries of the proprietary unit, registration of title, the formal processes of land transfers, the management of boundary and access disputes, and through the processes of property valuation, taxation, and land use management. The customary law approach focuses on customary norms and rules, which are those that are validated by community or family consent regarding rights of use and access. In order for custom to be considered customary law it must pass the test of certainty, reasonableness, uniform observance in the community, and endurance [52, 53]. It is like ‘unofficial law’ that is widely practiced and regarded as locally legitimate.

One of the goals of effective land administration is to provide land tenure security. The degree of tenure security may be an indicator of good land governance [54]. Benefits of secure tenure include sustainable development and improved livelihoods, dispute resolution, reduced land conflicts, improved land use planning, management of natural resources, and environmental protection. It also gives people more decision-making capacity and mobility. Land tenure security may be understood to reflect the certainty that land rights-holders will be able to uphold their rights to land in the face of challenges to those rights. In other words, tenure security is “the legal and practical ability to defend one’s ownership, occupation, use of and access to land from interference by others” [55]. Such challenges often come in the form of investment projects such as agri-businesses, mining ventures, wind farms and irrigation projects; or they may stem from increased urbanisation, population pressure and climate change. Without secure tenure, customary land rights-holders are easily displaced by powerful elites (see e.g. [56]).

From a civil legal perspective, *ownership* in relation to property is equated with *dominium* [57], i.e. the complete power to use, enjoy, and dispose of property unless prohibited by law [58]. In Anglo-American legal systems, ownership is depicted as a bundle of rights, “envisaged as a bundle of sticks with each stick representing a right” [43]. Such analogy is inconsistent with the concept of ownership in South African law, wherein ownership is viewed as a unified, hierarchical concept that confers the greatest range of rights in land [59–61]. Hornby [62] relates that in some rural, customary contexts in South Africa, the concept of ownership is layered and there may be multiple answers – each one correct in its own right – to the question ‘Who owns this land?’ From a formal, legal perspective, the State may be the owner. From a customary perspective, the chief (*inkosi*) may identify as the owner, and equally the subjects to whom he has allocated occupation and use rights would identify as owners. Thus, they “all owned [the land] simultaneously, in layers. This is not so much a hierarchical organization as a layered one, with different answers to the question of ownership depending on context” [62]. Such a scenario is not possible in a land administration system built on individualistic, exclusionary human rights principles. But it is possible in a customary land administration system built on the principles of *ubuntu*.

#### 4.2 The influence of international treaties

Several international treaties and instruments that are founded on human rights principles affirm the right to property, adequate housing, and food, all of which are relevant for land administration [63]. Land tenure security and adequate housing are given specific attention in the UN Committee on ESCR’s General Comment no. 4 [64]. The New Urban Agenda (NUA) [65], items 13a and 35, likewise support the provision of adequate housing and tenure security respectively. The acknowledgement of the importance of land rights for all appears in several of the Sustainable Development Goals (SDGs) [66] and associated targets and indicators, as summarised in **Table 2**. The *Voluntary Guidelines on Responsible Governance of Land, Fisheries and Forests in the Context of National Food Security* [67], better known as the VGGTs, include principles that are based on and reflect the human rights principles listed in **Table 1**. They also recognise the need for secure land tenure for sustainable development and improved livelihoods, especially for the poor and vulnerable.

These documents are all rooted in human rights principles that inform the guiding principles of national land policies and land administration systems. They thus draw on Western bias that may not be appropriate for the intended beneficiaries,

Goal 1	Target 4	Ensure that all men and women have access to ownership and control over land and other forms of property
Goal 2	Target 3	Double agricultural productivity and incomes of small-scale producers, including through secure and equal access to land
Goal 5	Target 5a	Give women access to ownership and control over land and other forms of property
Goal 11	Target 1	Ensure access for all to adequate, safe and affordable housing
Goal 15	Target 9	Integrate ecosystem and biodiversity values into national and local planning, development process, poverty reduction strategies and accounts
Goal 16	Target 3	Promote the rule of law at the national and international levels and ensure equal access to justice for all.

**Table 2.**  
SDG targets that include a requirement for access to land for all.

especially in African customary contexts. Land policymakers and administrators should thus be cognisant of this potential conflict of principles when applying well-intended guidelines in diverse contexts. If interventions aimed at benefitting land rights-holders do not address their worldview or their understanding of land, they may lack significance for them and their sustainable success may be compromised [68].

To return to the question raised earlier: strict enforcement of human rights principles runs the risk of alienating cultures that do not accept these principles and may not do so in the foreseeable future. Their 'right' to enforce their own societal rules should be weighed against the requirement of human rights-based organisations to ensure non-violation of human rights. A potential remedy is an approach based on democratic land governance, as explained below.

## 5. A way forward

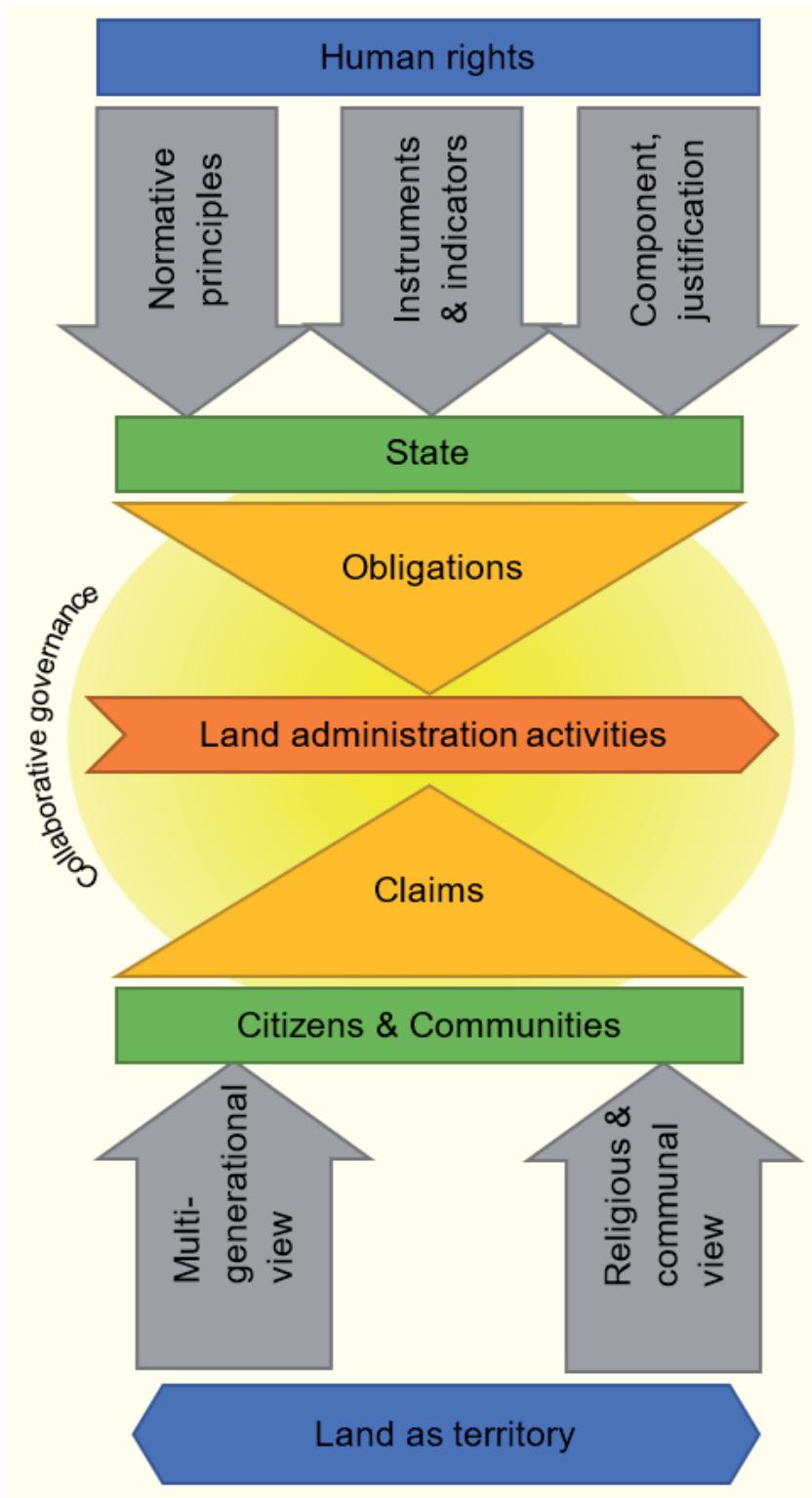
Achieving pro-poor land policy, which is inherently cognisant of human rights to land, requires *democratic* (rather than *good*) land governance [5]. This is a process involving three (vertically) interacting components: grassroots pro-reform mobilisations; top-down state reform initiatives; and mutually reinforcing, democratically embedded interactions between these two components. All three components are necessary for democratic land governance. This perspective marks a shift away from the usual, technical-administrative notion of land governance [40].

Linking this model to a HRBA to development, the grassroots mobilisations reflect broad-based participation by citizens and communities in response to their specific land-based needs. It relates to their full, meaningful, and effective access to use and control land in a manner that is fitting for their cultural norms. The state's top-down initiatives may relate to their obligations, as duty-bearers, towards the most vulnerable citizens as land rights-holders. The mutually reinforcing, democratically embedded interactions between the two reflect accountability, transparency, and mutually beneficial collaboration (see e.g. [58]).

Drawing from the preceding discussion, the pertinent elements of a HRBA to the development of land in an African customary setting are here identified. This starts with the human rights tradition [22] which identifies citizens and communities as rights-holders and states as duty-bound to respect, protect, promote, and fulfil their obligations in this regard. To achieve this, states are encouraged to draw on human rights as a set of *normative principles* to guide how development is done; as a set of *instruments* to aid in the development of assessments and *indicators* for the evaluation of development programmes; as a *component* to be integrated into programming; and as the *underlying justification* for interventions aimed at strengthening institutions [15].

For any development process, the cultural context needs to be understood and respected if development is to be sustainable, successful, and significant. An understanding of context is also important for acknowledging the relative importance of land rights: while land rights are not internationally recognised as human rights [45, 50], for rural African cultures they have a profound social, cultural, and religious significance that cannot be overlooked [32, 69]. Land rights must therefore be understood cross-generationally through a socio-cultural lens, i.e. land is not merely a commodity to be bought or sold; it is part of the communal responsibility for governance of society and the environment [20, 31, 47]. Land is thus viewed as territory [23].

A new model for democratic land governance is thus derived – see **Figure 1**. In this model the state is illustrated as drawing from human rights as a set of normative



**Figure 1.**  
*A new model for democratic land governance.*



principles guiding development, as instruments and indicators for evaluation of development, as a component of development, and as the underlying justification for development. Thus informed, the state is directed by the human rights tradition to fulfil its obligations to land rights-holders by initiating land administration processes in order to address human rights-related deficiencies in the current status quo. This is the top-down approach of the human rights tradition. The bottom-up approach sees people as individual citizens and communities of land rights-holders who draw on their understanding of land as territory – with corresponding horizontal obligations to one another and incorporating a multi-generational, socio-cultural, religious view of land – to claim their right to use and/or control land. (Horizontal obligations are illustrated in the figure by means of arrows on either side of the ‘Land as territory’ block.) This claim drives their desire for land administration/reform.

The two approaches meet and need to find mutual acceptance and understanding through a setting of collaborative governance. This is defined as [70]:

*“the processes and structures of public policy decision making and management that engage people constructively across the boundaries of public agencies, levels of government, and/or the public, private and civic spheres in order to carry out a public purpose that could not otherwise be accomplished.”*

Ten propositions have been put forward for successful collaborative governance that crosses these boundaries (referred to by [70] as the collaborative governance regime, or CGR). These are summarised in **Table 3**.

1. Drivers	Strong leadership, pertinent incentives, necessary interdependence, and/or uncertainty are necessary for a CGR to be initiated.
2. Principled engagement	Interactive discovery of shared interests, concerns and values; definition to build shared meaning; deliberation between participants; and the construction of shared determinations are generators and sustainers of engagement.
3. Shared Motivation	Repeated, quality engagements build trust, mutual understanding, legitimacy and commitment for further engagement.
4. Virtuous cycle	Shared motivation enhances and sustains further principled engagement and vice versa.
5. Joint action	Principled engagement and shared motivation stimulate the institutional arrangements required for generating and sustaining joint action.
6. Capacity	Joint action requires the necessary procedural and institutional arrangements, strong leadership, shared knowledge, and resources.
7. Collaborative dynamics	The quality and extent of collaboration depends on the interactions between principled engagement, shared motivation, and capacity for joint action.
8. Collaborative action	Collaboration is more likely to result in action if a shared theory of action is explicitly identified and the collaborative dynamics function to generate the required capacity for joint action.
9. Impacts	Impacts will better align with intended outcomes if they stem from a shared theory of action using collaborative dynamics.
10. Adaptation	CGRs will be sustainable if they adapt to the impacts arising from their joint actions

**Table 3.**  
*Propositions for initiating and sustaining a CGR (adapted from [70]).*

Where cultural norms challenge human rights-based approaches to development, adherence to the propositions underscoring a CGR may assist relevant parties to find common ground. This may assist in ensuring the significance of the interventions for the land rights-holders, and hence the intervention's sustainable success.

## **6. Conclusion**

In this chapter, a human rights-based approach to development is defined as stemming from the human rights tradition. Following this tradition, citizens and communities are rights-holders who can hold states to account regarding the realisation of their rights, which is referred to here as their vertical obligation. States are obligated as duty-bearers to respect, protect, promote, and fulfil human rights. Adherence to a HRBA to development empowers the needy to claim their rights, promotes transparency of governance, and encourages active, free, and meaningful participation in development processes. But, following a HRBA to development is not without its challenges. Other than the implementation challenges, there is the challenge related to the universal acceptance of human rights: the “West and the Rest” debate. The issue of horizontal obligation – the obligation of rights-holders to uphold the rights of other rights-holders – may contribute to addressing this challenge, because the types of rights are then understood on an equal footing.

It is argued that the right to occupy and use land is not a recognised human right, though it may be a human rights *issue*, especially in a developing, African context. A human rights-based approach to land rights is important in highlighting the social and cultural importance of land, as opposed to viewing land simply as a commodity to be bought or sold. This resonates with the distinction between Eurocentric human rights and the *Ubuntu* approach. Differences aside, the human rights tradition places the onus for the recognition and protection of land rights squarely on the shoulders of states, as (vertically obligated) duty-bearers. Individuals, community leaders, and communities shoulder some of the responsibility as (horizontally obligated) duty-bearers.

Adopting a human rights-based approach to land is acknowledged to be pro-poor. Poverty reduction should be at the forefront of development, especially developments involving land. Acknowledgement of the importance of land as a social, cultural, and even religious asset is imperative for land administration and land reform programmes that are sensitive to the needs and beliefs of customary land rights-holders in Africa. The model of democratic land governance is presented as a pro-poor, human rights-based approach to development of land, and is modified to accommodate the views presented above.

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The authors declare no conflict of interest. The funders had no role in the design of the study; in the collection, analyses, or interpretation of data; in the writing of the manuscript, or in the decision to publish the results.

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# Equality before the Law Matters: The Legacy of American Jews and the Founding of the NAACP and the Modern Civil Rights Movement

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## Abstract

This chapter examines efforts by a small cadre of leading American Jews to bring to light human rights violations toward African Americans at the beginning of the 20th century. More specifically, this effort scrutinizes efforts by Jews who ushered in an era of human rights campaigning based on their moral principles, norms, and cultural practices. These same principles and practices manifested themselves in the co-founding of the National Association for the Advancement of Colored People in 1909. This profoundly important organization would lead concerted efforts to organize legal protest movements to bring about fairness in housing, employment, and education, regardless of race, color, or creed. This study will answer the following questions: What motivated leading American Jews to help co-found the NAACP and guide it become a leading advocate for African Americans in legal, political, and financial matters? Who were the Jewish leaders who came from various fields, including civil matters, education, law, and business to help create this nascent enterprise? What coalition-building took place between the Jews and African Americans over the last century leading to the birth of the civil rights movement in America in the 1950s and 1960s? What inroads or gains were made from the establishment of the NAACP and its development to bring about civil rights, and equality under the law in housing, education, employment, and banking to the forefront for blacks living in America? Ultimately, this research will underscore ways in which leading Jewish men and women who helped establish the NAACP were successful in integrating this organization with other civic organizations and working black leaders to make it a force in making the NAACP a force in achieving social justice and equality before the law.

**Keywords:** civil rights, education, conscious raising, equality under the law, NAACP, American Jews, African Americans, coalition-building

## 1. Introduction

American Jews have played a significant role in the founding and funding of some of the most important civil rights organizations in the United States over

the last 100 years. These include the National Association for the Advancement of Colored People (NAACP) in 1909, the Leadership Conference on Civil and Human Rights in 1950, the Southern Christian Leadership Conference (SCLC) in 1957, and the Student Nonviolent Coordination Committee (SNCC) in 1960. These advocacy efforts are largely the by-product of calls within Jewish culture and religion to respect the fundamental rights of all human beings. More importantly, they draw from a central Jewish tradition that all people are created equal, and it is the religious and cultural duty of all Jews to see that they are treated equally under the law [1].<sup>1</sup>

A majority of historical and scholarly discourse concerning Jews and blacks largely focuses on fluctuating inter-group relationships and perceptions of the two communities in the post-World War II period. Consequently, most of the attention paid concerns the roles that blacks, and Jews played in the Civil Rights Movement of the 1950s and 1960s ([2], p. 70). This lack of attention is largely attributed to supposedly limited contact between Jews and blacks prior to 1920. However, as I will demonstrate in this chapter, while this contact was indeed limited, many of the efforts put forth by Jews and blacks in the mid-twentieth century originated in response to circumstances occurring decades earlier, including the Springfield Riots of 1909 and the Russian Pogroms of 1904 and 1905, as well as early attempts to combat escalating racial violence and injustices through legal means in the 1920s and 1930s.

Another important element that makes the fate of Jews and the Civil Rights Movement unique concerns the role of empathy. Jews, more than other groups, could and did empathize with the plight of blacks and their historical oppression. In newspaper articles, speeches, and debates, Jewish activists compared the black movement out of the South to the exodus from Egypt, noting that both blacks and Jews lived in ghettos, and both groups suffered at the hands of mob violence; for blacks, it was lynching's and for the Jews, it was pogroms. These comparisons would lead many Jewish civil rights activists to find compassion and empathy for blacks, but also, the imperative to act on an article of faith.

This chapter highlights the evolution of Jewish civil rights activism, such as the Reformed Judaism and the Ethical Cultural Society's efforts to promote an evolution of humanist and Unitarian views to form the basis of Jewish activism throughout the twentieth century. Their involvement would lead to a series of coalition-building enterprises during the modern civil rights movement of the 1950s and 1960s, forming the crux of an all-out attack on the racial "status quo" in America, challenging the existing inequality for African Americans in housing, education, employment, and civil rights. These exertions contributed ultimately to the passage of the two most important pieces of legislation regarding civil rights, the Voting Rights Act of 1964 and the Civil Rights Act of 1965.

## **2. Two evils converge**

The future of blacks and Jews working together for the cause of equality and dignity for all was greatly impacted by two events in the late-nineteenth and early-twentieth centuries, one domestic and the other foreign. The Russian pogroms against Jews during the late 1880s and early 1900s mirrored violence that was taking

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<sup>1</sup> Judaism teaches respect for the fundamental rights of others is a duty to God. Equality is also espoused in the Jewish tradition that all mankind is created in God's image and laws should not be written to favor one over the other. Both teachings are found in the Babylonian Talmud and the book of Leviticus in the Hebrew Bible.

place in America against blacks in the South as well as in the North. Denunciation of Russia's treatment of Jews exposed the embarrassing question of similarity between Russia's oppression of Jews and others, with American treatment of blacks or, for that matter, of Chinese and Native Americans. This embarrassment was not limited to public opinion or media scrutiny. It was also paradoxically being exposed in political circles as well. As early as 1892, the platforms of both the Democratic and Republican parties denounced religious persecution in Russia amid widespread criticism of Russia's antisemitic practices ([3], p. 186). While both political parties were steadfast in their inclination to emphasize Russian obscurantism, they were also inclined to ignore the alarmingly common place practice of lynching, as well as urban antiblack riots taking place [3]. However, Russian horrors sensitized some Americans to the need to react with urgency to their own country's indignities ([3], p. 187). This would be especially true with the urgency by some Jewish activists with the plight of blacks living in a racist America.

The Russian pogrom waves of 1905–1906 propelled a new cadre of activists, many of them Jewish, for whom the connotation of lynching and pogroms would be second nature. The belief that such travesties were born of similar cases—the conveyance of authorities, the righteousness of the victims—helped give the issue of black injustices prominence not seen previously. The intersection between the call for the protection of blacks from lynching and Jews from pogroms would provide the immediate backdrop to lynching in 1909 and the first major American organization for the promotion of black civil rights: The National Association for the Advancement of Colored People (NAACP). More specifically, the Kishinev pogroms greatly influenced the politics of the American left concerned for Jews on the Lower East Side who were now preoccupied with the conditions of American blacks ([3], p. 188).

### 3. Springfield riots

The Springfield Riots resulted from exaggerated accusations by local authorities against two African American men for allegedly attacking white women ([4], p. 12).<sup>2</sup> The ensuing violence resulted in lynching's, additional deaths, and the burning of many homes and businesses. The arrival of militia and thousands of National Guard troops forced thousands of black residents of Springfield to flee for their lives [4]. Local officials explained away the riots in Springfield by blaming the incident on local blacks who were on the cusp of taking over the city. In response to their incursion, rioters tried to run them out of town. Local officials reported in the press that blacks had fired on whites first—a standard charge in official reports on Russian pogroms as well—and that the mob violence was revenge for the murder of whites ([3], p. 201).

Labor leader and settlement house activist William Wallings traveled to Springfield to view the carnage for himself. Writing for the *Independent Magazine*, he penned an article called “The Race War in the North,” published on September 2, 1908 ([4], p. 12). In his reporting of the race riots, Wallings forewarned that if unchecked, the heinous antiblack repression so characteristic of the South was certain to move northward, remarking, “what was needed was a large and powerful body of citizens ready to come to their aid” ([3], p. 201).

Upon his return to New York City, Walling went to work formulating concrete proposals for forming a committee to denounce both the treatment of American blacks and Russian Jews. His work to highlight the plight of Russian Jews under the Tsar Nicholas II was published in his 1908 *Russia's Message: The True World Import of*

<sup>2</sup> The two men lynched were a barber and cobbler, both of whom were married to white women.

*the Revolution*. Translated into nine languages, the book illuminated the treatment of Jewish suffering as extensive, with staggering poverty, government persecution, and anti-Jewish massacres, along with the Kishinev's pogrom extensively detailed ([3], p. 202).

Supporters of Wallings' reporting of the Springfield Riots encouraged him to take the initiative to launch a "large and powerful body." At a public meeting in the fall of 1909 taking place at New York City's Cooper Union Hall, they laid the groundwork for such an organization as a direct response to the pogroms of Russia and the violence against blacks throughout the United States that had reached a tipping point in Springfield in the spring of 1909 [4]. This call to arms by Wallings would later lead to the establishment of the National Negro Committee and formation of the National Association for the Advancement of Colored People in 1909. The NAACP was the first major American organization for the promotion of black civil rights, saw an intersection in the call for the protection of blacks from lynching and Jews fleeing from Russian pogroms. In their first organization meeting, delegates passed a resolution of sympathy with the victims of the Kishinev Massacre and vowed to combat the unending violence visited on America's black population ([5], p. 92).

Wallings efforts to promote black civil rights was greatly supported by his association with the Ethical Culture Society (ECS) also founded in New York City decades earlier. The ECS was a largely deist and republican organization formed to promote social and humanitarianism to those less fortunate ([3], p. 15).<sup>3</sup> ECS members who had served as agents of change on politically charged matters such as labor rights, civil liberties, and environmentalism. Prominent Ethical Culture members included Dr. Henry Moskowitz, John Lovejoy Elliott, Anna Galin Spencer, and William Salter, along with other ECS members from fields of law, education, government, and finance. Other important Jewish figures in the early development of the NAACP included Louis Marshall, founder of the American Jewish Committee, who vowed to take on the KKK at every turn in the South on behalf of blacks and Jews alike ([3], p. 15).<sup>4</sup> Another was Supreme Court Justice Felix Frankfurter who helped draft legal briefs and train legal clerks in the NAACP field offices. To their credit, they would also not only help found the NAACP, but other civic minded organizations as well. These include the National Civil Liberties Bureau, the forerunner of the American Civil Liberties Union (ACLU). The central theme to many of these organizations was the belief that change needed to be pragmatic and to

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<sup>3</sup> The mantra of this group was "deed not creed." The Society argued that "man must assume responsibility for the direction of his life and destiny." All told, the ECS was an outgrowth of American Reform Judaism, and went to great pains to be "non-religious" in as many ways as possible. This organization was largely followed by upper-middle-class German Jews, dedicated to assimilation in American society. The tenets of ECS were born out of radical new notions about the universality of God and man's responsibilities to society. The leader of ECS in America is credited to Felix Adler who had been radicalized in Germany while studying at Heidelberg University. In his opinion, Judaism of the future was one that would survive in the modern world by recasting some of society's deeply held beliefs. One such belief was Jews must reject its "narrow spirit of exclusiveness." This effort included defining themselves not by their biblical identity as the "chosen people," but rather their social concern and deeds on behalf of the labor classes.

<sup>4</sup> Anti-Semitic violence loomed large in the southern cities of Atlanta, Nashville, Jacksonville, and Miami, as well as synagogues in Birmingham, Charlotte, and Gastonia, North Carolina. Even when faced with such violence, Rabbis and Jewish business leaders still took part in rallies and protest marches and found themselves victims of death threats as well.

some degree radical in nature. Another important tenet adhered to be the steadfast belief that a better world required hard work, persistence, and political organization ([3], p. 19).

The NAACP, which represented several once-stigmatized groups, had begun to chip away at the edifice of discrimination, and increasingly emboldened other groups to assert their rights. Labor unions, radical groups, feminist organizations, and bodies such as the American Civil Liberties Union (1917), the American Association of University Professors (1915), and the National Conference of Social Workers (1917) made criticizing the established order politically possible. Muckraking journalists exposed one flaw after another in American society leading to substantial changes in educational, legal, and professional options. However, such challenges to the “status quo” in American society by these groups created a backlash led by White Protestant Americans who identified with the older social order and believed any attack on the “status quo” was an attack on them ([5], p. 115). This, in turn, led to restrictive immigration policies directed at the composition of the recent immigrants between 1880 and 1920 ([5], p. 116).<sup>5</sup>

The founders of the NAACP set out to allow people, individually or collectively, to define who they are, so society could accept their definition. The founder’s people’s need to be defined by their dreams, goals, sense of identity, and self-consciousness, not the identity thrust upon them by society ([4], pp. 12–13). The association’s attempt to extend progressive values, goals, and methods into the area of race relations was in direct conflict with Booker T. Washington’s program of self-help, solidarity, and moderation, and was met with luke-warm acceptance by both Northern reformers and those in the South who dared attempt to attack the “status quo” ([6], p. 6).

Walling and Marie White Ovington, a fellow settlement house activist, were later joined by Oswald Garrison Villard, president of the *New York Evening Post*, which published the manifesto, *The Call*. This publication encouraged many prominent American progressives to join a national movement to combat the evils of racial discrimination and its associated violence. These representatives included progressives from settlement house movements, the women’s suffrage movement, the Niagara Movement (1905–1910), the African American churches, the descendants of the abolitionist movements, and the anti-lynching crusade, led by Ida B. Wells-Barnett. The progressives who constituted many of the delegates who formed the NAACP would later be joined by W.E.B. Du Bois, charged with leading the research and publicity department and serving as editor of the NAACP’s official magazine, *The Crisis: A Record of the Darker Races* ([4], p. 12). This magazine served as an effective vehicle for keeping the organization’s programs and activities before the black public ([6], p. 7).

#### 4. The New York paradox

While it is true that many Jewish activists who helped found the NAACP were living in New York at the time, there existed a certain level of irony involved since tens

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<sup>5</sup> Calls to curtail immigration severely and to ensure the immigrants represented the more “desirable” races date back to 1894 with the founding of Immigration Restriction League. The members of this old-stock new England patricians who banded together to call for an end to free and open immigration into the United States, expressed a vision of America in which people like them would define culture and hold political power.

of thousands of both races were facing their own troubles while living within a stone's throw of one another ([3]), pp. 17–18).<sup>6</sup> This circumstance was largely the by-product of immigration patterns that shifted at the turn-of-the-century, for both the black and Jewish diasporas ([5], p. 25).<sup>7</sup> Paradoxically, so did their limited and confined relations between the two groups. It would take the Russian pogroms and the Springfield Riots to bring them together. All told, New York City would serve as the epicenter of the union between the two and it would last for well over a hundred years.

The period between 1895 and 1920 saw an increase of tens of thousands of southern blacks and Eastern European Jews settling in the Empire State. With little money, grand expectations, and faced with housing, education, and employment discrimination, both groups centered their relocation within the confines of Harlem, New York. For blacks, a string of natural disasters, mob violence, and a lack of economic opportunities led them northward. The eastern European Jews, like many northern blacks, were also escaping restricted freedoms, substandard living conditions, mob violence, and romantic notions of America's promised wealth ([5], p. 71).<sup>8</sup>

To combat these ills, the National Urban League was founded in New York in 1911 to help newly arrived black migrants from the rural South. This organization sought to enable African Americans to secure economic self-reliance, parity, and civil rights. Jewish activists went to great lengths to help support this endeavor with financial and organizational help as well as leadership. Jewish American economist, Edwin R. A. Seligman served as its first chairman of the board. In addition, Jewish labor activists went to great pains to work with the Amalgamated Clothing Workers to help organize their "black brothers" for union membership which was opposed by the American Federation of Labor national board.

These newcomers to New York both experienced backlash from landlords, employers, and social clubs. This anti-Negroism and anti-Semitism inhibited economic and social opportunities for both groups, promoted by hatred and racism including landlords refusing to rent to either community as well as denied membership to social clubs regardless of merit. In many respects, blacks, and Jews

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<sup>6</sup> Throughout the late 1860s and early 1870s, Jews of New York City had experienced little or no anti-Semitic episodes. However, that changed after the Stock Market Crash of 1873. Since the crash was blamed on the bond market in Germany and because many Jews in the financial section in New York were German, the resulting depression was laid at the feet of Jews. Sadly, the impact of this crash was felt for over seven years and resulted in the unemployment of one out of four Americans. The result of this crash and its fallout would give rise to antisemitism in New York and other parts of the United States for the next fifty years. The exclusion of Joseph Seligman, a wealthy and prominent Jewish businessman of German descent from a famed hotel in New York City served as a harbinger of things to come for many esteemed and successful Jews who once were able to mingle with many White Protestant elites.

<sup>7</sup> Over 6.5 million blacks would migrate North between 1865 to 1940. Many would settle in Chicago, New York, Philadelphia, and Boston.

<sup>8</sup> By 1900, Harlem became a popular destination for most Eastern European Jews and Southern blacks. Even though both groups co-existed in Harlem, they lived parallel lives. Living beside one another, and not among one another typified their relations. While they shared many of the same problems, they went about solving them independently of each other. This would change over time with the inception of the NAACP and collaborative effort of activists in both communities.

both occupied the lowest rung on the social hierarchy ladder, and without mutual assistance toward one another, they would remain there [5].<sup>9</sup>

Not all the discrimination and hatred experienced by blacks and Jews was attributed to the bigotry and intolerance of the dominant gentile white population. Ironically, both groups experienced biases and prejudice from within their own communities. Eastern European Jews were attacked by assimilated German Jews for having lacked social, political, and economic acumen. This included clannish behavior, orthodox dress, mores, traditions, and lack of effort to learn the English language. Similarly, well-established blacks wanted to curb the influx of Southern blacks whose presence created an unbalanced job market, plagued by excessive supply, and limited demand. Northern blacks did not spare the rod when it came to southern black migration; they were deemed lazy, shiftless, and an illiterate mass who migrated north, thereby reducing economic opportunities and privileges to a minimum for Northern blacks [5].<sup>10</sup> This bigotry and intolerance exhibited by members of their own communities would play a prolific role in both groups pushing for measures to combat racism and prejudice. Elites and those who had made it, did not want to make waves, and impede their own gains. However, these very same elites would later find the doors of many upper echelon institutions, hotels, social clubs, and preparatory schools were slammed shut against Jewish membership. The ECS provided Jewish society with a timely vehicle for dealing with this mounting bigotry ([3], p. 17).<sup>11</sup>

## 5. Freedmen schools legacy enjoined

Throughout their history, proper non-secular and secular schooling was a mainstay for the success of Jewish diaspora. This success would include efforts by Rabbi Felix Adler to “humanize” course offerings for young children in Ethical Society schools to provide a well-rounded education for children both Jewish and Gentile. Educational efforts on the part of Jewish activists were not limited to children in the North, they took their mission to the South as well. Using the Freedman schools as a model, this tradition was once again carried forth by Jewish philanthropists who worked with other African American reformers to bring education to rural blacks living in the South at the turn of the century. These efforts would play a large role in closing the education gap between whites and blacks. It was estimated that completion of school consisted

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<sup>9</sup> Critics charge the lack awareness or sympathy of the plight of blacks was in large part a by-product of the self-segregated nature of the Jewish community. Share cultural experiences, religious upbringing, and dietary restrictions fostered a social, cultural, and economic divide between Jews and non-Jews, namely the blacks of New York. The lack of shared experiences was also related to the clannish and tribalistic disposition of Jews themselves. They most often frequented establishments owned and operated by fellow Jews. Some argue this was largely attributed to communal dependence and preserving ethnic homogeneity.

<sup>10</sup> With mixed success, each group fought and won legislative measures to combat oppressive prejudice they endured politically and socially. The Civil Rights Act of 1895 and 1913 resulted in provisions which forbade discrimination in public accommodations.

<sup>11</sup> Where Jews once lived in an atmosphere of tolerance, the tide toward discrimination and prejudice had turned against Jews in New York and other cities throughout the United States. The case of Joseph Seligman, a wealthy and prominent Jew of German descent who was denied entrance to the famous Grand Hotel of Saratoga, New York bears this out.

of a three-year gap. Among whites, the average was the completion of eighth grade, as compared to the fifth grade for blacks. By 1950, the education gap between whites and blacks living in the South had closed within one grade.

Between 1910 and 1940, this effort was led by Booker T. Washington, founder of the Tuskegee Institute, who worked tirelessly with Chicagoan Julius Rosenwald, president of Sears and Roebuck, to fund primary and secondary schools and twenty black colleges (including Howard, Dillard, and Fisk Universities) throughout the American South. Over 5,357 schools, shops, and teacher homes were constructed in three decades. At the height of the so-called “Rosenwald Schools,” nearly forty percent of southern blacks were educated at one of these institutions ([7], p. 1).<sup>12</sup> This effort has been called by some historians and scholars one of the most important initiatives to advance black education in the early 20th century ([8], p. 1).<sup>13</sup>

The gains made from Rosenwald graduates were profound. Students who went to Rosenwald Schools had higher IQ scores than kids who did not. They made more money later in life. They were more likely to travel to the North as part of the Great Migration. They lived a little bit longer. The women delayed marriage and had fewer kids. And crime rates around the schools went down ([9], p. 1).

By the mid-1950s, Jews along with African Americans began to press for federal legislation that would check the free hand of private institutions to discriminate as they pleased. This effort rivaled the same spirited moral crusade put forth by the abolitionists following the Civil War and supported by Republican radicals throughout the late 1860s and early 1870s. Jewish defense groups and religious organizations understood that the divide between public and private meant little in a place where a state gave employers, realtors, admission offices, hotels, and others the right to do their business as they pleased. The new kind of America that these groups sought to cultivate through legal sanction would allow people to put themselves forward as applicants for jobs, schools, housing, and places of recreation as individuals, and no one would be able to bar entry to them as Jews or blacks ([5], p. 267).

If any era in the history of American Jewry could be considered a “golden age,” it would be the twenty years following World War II ([5], p. 259). This period, say American Jews, pushed the troubled memories of the recent past aside—the uncertainties of the Great Depression, the anti-Semitism of the 1920s, 1930s, and 1940s, and the horrors of the Nazi regime—to the margins of their concerns. American Jews embraced themes that were a mainstay throughout the post-war years: prosperity and affluence, suburbanization and acceptance, the triumph of political liberalism, and the expansiveness of unlimited possibilities. In addition to their efforts to improve their own lot, they also joined forces with other Americans of goodwill who worked to change the status quo both for themselves and for America’s larger minority population, the African Americans ([5], pp. 260–261).

American Jews went to great pains to express their awareness of what had happened to the European Jewry during the Holocaust and apply to the injustices happening in America to other minority groups. While the pursuit of upward mobility, gaining acceptance, and avoiding memorializing the tragic events that destroyed Jewish life in Europe was always present, they kept the message of “social justice”

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<sup>12</sup> Many of these schools would become obsolete by 1954 after the Supreme Court ruled the segregated schooling was unconstitutional. Once the pride of many black communities, many were abandoned or demolished.

<sup>13</sup> Rosenwald’s munificence was continued by his daughter, Edith Stern of New Orleans, whose Stern Family Fund in later years contributed vast sums to civil rights activities throughout the South. With Jews only constituting only one percent of the region’s total population their philanthropy, namely funds and manpower in this regard is substantial.



for all alive in their synagogues and in the Jewish press. American Jews worked tirelessly at the local, state, and federal levels with other civil rights organizations, as well as on their own to push through civil rights bills. While Jews had participated in the freedom struggle of African Americans since the beginning of the twentieth century, and American Jewish publications, both in Yiddish and English, had decried racism for five decades, only in the aftermath of World War II did the organized Jewish community—synagogues, synagogal bodies, defense organizations, and the like—become a force engaged in social justice movements. With the anxiety of their own status in America abated, it was time for American Jews to take on the task of securing the status of other minorities in America even if it meant rising the opprobrium of the non-Jewish majority 9 ([5], p. 266).

There exists a legion of examples of Jewish participation, large and small, in the civil rights struggle of the postwar years. Jewish lawyers supported the civil rights struggle by defending black defendants who are wrongly accused of crimes for which they did not commit. For example, in 1950 Civil Rights Congress attorney, Bella Abzug went to Mississippi to defend Willy McGee, an African American who had been falsely accused of raping a white woman. On appeal, Abzug argued that McGee's rights to due process, venue change, and a jury of his peers had been violated. Even though this appeal failed, Abzug's actions fit into the tradition going back to the early part of the century of Jewish lawyers using their professional expertise to bring racism to an end [5]. The same sense of responsibility to help African Americans achieve status in America culminated in several Jewish organizations risking their reputations in support of ending segregation of schools, playgrounds, and swimming pools – all considered widely controversial by most Americans at the time.

## **6. Brown v. Board of Education (1954)**

The movement to end public school segregation was realized with the landmark 1954 *Brown v. Board of Education* ruling. Helping in this effort was research performed by the black sociologist Kenneth Clark who was commissioned by the American Jewish Committee and the Anti-Defamation League. His study documented the psychological impact of school segregation on children. Clark's findings that segregation damaged self-esteem fed directly into the legal brief prepared by the NAACP. This ruling was called by many Jewish leaders a "red-letter day in American history" ([8], p. 23).

Inspired by this important legal win of the NAACP, Jewish communal leaders in Washington, D.C., led by executive director Isaac Frank, were instrumental in using their offices of the Jewish Community Council to facilitate the desegregation of the city's schools, playgrounds, and swimming pools [5]. This effort rested on the Jewish Community Council's belief that Jews, as well as blacks living in America, deserved to be seen as individuals rather than members of a group to be discriminated against.

Spurred by the Brown ruling and the success of taking on segregation in District of Columbia's schools, pools, and playgrounds, Jewish defense organizations in other cities continued to file legal briefs in civil rights cases dealing with housing, employment, education, and public accommodation. Many of the local and state desegregation appeals and subsequent regulations were drafted in the offices of these very same Jewish agencies [8].

The moral crusade of the 1950s and 1960s for social justice, led by many Jews of this period, centered on the belief that Jews had long suffered from laws and

social practices that prevented them from being considered individuals, rather than members of a group. For many Jews participating in this crusade still felt the lingering effects of discrimination against Jews in employment, housing, and education and felt it morally imperative to secure federal legislation that would check the free hand of private institutions as well as government institutions to discriminate as they please [5]. Jewish defense groups and religious organizations understood that the divide between public and private meant little in a place where the state gave employers, realtors, admissions offices, hotels, and others the right to do their business as they pleased. Ultimately, they were seeking to recast America in such a way that people regardless of race, color, or creed could put themselves forward as applicants for jobs, schools, housing, and places of recreation as individuals, and no one could be able to bar entry to them.

## **7. Into the breach (1960s)**

The sense of common purpose on behalf of social justice for all taken up by many Jews manifested itself in innumerable symbolic actions throughout the twentieth century ([5], p. 268). Jewish participation in the Civil Rights Movement during the 1960s far transcended institutional associations. This was especially true with many Jewish activists who identified themselves with the liberal avant-garde of the civil rights movement of the 1960s. This call to action was not lost on the young within the Jewish community as more and more college aged Jews took part in several civic rights projects at the local, state, and federal levels throughout the 1960s. They joined other like-minded young people who saw fit to challenge the “status quo” of racial segregation in the South and support efforts to pass federal laws and court orders to shatter legal supports of Jim Crow ([8], p. 25). One of the most important challenges to Jim Crow came in the summer of 1961, when several hundred young men and women rode busses across the South to challenge segregation in public transportation. Organized by the Congress of Racial Equality (CORE) and Student Nonviolent Coordinating Committee (SNCC), white Freedom Riders (about two thirds of whom were Jews) traveled throughout the South on regularly scheduled busses for seven months in 1961 in order to challenge racial discrimination in public accommodations ([10], p. 1).<sup>14</sup> They joined other young activists from other parts of the country to heighten the public’s awareness that recent Supreme Court rulings regarding public accommodations were not being followed. The rides’ purpose was to test compliance with two Supreme Court rulings: *Boynton v. Virginia*, which declared that segregated bathrooms, waiting rooms and lunch counters were unconstitutional, and *Morgan v. Virginia*, in which the court ruled that it was unconstitutional to implement and enforce segregation on interstate busses and trains ([11], p. 1). For their efforts, these activists were harassed, attacked, beaten, and jailed. Moved to act on their behalf and rally to their cause, Attorney General Robert F. Kennedy petitioned the Interstate Commerce Commission to ban segregation in interstate travel, removal of Jim Crow signs from stations, waiting rooms, water fountains and restrooms in bus terminals. This law went into effect on November 1, 1961 ([11], p. 2).

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<sup>14</sup> It is estimated that over 60 Freedom Rides took place, nearly 75 percent of the riders were between the ages of 18 and 20 years old. About one third were blacks, a quarter, women. The volunteers came from 40 states and were put through rigorous training in non-violence tactics. In later years, more than two dozen of the riders would go onto become teachers or professors, ministers as well as lawyers.

## 8. Mississippi freedom summer (1964)

Another poignant movement in the civil rights movement of the 1960s came in summer of 1964 when several hundred northern college students heeded the call from SNCC and CORE to participate in voter-registration drives in several Southern states. Once again, young Jewish activists were among these civil rights advocates. It is estimated that as many as 90 percent of the civil rights lawyers in Mississippi were Jewish ([8], p. 27). Large numbers of them were recent graduates of Ivy League law schools who dedicated themselves to working around the clock analyzing welfare standards, the bail system, arrest procedures, justice-of-the-peace rulings. Racing from one Southern town to another, they obtained parade permits and issued complaints on jail beatings and intimidation.

During the 1964 Mississippi Freedom Summer, students who took part made up about one-third to one-half of the young men and women (out of 700) who traveled to the South. These students were lauded for taking part in legal, medical, and educational pursuits on behalf of poor African Americans living in rural areas of Mississippi.<sup>15</sup> In addition, many of these students led voter registration drives that put them in harm's way. The strategy for this program was to take advantage of America's violent racism and publicize it ([5], p. 268).

The organizers surmised that violence against white northern college students would attract the attention of the federal government and the nation, whereas commonplace violence against African Americans did not ([11], p. 1). In turn, the federal government would be forced to protect the civil rights workers and stand up to the state and local authorities [11]. Sadly, over the course of Freedom Summer, at least six activists were murdered, and volunteers also experienced 1,000 arrests, 80 beatings, 35 shooting incidents, and 30 bombings of homes, churches, and schools. However, the intensity of this experience also created a powerful sense of purpose and community among blacks and whites working together for a common cause [11].

Even though only a few hundred new black voters were able to register in Mississippi that summer, the harassment, and reprisals against them, was widely covered in the national media and spurred public outrage. This would in turn lead to a groundswell of support for new laws and federal intervention in Mississippi and other Southern states on behalf of black voters. In the end, the harassment and reprisals against black voters and violence toward young middle-class students and activists helped spur the U.S. Congress to pass the Civil Rights Act of 1964 and the Voting Rights Act of 1965 [11].<sup>16</sup>

## 9. Freedom marches (1964–1965)

While the number of Jewish activists who rode busses into the South, registered blacks to vote, picketed segregated establishments, and participated in protest marches is noteworthy (over thirty percent), their activism was not done. They also marched in several protests in southern cities as well. Among them were not only young Jewish students, but also several dozen Reform rabbis who marched among the demonstrators in Selma and Birmingham. Many of them were beaten,

<sup>15</sup> More than 40 Freedom Schools opened in 20 communities. Over 2,000 students were enrolled, and 175 teachers were enjoined in the effort.

<sup>16</sup> It is estimated that only a few hundred new black voters were able to register, but the harassment and reprisals against them were widely covered in the national media. Public outrage helped swell support for new laws and federal intervention.

tear gassed and arrested for their efforts. Anyone who tried to render aid to these protesters were also beaten as well. The lasting impact of these freedom rides, voter drives, and marches was far reaching since they were not only reporting in print but also broadcasted on television sets all across America. The federal government could no longer ignore the public opinion that supported crusades for racial justice, proposed civil rights legislation, and calls the realization of the American dream for all its citizens.

## **10. Civil rights legislation (1964–1965)**

The Civil Rights movement of the 1950s and 1960s culminated in federal legislation pass by Congress and signed into law by President Lyndon Baines Johnson. While the face of these efforts by 1964 and 1965 was Dr. Martin Luther King behind the scenes he was buoyed by devoted Jewish activists. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 were drafted by legal scholars housed in the Religious Action Center of Reform Judaism under the aegis of the Leadership Conference. The Jewish community continued its support for civil rights laws addressing persistent discrimination in voting, housing, and employment against not only women and people of color, but also those in the gay, lesbian, bisexual, and transgendered communities, and the disabled community as well.<sup>17</sup>

## **11. The purge and contradiction in terms**

At the height of the Civil Rights Movement between 1954, the year of *Brown v. Board of Education*, to 1964, when the Civil Rights Act was passed, Jews and blacks worked hand in hand for equal justice and civil rights. They marched together, put themselves in harm's way, and pressed politicians to pass important legislation to change the status quo. However, with the passage of the Civil Rights Act of 1964 (ended legal segregation), even though it was a great victory, blacks saw little to celebrate since deep institutional systemic racism had not been addressed.

Another important development in the Civil Rights Movement was an internal struggle within the black civil rights movement between Dr. Martin Luther King and a new generation of more militant black youth. Eventually the influential black organization SNCC (Student Nonviolent Coordinating Committee), purged whites from their leadership, which in effect meant Jews. These younger black leaders believed the black power movement needed to help themselves and allying with whites would not advance the cause. More importantly, they viewed Jews as white, not as fellow travelers who also have suffered from oppression ([12], p. 1).

Even though Jews had much effort and resources into the fight for civil rights, there existed a dichotomy between the two groups. Those Jews who had put themselves on the front lines of the civil rights movement had misjudged what it took for whites to reshape their lives through their hands, feet, mouths, and hearts, as compared to blacks who still faced systemic institutional racism even with the passage of legislation. The African American population still suffered persecution, poverty, and deprivation as no other group in America had and still does ([13], p. 1). Some critics argued that Jews had struck a “Faustian bargain” in the process of making it in America, that is they accepted acculturation and in doing so they had given up their collective self.

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<sup>17</sup> Religious Action Center of Reform Judaism, assessed on January 5, 2021. <https://rac.org/jews-and-civil-rights-movement>.

Another important development in the schism between Jewish civil rights activists and their black counterparts was the rise of black antisemitism which cast doubt on the intention of the identity of American Jewish liberals and radicals. With candor and realism, this black antisemitic rebuke centered on two premises advocated by Jewish liberals and radicals: one, the notion that both blacks and Jews comprise a community of the oppressed and are striving for the same outcome—an American society of merit in which religious, ethnic, and racial barriers were unimportant; and two, Jews are never acting more true to their religious and ethnic heritage than when they are working side by side with blacks to create a society free of racial and religious prejudice ([13], p. 1). All told, many African American critics of Jewish activism on behalf of blacks centered on the charge that Jews were whites with all the privileges accruing to those white skins and they were no longer an oppressed minority group, they had made it in America economically, politically, and socially [13]. In this vein, they were a part of the majority and were party to the continued oppression of blacks. In no short order Jews had never experienced anything remotely resembling the enslavement, discrimination, and racism encountered by blacks while living in America for over three and a half centuries, nor had blacks achieved gains in status, never experienced the economic gains and social prosperity of Jews, not before or since [13].

When Jews no longer found themselves being accepted into the civil rights movement of the late 1960s, they turned their attention elsewhere. This was especially true after the Six-Day War, which came right after the rise of identity politics and the rejection of black power activists of whites inside their movement and cause. In response, Jews began to turn their attention and political energy on the fate of Soviet Jews and the security of Israel [12].

## 12. Conclusion

Most of the historical and scholarly discourse concerning civil rights in America focuses on the fluctuating inter-group relationships between Jews and blacks during the post-World War II period. However, there exists a body of additional knowledge that highlights the efforts made by Jewish activists, both secular and non-secular, prior to the 1950s and 1960s to move racial, economic, and political injustices against blacks to the forefront. Ultimately, this chapter focuses on the role that human empathy in response to violence against both Jews and blacks played in helping form some of the most important civil rights organizations of the twentieth century in their quest for social justice.

The efforts by a small cadre of leading American Jews to bring to light human rights violations toward African Americans ushered in an era of human rights campaigning based on their moral principles, norms, and their cultural practices. The confluence of Jewish interests and the African American pursuit of economic, political, and social freedom was not without pain and suffering to both parties. Those Jews who supported civil rights activism in both the South and North found themselves the subjects of anti-Semitic violence, which included the bombing of temples and other crimes against the Jewish people.

Jewish leaders argued that both groups would greatly benefit if American society progressed beyond restrictions based on religious, ethnic, and racial discriminations. To this end, Jews activists established the American Jewish Committee, the American Jewish Congress, and the Anti-Defamation League to help eradicate racial prejudice in American society. They also made substantial financial contributions, provided organizational and leadership help, and volunteered to serve in the many civil rights organizations throughout the 1950s and 1960s—including the NAACP,

the Urban League, the Congress of Racial Equality, and the Student Nonviolent Coordinating Committee. Sadly, these later contributions have been largely forgotten when it comes to Jewish contributions to help America live up to its ideals of equality and justice and their place in the fight for civil rights for all.

In the final analysis, the reasons why so many Jews were drawn to the cause of racial equality and justice are multifaceted. Judaism expresses the moral obligation to work for justice for all people, and the desire to achieve the ideals of American equality became a mutual aspiration of all people. Additionally, Jews empathized with African Americans in their pursuit to move beyond discriminatory racial labeling as being “other” citizens, as the memory of the Holocaust impelled them to prevent racist violence against another group [14]. Jewish leaders, organizations, and the press called for the involved dismantling of the status quo and to upset the cherished equilibrium that had allowed both Northern and Southern Jews to thrive in a largely Protestant America ([5], p. 271).

American Jews went to great pains to express their awareness of what had happened to the European Jewry during the Holocaust and apply to the injustices happening in America to other minority groups. While the pursuit of upward mobility, gaining acceptance, and avoiding memorializing the tragic events that destroyed Jewish life in Europe was always present, they kept the message of “social justice” for all alive in their synagogues and in the Jewish press. American Jews worked tirelessly at the local, state, and federal levels with other civil rights organizations, as well as on their own, to push through civil rights bills.

These same moral principles and practices manifested themselves in the founding of the National Association for the Advancement of Colored People in 1909. This profoundly important organization would organize legal protests to bring about fairness in housing, employment, and education, regardless of race, color, or creed. The Jewish men and women who helped establish the NAACP were successful in integrating this organization with other civic organizations and mentored black leaders to take over the leadership of the NAACP and establish it as a powerful agent for social justice and equality under the law. These joint efforts contributed to the passage of two of the most important pieces of legislation regarding civil rights: The Voting Rights Act of 1964 and the Civil Rights Act of 1965.


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This book is a collection of narratives and research that explores our understanding of human rights in the contemporary world. The chapters highlight the narrative and experiences of researchers and academics who seek to ensure that human rights are implemented in policies and practices in their communities, their countries, and the global world. The book presents contemporary themes of the United Nations Human Rights in terms of current policies and practices, legislative reform, property rights, liberty, security, and freedom of expression. It also provides a comprehensive understanding of the importance of human rights across a number of fields of study that are very relevant in our contemporary world today.

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