

Syracuse University College of Law



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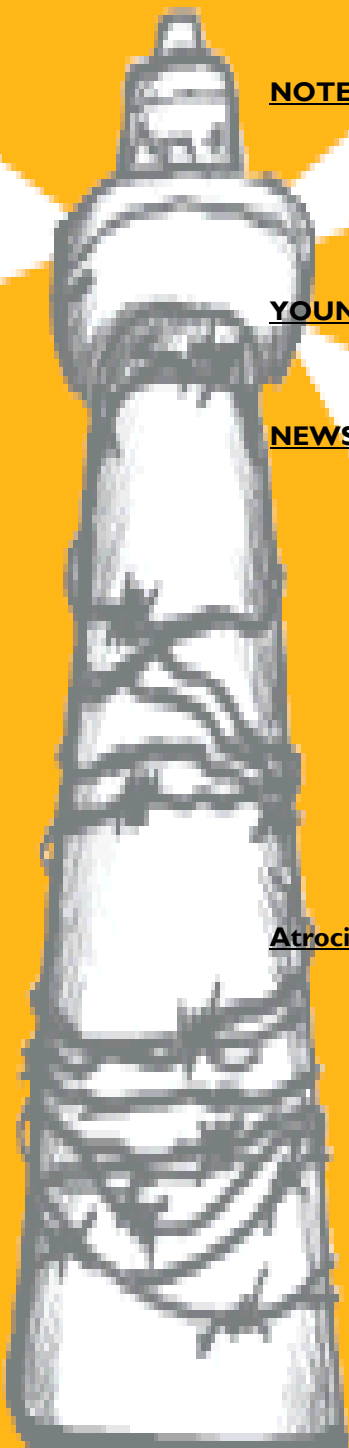
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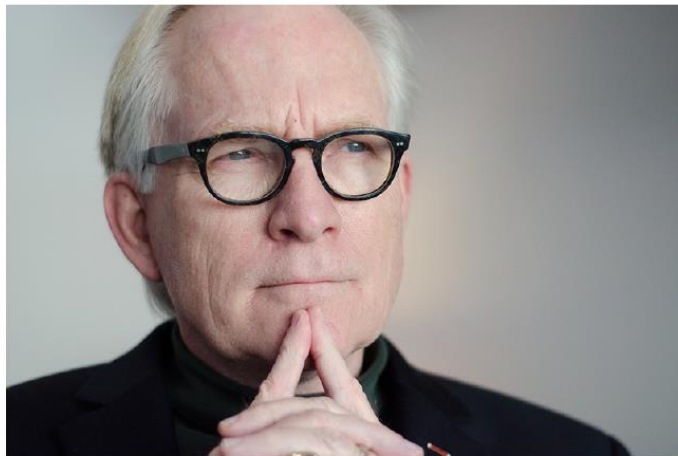
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As Chief Prosecutor, Professor Crane served with the rank of Undersecretary General, with a mandate to prosecute those who bore the greatest responsibility for war crimes, crimes against humanity, and other serious violations of international human rights committed during the civil war in Sierra Leone during the 1990s. Among those he indicted for those horrific crimes was the President of Liberia, Charles Taylor, the first sitting African head of state in history to be held accountable. Professor Crane was the first American since Justice Robert Jackson and Telford Taylor at the 1945 Nuremberg Trials to be the Chief Prosecutor of an international war crimes tribunal. The Office of the Prosecutor is located with the Special Court in Freetown, Sierra Leone.

Professor Crane teaches international civil and criminal law, international humanitarian law, and national security law courses at the College of Law. Additionally, he is a member of the faculty of the Institute for National Security and Counterterrorism, a joint venture with the Maxwell School of Citizenship and Public Affairs at Syracuse University. Professor Crane is on the leadership council of the American Bar Association's International Law Section and serves as a co-chair on the section's International Criminal Court Task Force. In 2006, he worked with a dedicated group of students to found *Impunity Watch* (www.ImpunityWatch.com) a law review and public service blog, with the official launch of the journal in October 2007.

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Lost in Transmission: Rule of Law Challenges in the Philippines

By: Dante Gatmaytan

Lost in Transmission: Rule of Law Challenges in the Philippines

Dante Gatmaytan

Abstract

Philippine President Rodrigo Duterte's war on drug users and dealers has led to thousands of deaths. The international community has condemned this war, yet Duterte's popularity at home has never wavered. A majority of Filipinos continue to support both Duterte and his anti-drug war.

This support raises questions about Filipinos' commitment to constitutionalism and, more specifically, the relevant rules of law. A majority of Filipinos ignore blatant human rights violations and blindly support departures from constitutional structures. This is surprising considering the United States had consciously built the Philippines, a former colony, in its image and likeness.

Filipino indifference or acquiescence to executive acts that violate the Constitution is the product of Philippine colonization. Filipinos do not demonstrate the same reverence towards constitutional values as Americans do. The Duterte Administration violates constitutional structures easily because these concepts were grafted onto indigenous concepts of law and justice. I argue that the transfer of constitutional ideas in the context of colonization inevitably leads to constitutional disintegration. By refusing to implement the Constitution, Duterte adds a second way constitutional disintegration happens in the Philippines.

The developments in the Philippines show that it is difficult for constitutional values to be transmitted effectively in that area. Whether done through colonization, or more recent "rule-of-law projects" by the international community or aid agencies, these efforts fail if they are not tailored to the local system. They cannot be completely and seamlessly incorporated because the incongruent histories of colonizers and colonies cast different meanings on these constitutional values. Therefore, former colonies are rarely able to live up to the standards that are set in their Constitutions.

Lost in Transmission: Rule of Law Challenges in the Philippines

*Dante Gatmaytan**

1. Introduction

Philippine President Rodrigo Duterte's year-old administration has waged a brutal war on drug users and dealers that has led to thousands of deaths. According to the Philippine National Police (PNP), the death toll in the "war on drugs" has reached 3,451.¹ The PNP, however, did not release an official tally of drug-related deaths outside police operations.² Human Rights Watch believes that the total deaths equates to at least 7,000 people; those numbers include suspected drug users and dealers, including killings by police and vigilante killings.³ Duterte urges citizens and the police to conduct extra-judicial killings of suspects,⁴ and has said that the war would continue until the end of his term in 2022.⁵

* Professor, University of the Philippines, College of Law. The author wishes to thank Yanna Perez, Marianne Vitug, and Marcella Karaan for their research assistance, and Brian Dennis Tiojanco for his comments and suggestions.

¹ *#RealNumbersPH Update*, PHILIPPINE NAT'L POLICE (July 26, 2017), http://pnp.gov.ph/images/2017News/realnumbers/rn_731.pdf.

² Jodesz Gavilan, *CHR: Death toll in drug war higher than what gov't suggests*, RAPPLER (Aug. 19, 2017, 9:10 AM), <https://www.rappler.com/nation/179222-chr-number-drug-war-victims>.

³ *Philippines: Duterte's First Year a Human Rights Calamity*, HUM. RTS. WATCH (June 28, 2017, 8:00 AM), <https://www.hrw.org/news/2017/06/28/philippines-dutertes-first-year-human-rights-calamity>.

⁴ *Profile: Duterte the controversial 'strongman' of the Philippines*, BBC NEWS (Oct. 4, 2016), <http://www.bbc.com/news/world-36659258>.

⁵ Conor Gaffey, *Philippine President Rodrigo Duterte Suspends Drugs War to 'Cleanse Corrupt Police'*, NEWSWEEK (Jan. 30, 2017, 4:50 AM), <http://europe.newsweek.com/philippines-suspends-drugs-war-cleanse-corrupt-police-549938?rm=eu>.

Duterte remains popular in the Philippines.⁶ This popularity raises questions about Filipinos' commitment to constitutionalism⁷ and the rule of law.⁸ Filipinos were reared under a legal system largely based on the U.S. model, yet ironically, ignore blatant violations of human rights. They applaud when the President challenges any constitutional check on his actions.

I argued elsewhere that Filipino indifference and/or acquiescence to executive acts that violate the Constitution is the product of Philippine colonization.⁹ With a history so different from the colonizers, Filipinos demonstrate less reverence towards constitutionalism than Americans do. The Duterte Administration violates constitutional structures easily because these concepts were grafted onto indigenous notions of law and justice. I argue that the transfer of constitutional ideas in the context of colonization inevitably leads to “constitutional deconsecration”.

I also argued that constitutional deconsecration in the Philippines occurs because President Duterte refuses to recognize the constitutional order, including the separation of powers and any check on the President's use of authority. He treats the existing system of checks and balances as

⁶ Helen Flores, *Rody gets record-high satisfaction rating - SWS*, THE PHILIPPINE STAR (July 7, 2017, 4:00 PM), <http://www.philstar.com/headlines/2017/07/08/1717491/rody-gets-record-high-satisfaction-rating-sws>.

⁷ Constitutionalism, as I use it here, imposes limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights. See Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 671-676 (2009). See *infra* Part 5.

⁸ I use the social justice approach of “rule of law,” which defines the rule of law as “an instrument, a tool or a means to an end.” This approach uses the law as a tool to achieve the particular social or political goals of individual groups regardless of the impact on society as a whole. Arthur H. Garrison, *The Traditions and History of the Meaning of the Rule of Law*, 12 GEO. J. L. & PUB. POL'Y 565, 609-610 (2014).

⁹ Dante B. Gatmaytan, *Constitutional Deconsecration: Enforcing an Imposed Constitution in Duterte's Philippines*, 62 ATENEO L.J. 311-351 (2017) [hereinafter Gatmaytan, *Constitutional Deconsecration*]. Some portions of this earlier work are incorporated in this Article.

borrowed and an impediment to the country's progress.¹⁰ In other words, constitutional deconsecration in the Philippines happens due to resistance to colonization and the refusal of Duterte to follow the Constitution's structures.

I pursue my inquiry here and ask if the rule of law as a constitutional value can be successfully transferred to former colonies, post-conflict, or failed states. I look at precedents and current rule of law efforts to establish that these projects are almost universal failures and these projects need to address cultural issues before they can succeed.

Conversely, I make no excuses for the spate of extra-judicial killings that have taken place since Duterte took office. Filipinos have ring-side seats to one of the most horrific displays of abuse of power. There can never be an excuse for the guilt-by-suspicion approach of the Duterte administration, no matter how flawed the process of constitutional borrowing may have been.

2. The "War on Drugs"

Philippine President Rodrigo Duterte is making international headlines, mostly for a string of killings (more than 8,000 people according to some sources¹¹) of suspected drug users. Duterte is fulfilling a campaign promise to launch a "war on drugs" and to aggressively go after suspected

¹⁰ Kapil Komireddi, *Despite its heavy cost to the poor, Duterte won't stop his war on drugs*, THE NATIONAL (Dec. 28, 2016, 4:00 AM), <http://www.thenational.ae/opinion/comment/despite-its-heavy-cost-to-the-poor-duterte-wont-stop-his-war-on-drugs>.

¹¹ Manuel Mogato, *Philippine drugs war gets complex as Duterte creates new super-agency*, REUTERS (Mar. 10, 2017, 10:33 AM), <http://www.reuters.com/article/us-philippines-drugs-idUSKBN16H1YV>.

drug dealers and users. He promised fast results through harsh punitive measures,¹² threatened to disband Congress, tame the courts, and ignore Human Rights advocates if they stood in his way.¹³

Duterte eggs the police on, gives inflammatory speeches that call for the slaughter of drug-dealers, and promises to protect officers who kill suspects.¹⁴

On average, around thirty people are killed every day in the first 167 days of the President's crackdown on crime.¹⁵ Of the small percentage of incidents that were investigated a majority of these killings appear to have been extrajudicial executions or, "unlawful and deliberate killings carried out by government order or with its complicity or acquiescence."¹⁶ Human Rights Watch claims "Duterte's repeated calls for killings as part of his anti-drug campaign could constitute acts instigating law enforcement to commit the crime of murder. His statements encouraging vigilantes among the general population to commit violence against suspected drug users could constitute incitement to violence."¹⁷ The International Narcotics Control Board reported that extrajudicial

¹² Julio C. Teehankee & Mark R. Thompson, *Electing A Strongman*, 27 J. DEMOCRACY 125, 127 (2016). On Benigno Aquino's reformism, see generally Mark R. Thompson, *Populism and the Revival of Reform: Competing Political Narratives in the Philippines*, 32 CONTEMP. SOUTHEAST ASIA 1 (Apr. 2010) [hereinafter Thompson, *Populism and the Revival of Reform*].

¹³ Teehankee & Thompson, *supra* note 12, at 127.

¹⁴ *The president of the Philippines admits his war on drugs has been dirty*, THE ECONOMIST (Feb. 4, 2017), <http://www.economist.com/news/asia/21716061-drug-squad-officers-are-implicated-kidnapping-extortion-and-murder-president?fsrc=scn/fb/te/bl/ed/the-president-of-the-philippines-admits-his-war-on-drugs-has-been-dirty>.

¹⁵ Cecille Suerte Felipe, *30 people killed daily in 167 days under Duterte*, THE PHILIPPINE STAR (Dec. 15, 2016, 12:00 AM), <http://www.philstar.com/headlines/2016/12/15/1653666/30-people-killed-daily-167-days-under-duterte>.

¹⁶ *Philippines: "If You are Poor, You are Killed": Extrajudicial Killings in the Philippines' "War on Drugs"*, AMNESTY INT'L 6 (Jan. 31, 2017), <https://www.amnesty.org/en/documents/asa35/5517/2017/en/>.

¹⁷ Peter Bouckaert, *"License to Kill": Philippine Police Killings in Duterte's "War on Drugs"*, HUM. RTS. WATCH (Mar. 2, 2017), <https://www.hrw.org/report/2017/03/01/license-kill/philippine-police-killings-dutertes-war-drugs>.

action “is fundamentally contrary to the provisions and objectives of the three international drug control conventions, under which all actions must be undertaken within the due process of law.”¹⁸

The victims of these shootings are poor and many were suspected drug users, not dealers. Almost all of the victims were either unemployed or worked menial jobs and lived in slum neighborhoods or informal settlements.¹⁹

Fifty-four incidents involving the death of children have been recorded from July 2016 to August 2017,²⁰ but Duterte dismisses these deaths as “collateral damage.”²¹ Duterte claims responsibility for every death in his war.²²

Popular

Duterte enjoys public support. A week after taking office, surveys showed that Duterte enjoyed a ninety-one percent trust rating.²³ The Social Weather Stations (SWS) reported that the government received the highest approval for its war on drugs and the promotion of human rights,

¹⁸ U.N. INT’L NARCOTICS CONTROL BOARD, REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2016, at 73, U.N. DOC. E/INCB/2016/1, U.N. Sales No. E.17.XI.1 (2017).

¹⁹ Bouckaert, *supra* note 17.

²⁰ *Isolated? Kian is 54th minor killed in drug war, says children’s rights group*, ABS-CBN NEWS (Sept. 4, 2017, 2:56 PM), <http://news.abs-cbn.com/news/09/04/17/isolated-kian-is-54th-minor-killed-in-drug-war-says-childrens-rights-group>.

²¹ Brennan Weiss, *Children and Duterte’s drug war: Lessons from the past*, ALJAZEERA (Feb. 17, 2017), <http://www.aljazeera.com/indepth/features/2017/02/children-duterte-drug-war-lessons-170216121942335.html>.

²² Ed Margareth Barahan, *Duterte tells Church, HRW he’s responsible for war on drugs*, PHILIPPINE DAILY INQUIRER (Mar. 4, 2017, 11:59 AM), <http://newsinfo.inquirer.net/877391/duterte-tells-church-hrw-hes-responsible-for-war-on-drugs>.

²³ Rishi Iyengar, *Inside Philippine President Rodrigo Duterte’s War on Drugs*, TIME (Sept. 15, 2016), <http://time.com/4495896/philippine-president-rodrigo-duterte/>.

in a survey conducted nearly a hundred days after Duterte took office.²⁴ His approval ratings cut across economic classes.²⁵

Pew Research Center's 2017 survey found that Duterte is well-liked domestically and his policies, including his approach to the war on drugs, are generally popular among Filipinos. The same report found that eighty-six percent of Filipinos hold a favorable opinion of Duterte, with forty-one percent holding a very favorable opinion of the President. Only twelve percent of Filipinos have an unfavorable view of Duterte.²⁶

Duterte also enjoys institutional support. The Senate silences dissent by controlling leadership in key committees. For example, the Senate jailed a Senator who had the temerity to investigate the war on drugs. Congress²⁷ and the Supreme Court²⁸ refuse to check the President's use of emergency powers. The Supreme Court has also ruled against the minority positions in the House of Representatives.²⁹

²⁴ Eimor P. Santos, *Gov't bags 'very good' SWS satisfaction rating: Drug war 'excellent,' 'very good' in human rights*, CNN PHIL. (Nov. 17, 2016, 14:23 PM), <http://cnnphilippines.com/news/2016/11/17/SWS-satisfaction-rating-Duterte.html>.

²⁵ The National Administration's initial net rating was *very good* in all economic classes. *See Third Quarter 2016 Social Weather Survey: Initial net satisfaction rating of the Duterte National Administration is a "Very Good" +66*, SOC. WEATHER STATIONS (Nov. 19, 2016, 11:12 AM), <http://www.sws.org.ph/swsmain/artcldisppage/?artcsyscode=ART-20161117111243>.

²⁶ Jacob Poushter & Caldwell Bishop, *People in the Philippines Still Favor U.S. Over China, but Gap Is Narrowing*, PEW RES. CTR. 1, 5 (Sept. 21, 2017), http://assets.pewresearch.org/wp-content/uploads/sites/2/2017/09/201711150/Pew-Research-Center_Philippines-Report_2017.09.21.pdf.

²⁷ Padilla v. Congress of the Philippines, G.R. No. 231671 (S.C., July 25, 2017) (Phil.).

²⁸ Lagman v. Medialdea, G.R. No. 231658 (S.C., July 4, 2017) (Phil.).

²⁹ Baguilat v. Alvarez, G.R. No. 227757 (S.C., July 25, 2017) (Phil.).

3. The President

Populist

In the 2016 elections, Duterte received more than 16.6 million votes, which was approximately 6.6 million more than his closest rival.³⁰ Duterte's received votes also equated to about thirty-nine percent of the votes.³¹

Duterte tapped into anxieties about criminality, rampant smuggling, incompetence, and government corruption of those who were only slightly better off after a couple of decades of solid growth.³² Duterte won because he promised change and did not campaign like a traditional politician; he made himself appear like a “game changer” who does not care about public relations.”³³

Duterte's personality and style of governance was shaped by the bloody democratic transition in Mindanao, the country's conflict-torn southernmost island.³⁴ As mayor of Davao City, Duterte dealt with death squads battling with various criminals, and the communist New People's Army. He sees human rights as a hindrance and “prefers instead the force of his personality

³⁰ *Rodrigo Duterte Wins Philippine Presidency in Official Count*, THE WALL STREET J. (May 27, 2016, 2:20 PM), <https://www.wsj.com/articles/rodrigo-duterte-wins-philippine-presidency-in-official-count-1464373202>.

³¹ Richard C. Paddock & Floyd Whaley, *Rodrigo Duterte's Rivals Concede in Philippine Election*, N.Y. TIMES (May 10, 2016), <https://www.nytimes.com/2016/05/11/world/asia/philippines-election-rodrigo-duterte-president.html>.

³² Julio C. Teehankee, *Weak State, Strong Presidents: Situating the Duterte Presidency in Philippine Political Time*, 32 J. DEVELOPING SOCIETIES 293, 306 (July 18, 2016).

³³ Alexis Romero, *Why Duterte won despite himself*, PHILIPPINE STAR (June 29, 2016, 11:43 AM), <http://www.philstar.com/news-feature/2016/06/29/1597834/why-duterte-won-despite-himself>.

³⁴ Sheila Coronel, *'I Will Kill All the Drug Lords': The making of Rodrigo Duterte*, THE ATLANTIC (Sept. 20, 2016), <http://www.theatlantic.com/international/archive/2016/09/rodrigo-duterte-philippines-manila-drugs-davao/500756/>.

articulated through extrajudicial methods that have defined his experience with politics.”³⁵ Duterte takes public criticism personally and sees no reason to provide a rational defense for his actions. Instead, he unleashes an irrational torrent of abuse meant to reduce his critics to silence or death.³⁶

Thompson describes Duterte as an illiberal populist who changed the prevailing liberal reformist political order into an illiberal one. His methods included a new law and order script, new key strategic groups – the communist left and the police – and the removal of liberal constraints, particularly in Congress and the Supreme Court. Duterte, Thompson writes, constructed a strongman political model at the local level before “nationalising” it after his election as president.³⁷

Duterte mobilised a mass constituency through the media with radical rhetoric portraying the elite as coddlers of drug dealers and addicts. Duterte focused his campaign on a specific group deemed sub-human and worthy of extermination: drug dealers and users. Duterte considers drug addicts “beyond redemption” because “once you’re addicted to [crystal meth], rehabilitation is no longer a viable option.” In Duterte’s “war on drugs,” suspects die in “encounters” with police, are shot by motorcycle-riding vigilante gunmen, or are killed by trained and unofficial police death squads. The guilt of victims is assumed without proof, investigation, or question. “The thousands of extrajudicial killings during Duterte’s first few months in office and his denunciations of the

³⁵ Vicente L. Rafael, *Duterte, war maker*, PHILIPPINE DAILY INQUIRER (Nov. 12, 2016, 12:08 AM), <http://opinion.inquirer.net/99159/duterte-war-maker>.

³⁶ *Id.*

³⁷ Mark R. Thompson, *Bloodied Democracy: Duterte and the Death of Liberal Reformism in the Philippines*, 35 J. CURRENT SOUTHEAST ASIAN AFF. 39, 42 (Jan. 2016) [hereinafter Thompson, *Bloodied Democracy*].

United Nations, Western countries, and human rights groups, both international and domestic, that dared to criticize his violent drug crackdown signal a more virulent form of populism.”³⁸

Dutertismo

Political theorists define the logic underpinning populism as the construction of an antagonism between “the people” and “the dangerous other.” Some populists distinguish the people from corrupt elites, while others denounce immigrants and refugees for undermining the West’s way of life.³⁹ Duterte used “penal populism” to pit virtuous citizens against hardened criminals who are beyond redemption.⁴⁰ Duterte’s appeal lies in his promise to overcome the corrupt bureaucracy in the justice system and deliver peace and order in a swift and decisive manner.⁴¹ Duterte’s anti-crime message resonated because it was supported by his undisputed record of performance in addressing such a concern.⁴²

Duterte is popular because he sent a clear message about who can be killed: drug lords, habitual criminals (preferably males), and drug addicts who currently partake or who repeatedly went into rehabilitation. The State, in Duterte’s words, is wasting resources for their

³⁸ Thompson, *Bloodied Democracy*, *supra* note 37, at 50-51.

³⁹ Nicole Curato, *Politics of Anxiety, Politics of Hope: Penal Populism and Duterte’s Rise to Power*, 35 J. CURRENT SOUTHEAST ASIAN AFF., 91, 94 (2016) [hereinafter Curato, *Penal Populism*].

⁴⁰ *Id.* at 94.

⁴¹ *Id.* Populists also point to the “dangerous others” who threaten the people, such as special interests groups. Populists on the left tend to point to the danger of large economic corporations and financial interests. However, these broad distinctions do not always hold. The current radical and populist right also oppose international corporate interests and globalization, a discourse that is more common to the left. Populists on the right, on the other hand, tend to scapegoat minority groups, such as immigrants, the unemployed, environmentalists, and feminists. *See also* Andrej Zaslove, *Here to Stay? Populism as a New Party Type*, 16 EUR. REV. 319, 323 (July 2008).

⁴² Ronald D. Holmes, *The Dark Side of Electoralism: Opinion Polls and Voting in the 2016 Philippine Presidential Election*, 35 J. CURRENT SOUTHEAST ASIAN AFF. 15, 33 (2016).

rehabilitation.⁴³ Killing criminals promises personal safety, public safety, and law and order, which is very appealing to citizens who experience insecurity in their daily lives. Duterte's reputation of actively targeting criminals and his track record in Davao of being able to deliver on his political promises boosted his popularity and that of those who followed him.⁴⁴

Populism is an effective narrative in the Philippines used by former President Joseph Estrada when he ran for Senator (1987), Vice-President (1992), and President (1998).⁴⁵ The populists emphasize popular sovereignty and "rely on media-based appeals more than clientelist ties."⁴⁶ Following in similar practices of past populists, Duterte launched an anti-elitist campaign, despite being part of the elite himself.⁴⁷

Sociologist Randy David coined the term "Dutertismo", pointing out that during the campaign for the presidency, Duterte ducked details and promised just one thing: "the will and leadership to do what needs to be done—to the point of killing and putting one's own life on the line."⁴⁸ David described his style as "a sensual experience rather than the rational application of ideas to society's problems."

David also defines "Dutertismo" as "the Filipino incarnation of a style of governance enabled by the public's faith in the capacity of a tough-talking, wilful, and unorthodox leader to

⁴³ Danilo Andres Reyes, *The Spectacle of Violence in Duterte's "War on Drugs"*, 35 J. CURRENT SOUTHEAST ASIAN AFF. 111, 118-119 (2016).

⁴⁴ *Id.*

⁴⁵ See discussion in Mark R. Thompson, *Reformism vs. Populism in the Philippines*, 21 J. DEMOCRACY 154, 158 (Oct. 2010) [hereinafter Thompson, *Reformism v. Populism*].

⁴⁶ *Id.* Populism involves media-carried promises to help the common people at the expense of the elite. Clientelism harvests votes through material incentives or violent threats in their bailiwicks. See also Thompson, *Populism and Revival of Reform*, *supra* note 12, at 7.

⁴⁷ Thompson, *Populism and Revival of Reform*, *supra* note 12, at 2.

⁴⁸ Randy David, 'Dutertismo', PHILIPPINE DAILY INQUIRER (May 1, 2016, 12:06 AM), <http://opinion.inquirer.net/94530/dutertismo> [hereinafter David, *Dutertismo*].

carry out drastic actions to solve the nation's persistent problems." He adds that Filipinos trust "almost exclusively in the instinctive wisdom of the leader to determine what needs to be done, the public is concerned less with the rationality of policy decisions than with the leader's manifest readiness to take full responsibility for all his decisions."⁴⁹

Duterte used illegal drug use to set himself apart from other candidates who painted a near-rosy picture of the economy that only needed to be tended with reform.⁵⁰ His foul language is an integral part of the populist appeal. Invoking the discourse of crisis requires a new language characterized by frankness and sensational language.⁵¹ "His language and coarse demeanor allows him to come across—to his admirers—as an endearing rogue who articulates without fear their own resentments and fantasies."⁵²

Duterte's image challenged the high-class backgrounds of both President Aquino and Aquino's chosen candidate, Mar Roxas. Duterte flaunted his crudeness as a mark of his maleness, boasting of his womanizing by claiming that he wished he had raped an Australian missionary, and after the election catcalled a female reporter at a press conference.⁵³

4. Disparaging the Constitution

President Duterte's personality and style of governance may have contributed significantly to his election. It is unclear how this following is sustained *after* the President demonstrated his

⁴⁹ Randy David, *Where is 'Dutertismo' Headed?*, PHILIPPINE DAILY INQUIRER (Dec. 17, 2017, 5:10 AM), <http://opinion.inquirer.net/109531/where-is-dutertismo-headed>.

⁵⁰ Nicole Curato, *Flirting with Authoritarian Fantasies? Rodrigo Duterte and the New Terms of Philippine Populism*, 47 J. CONTEMP. ASIA 142, 142 (Oct. 2016) [hereinafter Curato, *Flirting with Authoritarian Fantasies*].

⁵¹ *Id.*

⁵² Randy David, *The political outsider*, PHILIPPINE DAILY INQUIRER (Apr. 24, 2016, 12:17 AM), <http://opinion.inquirer.net/94430/the-political-outsider>.

⁵³ Duncan McCargo, *Duterte's Mediated Populism*, 38 CONTEMP. SOUTHEAST ASIA, 185, 188 (Aug. 2016).

contempt for the rule of law, the separation of powers, and checks and balances which make up the basic structure of Philippine legal system.

Duterte cites his training as a lawyer and a former prosecutor as proof that he knows the limits of the power and authority of the president. He claims, “I know what is legal and what is not.”⁵⁴ However, almost everything Duterte said during the presidential campaign and after he assumed the presidency smacks of illegality or unconstitutionality.⁵⁵

Duterte, for example, compared his campaign to kill criminals to the Holocaust, saying he would like to “slaughter” millions of addicts just like Adolf Hitler “massacred” millions of Jewish people.⁵⁶ Duterte threatens to kill human rights activists⁵⁷ and lawyers who defend suspects in the drug trade.⁵⁸ He threatened to shoot members of the Commission on Human Rights if they intervened in anti-drug campaigns.⁵⁹ He also claims that human rights is always the anti-thesis of government.⁶⁰

⁵⁴ *FULL TEXT: President Rodrigo Duterte inauguration speech*, INQUIRER.NET (June 30, 2016, 1:20 PM), <http://newsinfo.inquirer.net/793344/full-text-president-rodrigo-duterte-inauguration-speech>.

⁵⁵ See Gatmaytan, *Constitutional Deconsecration*, *supra* note 9.

⁵⁶ Emily Rauhala, *Duterte: Hitler killed millions of Jews, I will kill millions of drug addicts*, THE WASH. POST (Sept. 30, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/09/29/duterte-hitler-killed-3-million-jews-i-will-kill-3-million-drug-dealers/?utm_term=.e6ec2217f7c1.

⁵⁷ Marlon Ramos, *Duterte threatens rights activists*, PHILIPPINE DAILY INQUIRER (Nov. 30, 2016, 12:02 AM), <http://newsinfo.inquirer.net/849192/duterte-threatens-rights-activists>.

⁵⁸ Marlon Ramos, *Duterte warns drug lords' lawyers*, PHILIPPINE DAILY INQUIRER (Dec. 9, 2016, 2:00 AM), <http://newsinfo.inquirer.net/852028/duterte-warns-drug-lords-lawyers>.

⁵⁹ Audrey Morallo, *Duterte: Shoot CHR personnel if they obstruct justice*, THE PHILIPPINE STAR (Aug. 17, 2017, 1:16 AM), <http://www.philstar.com/headlines/2017/08/17/1729880/duterte-shoot-chr-personnel-if-they-obstruct-justice>.

⁶⁰ Dharel Placido, *Duterte: Human rights is 'anti-thesis' of government*, ABS-CBN NEWS (Sept. 30, 2016), <http://news.abs-cbn.com/news/09/30/16/duterte-human-rights-is-anti-thesis-of-government>.

His statements on his interpretation of the law are chilling. On one occasion, he said, "...if I use the contemporary rules, Constitution, I really can't do it. Because you want to kill them all (but) you will not have enough time."⁶¹ He articulated perhaps the most terrifying explanation for his theory of governance:

"We in government are admonished to follow the rule of law and that is what makes it hard, because you follow the rule of law, sometimes it could lead to perdition for people," said Duterte. He then said the Filipino people face a tough decision that may require "innovation" of the law. "I would like to follow the rule of law. It is rules which make up the law. But when shabu⁶² was coming in, strong and fast, we had to make a choice. We innovate the law, the rule of law or we let our people suffer. That's the choice," he said.⁶³

The Constitution, in the President's eyes, can be set aside if exigencies require it. The rule of law itself can be disregarded. Duterte does not care that the rule of law "is a major source of legitimation for governments in the modern world" and that "a government that abides by the rule of law is seen as good and worthy of respect."⁶⁴ Testimonials for the rule of law come from governing officials of various kinds of economic, cultural, political and religious systems and societies. Everyone agrees that governments should be adjudged by their adherence to the rule of

⁶¹ Janvic Mateo & Christina Mendez, *Duterte: So many to kill, so little time*, THE PHILIPPINE STAR (Nov. 12, 2016, 12:00 AM), <http://www.philstar.com/headlines/2016/11/12/1642968/duterte-so-many-kill-so-little-time>.

⁶² Shabu is an amphetamine derivative used in the form of a crystalline hydrochloride. It is used as a stimulant to the nervous system and as an appetite suppressant. *See Shabu*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/shabu> (last visited Mar. 3, 2018).

⁶³ Pia Ranada, *Duterte: Leaders need to do 'wrong' to protect people*, RAPPLER (Nov. 14, 2016, 5:30 PM), <http://www.rappler.com/nation/152342-duterte-do-wrong-protect-people>.

⁶⁴ Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SING. J. LEGAL STUD. 232, 232 (2012).

law many believing that it is a fundamental component of any successful recipe for political and economic stability and progress, as well as a standard by which to evaluate government legitimacy.⁶⁵ Everyone except Duterte.

Dutertismo has lead to a deterioration of the rule of law. The Philippines' ranking in Rule of Law dropped 18 places from 70 in 2016⁶⁶ to 88 in 2017-2018.⁶⁷ The country's score on "fundamental rights" including observance of due process was 83rd out of 113 countries in 2016,⁶⁸ and it dropped to 99th the following year.⁶⁹ The Philippines recently failed to meet the Millennium Challenge Corporation's (MCC) standards on rule of law and curbing corruption, which will be used as basis for giving grants to the Philippines.⁷⁰ The country received a score of 0 for control of corruption, and -0.01 for rule of law in the MCC scorecard.⁷¹ The Philippines is is the country with the highest impunity index (75.60).

⁶⁵ Brian Z. Tamanaha, *The Rule of Law for Everyone?*, 55 CURRENT LEGAL PROBLEMS 97, 100 (2002).

⁶⁶ World Justice Project, *WJP Rule of Law Index 2016*, https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (last visited Mar. 6, 2018) [hereinafter WJP Rule of Law Index 2016].

⁶⁷ World Justice Project, *WJP Rule of Law Index 2017-2018*, https://worldjusticeproject.org/sites/default/files/documents/WJP_ROLI_2017-18_Online-Edition_0.pdf (last visited Mar. 6, 2018) [hereinafter WJP Rule of Law Index 2017-2018].

⁶⁸ WJP Rule of Law Index 2016, *supra* note 67, at 125.

⁶⁹ WJP Rule of Law Index 2017-2018, *supra* note 68, at 120.

⁷⁰ Eimor P. Santos, *PH fails on rule of law, curbing corruption in U.S. group scorecard for aid*, CNN PHIL. (Nov. 4, 2017, 19:24 PM), <http://cnnphilippines.com/news/2017/11/04/Philippines-U.S.-aid-rule-of-law-corruption.html>.

⁷¹ Millenium Change Corporation, *Country Scorecard: Philippines FY18*, <https://www.mcc.gov/who-we-fund/scorecard/fy-2018/PH> (last visited Mar. 7, 2018). In response, the Duterte Administration announced that the Philippines chose to cancel the country's application to the MCC ostensibly to focus attention on the rehabilitation of conflict ruined areas. *See also* Philippine Daily Inquirer, *Marawi rehab needs P51.65B, OCD study says*, <http://newsinfo.inquirer.net/970970/marawi-rehab-needs-p51-65b-oed-study-says> (Feb. 24, 2018, 7:19 AM).

5. Constitutionalism and the Rule of Law

The carnage in the Philippines raises questions on Filipinos' understanding of constitutionalism.⁷² “Constitutionalism is defined as a ‘determination to bring...government under control and to place limits on the exercise of its power.’ ”⁷³

The modern concept of constitutionalism has two themes. The first is the existence of certain limitations imposed on the state, particularly in its relations with citizens, based on a clearly defined set of core values. The second is the existence of a clearly defined mechanism for ensuring that the limitations on the government can be legally enforced. The government that exceeds its limitations, in other words, should be held accountable.⁷⁴ Under constitutionalism, citizens must have a right to political participation, and their government must be controlled by substantive limits on what it can do.⁷⁵ It is also defined as:

[A] sufficiently shared willingness to use law rather than force to resolve disagreements; to limit government power and to protect human rights through law and defined processes; to provide a reasonable degree of predictability and stability of law that people may rely on as they structure their lives; and to

⁷² See generally Dante B. Gatmaytan, *Can Constitutionalism Constrain Constitutional Change?*, 3 NW. INTERDISCIPLINARY L. REV. 22, 30-33 (Jan. 2010) (discussing the definition of constitutionalism, the concept of the term, and its applications).

⁷³ Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1434 (June 2008).

⁷⁴ Charles M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from South Africa*, 55 AM. J. COMP. L. 1, 7 (2007).

⁷⁵ Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3 (Douglas Greenberg et al. eds., 1993).

maintain a government that is legitimate and effective enough to maintain order, promote the public good, and control private violence and exploitation.⁷⁶

The scholarship on constitutionalism continues to grow as scholars examine the concept from a variety of perspectives. Constitutionalism is said to have features,⁷⁷ components,⁷⁸ core elements,⁷⁹ and basic postulates.⁸⁰

Constitutionalism restricts the range of choices available to governing majorities.⁸¹ This is why constitutionalism is said to be in tension with democracy. In fact, the existence of democracy, certain democratic values, or institutions within a country does not necessarily indicate that there

⁷⁶ Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-making*, 49 WM. & MARY L. REV. 1249, 1254 (Mar. 2008).

⁷⁷ The features are: a) the supremacy principle—that the government itself should be subjected to the governance of law; b) the limited government principle—that requires institutional mechanisms both limiting the arbitrary exercise of state power and recognizing individual rights and freedoms; and c) the entrenchment principle—the constitutional limitations on state power cannot be subject to change by recourse to routine political processes. John J. Worley, *Deliberative Constitutionalism*, 2009 BYU L. REV. 431, 436-439 (Mar. 2009).

⁷⁸ The components are: a) commitment to the rule of law—a generally observed disposition to exercise public power pursuant to publicly known rules; b) a reasonably independent judiciary; and c) open elections, which are reasonably regular and free, with a reasonably widespread franchise. Mark Tushnet, *Comparative Constitutional Law*, THE OXFORD HANDBOOK COMP. L. 1226, 1230 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

⁷⁹ These core elements are: a) the recognition and protection of fundamental rights and freedoms; b) the separation of powers; c) an independent judiciary; d) the review of the constitutionality of laws; and e) the control of the amendment of the constitution. Fombad, *supra* note 75, at 7-8.

⁸⁰ Constitutionalism is said to have the following five basic postulates: (1) a system of classification, (2) the core object of which is to define the characteristics of constitutions (those documents organizing political power within an institutional apparatus), (3) to be used to determine the legitimacy of the constitutional system as conceived or as implemented, (4) based on rule of law as the fundamental postulate of government (that government be established and operated in a way that limits the ability of individuals to use government power for personal welfare maximizing ends), and (5) grounded on a metric of substantive values derived from a source beyond the control of any individual. These postulates separate constitutionalist systems from perversions of legitimate government such as tyranny, oligarchy, and mob rule. Backer, *supra* note 7, at 679.

⁸¹ Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861, 1861 (2004).

is constitutionalism. “There are however many situations where democracy can be used to subvert constitutionalism.”⁸² The ideology of constitutionalism to resist change also places it at odds with democracy. In this view, constitutional change is permitted to correct some historical mistakes, but a constitution’s “fundamental principles and the governmental structures it creates should be more or less immutable and placed beyond the scope of democratic politics.”⁸³

Constitutionalism is also defined as the widespread adherence to the democratic rules and norms contained in the constitution, and other basic laws governing political life. Constitutionalism is a generally accepted requirement for democratic consolidation because a government and state apparatus that acts within the constraints of law would allow citizens to exercise their political rights, hindering democratic development.⁸⁴

The literature shows that constitutionalism constitutes as a restraint on government action. By any metric, Duterte’s approach to the drug problem in the Philippines falls short of the requirements of constitutionalism. His contempt for the separation of powers, constitutional checks, and due process all go against the idea of constitutionalism.

Constitutionalism is inextricably entwined with the “rule of law”. In fact, the Rule of Law has become very close to becoming the ideal universal secular religion and a worthy ambition to strive for.⁸⁵ However, gauging whether a State observes the rule of law is a difficult task.

There is a conceptual anarchy among development theorists, experts, and donor agencies surrounding the very meaning of the expression “rule of law.” “Indeed, one fundamental problem

⁸² Fombad, *supra* note 75, at 9.

⁸³ Joel I. Colón-Ríos, *De-Constitutionalizing Democracy*, 47 CALIF. W. L. REV. 41, 46 (2011).

⁸⁴ Susan Alberts, *How Constitutions Constrain*, 41 COMP. POL. 127, 127 (Jan. 2009).

⁸⁵ Tara Smith, *Neutrality Isn’t Neutral: On the Value-Neutrality of the Rule of Law*, 4 WASH. U. JURIS. REV. 49, 50 (2011).

with measuring the success of rule-of-law reform initiatives is that the parties assessing them may have something quite different in mind to those implementing them.”⁸⁶ The rule of law, for example, is considered the common element that development experts, security analysts, and human rights activists agree upon. “Constitution making is also seen as a cornerstone of rule of law activities in post-conflict settings.”⁸⁷

There is a consensus that a State’s failure, or failure of the government, is the root of most issues found in security, development, and human rights. This consensus has in turn led to a focus on the rule of law as a way of rebuilding or strengthening the State. But using the rule of law as a way to build up states will not resolve the tensions between the disparate agendas of development, security, and human rights themselves. Effective governance of any society cannot rest on any basis other than law. However, the term “rule of law” has different meanings depending on the international policy agenda in which it is invoked.⁸⁸

Rule of law will not fit seamlessly in another state. The achievement of the “rule of law” in Western Europe and North America came after wars and revolutions, and they took place over centuries and decades. Some suggest that the “rule of law” is uniquely Western and that it may not be “for export.”⁸⁹ Those hopeful for success in the transmission of the rule of law say that “for both developed and developing countries, the advantages of the rule of law can only be realized

⁸⁶ Thom Ringer, *Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the “Rule of Law” and its Place in Development Theory and Practice*, 10 YALE HUM. RTS. & DEV. L.J. 178, 182 (2007).

⁸⁷ Balakrishnan Rajagopal, *Invoking the Rule of Law in Post-conflict Rebuilding: A Critical Examination*, 49 WM. & MARY L. REV. 1347, 1348 (2008).

⁸⁸ *Id.* at 1375.

⁸⁹ John V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT’L L. & COM. REG. 71, 71-72 (1998).

through changes in procedural, structural, political, and cultural characteristics rather than through mere substantive changes in the law.⁹⁰

6. Colonization

Ignoring the Constitution

There are ways to explain support for Duterte's extra-constitutional acts. In one view, frustration with the government's inability to provide basic security is said to have led to rising public demand for new leaders who would take more action. When people feel unprotected from crime, the threat makes them support vigilante justice, which feels like the best option for restoring order and protecting their personal safety.⁹¹ This reasoning was also used to explain why Filipinos acquiesced to Marcos' authoritarian rule.⁹²

Others also point out that the lack of outrage is because we have been conditioned to look away from the carnage in the Philippines. "This genocide is being ignored because, for too long,

⁹⁰ Nadia E. Nedzel, *The Rule of Law: Its History and Meaning in Common Law, Civil Law, and Latin American Judicial Systems*, 10 RICH. J. GLOBAL L. & BUS. 57, 109 (2010).

⁹¹ Amanda Taub, *How Countries Like the Philippines Fall Into Vigilante Violence*, N.Y. TIMES (Sept. 11, 2016), <http://www.nytimes.com/2016/09/12/world/asia/the-philippines-rodrigo-duterte-vigilante-violence.html>.

⁹² This account claims popular support for authoritarian government lay in the promise of efficiency, economic gains, and social reforms that martial law may provide:

[F]ilipinos were not and are not alienated from the concept of democracy. If they were in a mood to tolerate a turn toward authoritarianism it was because of certain bitter experiences with the workings of the system and with politicians who corrupted that system. Filipinos do not tolerate authoritarianism because they are ignorant about democracy, which is the case with many people in neighboring states. The Philippines, for all of its political defects, was more of a democracy than almost any other Third-World country, and Filipinos have paid a real, not a token, political price for whatever benefits—in government efficiency, economic prosperity and social reforms—martial law may provide.

See Peter R. Kann, *The Philippines Without Democracy*, 52 FOREIGN AFF. 612, 614 (1974).

the dehumanization of people who use drugs and calls for their death have been an acceptable part of the ‘drug war.’”⁹³

However valid these observations may be, the Constitution should still prevent the State from engaging in extrajudicial killings. The Bill of Rights should constrict the options available to the State.

Political analyst Richard Heydarian said that “democracy and liberal values in the Philippines are not fully internalized and that the country is still a fledgling democracy.”⁹⁴ The question is why? How much time does the Philippines need to internalize these ideals? Perhaps the question is not *when* it will internalize these ideals but *why* it has not done so.

I suggest that the real reason for Filipino’s lack of fealty towards the rule of law is the absence of a “constitutional moment.”⁹⁵ For example, the American constitutional values were introduced under colonial conditions and could not have transferred American understanding of constitutional values to the new nation.

⁹³ Maia Szalavitz, *Why we ignore thousands of killings in the Philippines: The victims were drug users*, THE WASH. POST (Oct. 6, 2016), https://www.washingtonpost.com/posteverything/wp/2016/10/06/why-we-ignore-thousands-of-killings-in-the-philippines-the-victims-were-drug-users/?tid=ss_fb&utm_term=.0b61935d3e43.

⁹⁴ Nyshka Chandran, *President Duterte’s war on drugs threatens the Philippines’s rule of law*, CNBC ASIA-PACIFIC (Aug. 24, 2016, 12:30 AM), <http://www.cnbc.com/2016/08/24/president-dutertes-war-on-drugs-threatens-the-philippines-rule-of-law.html>.

⁹⁵ Bruce Ackerman has a claim that the theory embodied in the 1787 Constitution is a theory of “dualist democracy,” where institutional structure presupposes a distinction between periods of “normal politics” on the one hand and “constitutional moments,” or periods of higher lawmaking, on the other. See Eben Moglen, *The Incomplete Burckean: Bruce Ackerman’s Foundation for Constitutional History*, 5 YALE J.L. & HUMAN. 531, 532 (2013) (reviewing BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993)).

Colony

Philippine-United States relations began as “a pious endeavour to liberate Cuba from Spanish oppression.” This project propelled the U.S. to oust Spain from the Philippines and crush the Filipino independence movement.⁹⁶ War eventually erupted between the U.S. and the Filipinos, but not before the latter had organized itself and produced a political Constitution known as the Malolos Constitution.⁹⁷ These efforts to establish a Filipino Constitution were crushed as a casualty of the war.

The Americans set themselves the task of training their new subjects to govern themselves in the American democratic manner, often believing that they had a mission of “Americanizing” the Orient.⁹⁸ Confident in their own proven powers and in the superiority of their own form of democratic government, they showed every intention of discarding any form of evolutionary growth, instead relying upon the closest approach practicable to their own governmental system.⁹⁹

American imperial policy was based upon the idea of assimilation, of making “the colonial societies over in the American model”, and there was a tendency to show scant respect for the prevailing culture in any of the new dependencies. The evolutionary approach used by the British in their own colonialism project had no appeal to the American administration in the Philippine

⁹⁶ STANLEY KARNOW, *IN OUR IMAGE: AMERICA’S EMPIRE IN THE PHILIPPINES* 79 (1989). This narrative which claims the United States was unprepared for its role as a colonizer has been challenged by recent scholars. *See* STUART CREIGHTON MILLER, “BENEVOLENT ASSIMILATION”: THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899-1903, at 13-30 (1982). *See also* Owen J. Lynch, *Legal Bases of Philippine Colonial Sovereignty: An Inquiry*, 62 *PHIL L.J.* 279, 294-316 (1987) (discussing the legal bases of American sovereignty over the Philippines).

⁹⁷ CESAR ADIB MAJUL, *THE POLITICAL & CONSTITUTIONAL IDEAS OF THE PHILIPPINE REVOLUTION OF 1896-1898*, 9-10 (1957).

⁹⁸ Howard T. Fry, *The Breakdown of the American Democratic Experiment in the Philippines: An Historical Analysis of a Crisis in Modernization*, 23 *AUSTRALIAN J. POL. & HIST.* 383, 387 (1977).

⁹⁹ *Id.*

Islands, which went ahead with its plans for a political and social revolution intended to culminate in the provision of an American-type democratic system. The Filipinos' own attempts at constitution-making during the period of the Philippine Revolution were condemned by the United States Philippine Commission as violating "so many of the principles laid down by Hamilton and Madison in the *Federalist*."¹⁰⁰

President McKinley's instructions to the second Philippine Commission betrayed an intention to discard evolutionary growth in the framing of a new system of government. These instructions started out by exhorting the commission to "bear in mind that the government which they are establishing is designed . . . for the happiness, peace and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices to the fullest extent compatible with the accomplishment of the indispensable requisites of just and effective government."¹⁰¹ Yet the next sentence showed that the way to a "just and effective government" needed an American-style constitution. The instructions continued:

At the same time the Commission should bear in mind, and the people of the Islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that

¹⁰⁰ Fry, *supra* note 99, at 388-389.

¹⁰¹ *Id.* at 389.

these principles and these rules of government must be established and maintained in the Islands for the sake of their liberty and happiness however much they may conflict with the customs or laws of procedure with which they are familiar.¹⁰²

Under the Tydings-McDuffie Act,¹⁰³ the Philippines would attain independence after a ten-year commonwealth-status. A Constitutional Convention was elected under the terms of the Act,¹⁰⁴ which sat from early in October until the later part of February, when it adopted a draft which was submitted to President Roosevelt for his approval. A preliminary draft was prepared by a subcommittee of nine members between the 9th and 20th of October, and was ultimately adopted by the Convention without any substantial changes. Its contents were derived, both in substance and in form, from the federal and state constitutions of the United States. The plan was for a unitary form of the presidential-congressional structure, with a unicameral legislative assembly having large powers.¹⁰⁵

The constitutional convention was required to submit the draft constitution to the President of the United States, who would determine whether it conformed with the limitations of the Tydings-McDuffie Act. If the President found that the Constitution did not conform with the provisions of the Act, he would advise the Governor General of the Philippine Islands and submit provisions that he believed would address the concerns. The Governor General would then submit such message to the Constitutional Convention for further action until the President and the Constitutional Convention were in agreement.¹⁰⁶

¹⁰² Fry, *supra* note 99, at 389.

¹⁰³ See Philippine Independence (Tydings-McDuffie) Act, Pub. L. No. 73-127, 48 Stat. 456 (1934) [hereinafter Tydings-McDuffie Act].

¹⁰⁴ *Id.* at § 1.

¹⁰⁵ *Id.*

¹⁰⁶ Tydings-McDuffie Act, *supra* note 104, at § 3.

Once the Constitution was signed by President Roosevelt, the statutory steps to nationhood followed. Filipinos ratified the Constitution in a national plebiscite, elections were held, and on November 15, 1935, the Commonwealth of the Philippines was inaugurated with Manuel Quezon as its President.¹⁰⁷

The number of votes that were cast in favor of the adoption of the Constitution were 1,213,934 (96.6%), while 42,690 (3.4%) votes were against the adoption.¹⁰⁸ The number of votes was less than half of those who were qualified to vote and it suggests that the political exercise did not capture the interest of the voters.¹⁰⁹

The drafting and adoption of the 1935 Constitution was done hastily. The Convention began in July of 1934 and had a final draft of the Constitution by February 1935.¹¹⁰ Voter turnout was also low, which makes one wonder how aware or involved the voters were regarding this matter. How could the transmission of constitutional ideas be successfully done under this process?

The Constitution of the Philippines drew its authority from the American Republic, not the Filipino people acting as agents in the exercise of their sovereign prerogatives.¹¹¹ The Convention

¹⁰⁷ Gerald E. Wheeler, *The Movement to Reverse Philippine Independence*, 33 PAC. HIST. REV. 167, 168 (1964).

¹⁰⁸ Conrado Benitez, *The New Philippine Constitution*, 8 PAC. AFF. 428 (1935).

¹⁰⁹ J. S. Reeves, *The Constitution of the Philippines*, 29 AM. J. INT'L L. 476 (1935).

¹¹⁰ *See id.* at 477. On July 10, 1934, 202 delegates were elected by the qualified voters to become part of the Constitutional Convention. The Convention opened on July 30 and Senator Claro M. Recto was elected as President. It proceeded with an organization of committees and the general discussion of constitutional trends and problems. On October 9, a special committee of seven was appointed to draft a Constitution. The final draft was submitted on October 20. On January 31, 1935, the Convention approved the draft as amended in open sessions. A special committee on style completed the revision, and on February 8 the Convention approved the final draft, which was signed by the members on February 19, 1935.

¹¹¹ Emmanuel Pelaez, *Law Reform and the Rule of Law*, 1 PHIL. INT'L. L.J. 441, 444 (1962).

kept within the framework of the terms of the Tydings-McDuffie Act, bound by the wishes of the American people and the U.S. government.¹¹²

Given the circumstances, the infusion of constitutional ideas under the colonial relationship between the United States and the Philippines must have been impaired. The adoption of U.S. legal concepts in the Philippines may be classified as an externally-dictated transplant because it involved “a foreign individual, entity or government that indicates the adoption of a foreign legal model as a condition for doing business or for allowing the dominated country a measure of political autonomy.”¹¹³ This includes transplants “whose acceptance is motivated by a desire to please foreign states, individuals or entities—whether in acquiescence to their demands, or to take advantage of opportunities and enticements that they offer.”¹¹⁴ The model has been described as an “intercolonial transfer.” After displacing Spain as the colonizer, the U.S. chose to cultivate the loyalty of the Spanish-speaking educated elite faction,¹¹⁵ careful not to replace Spanish law in keeping with this “policy of attraction.”¹¹⁶ In any case, the creation of a mixed system has often taken place when a country and its people have lost their political sovereignty, yet refuses to give up the right to keep living in accordance with their own personal or private laws.¹¹⁷

The Philippine case is part of a pattern of decolonization; imperial powers drafted the post-

¹¹² Pelaez, *supra* note 112.

¹¹³ Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 847 (2003).

¹¹⁴ *Id.*

¹¹⁵ VERNON VALENTINE PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 27 (Vernon Valentine Palmer ed., 2nd ed. 2001) [hereinafter *Mixed Jurisdictions Worldwide*].

¹¹⁶ *Id.* at 29.

¹¹⁷ Vernon Valentine Palmer, *Mixed Legal Systems—The Origin of the Species*, 28 TUL. EUR. & CIV. L.F. 103, 116 (2013). Legal hybrids are those countries or political entities that have a presence of substantial common and civil law elements in their legal system; or those countries where we expect to find—in addition certainly to other mixed elements, that common law and civil law constitute the basic building blocks of the legal edifice. See Kensie Kim, *Mixed Systems in Legal Origins Analysis*, 83 SO. CAL. L. REV. 693, 705 (2010).

independence constitutions of colonies as part of the process of decolonization. Colonizers would design the institutional and legal architecture of another political community without its consent. The Constitution was presented as a finished product with local participation to ensure the acquiescence of local elites, but the fundamental questions of constitutional choice safely remained in foreign hands, thus removing any meaningful, substantive decision-making power from the local population.¹¹⁸

Context

The transfer of constitutional ideas could not have been easy. The Philippines was a Spanish colony for over three centuries. The U.S. was seeking to implant the common law system in a country where the civil law system and indigenous legal systems were operating.

The introduction of new legal systems into societies with existing systems is a widely used tactic that poses important theoretical problems. Sometimes called legal transplantation or the imposition of law, the process came about during nineteenth-century colonialism. It radically reshaped and pluralized the law of much of Africa, Asia, and the Pacific. Colonial officials typically eliminated customs they considered repugnant, such as polygamy, witchcraft, payback killings, suttee, ritual gift-giving ceremonials, and many other kinds of practices defined as “savage” or “uncivilized”. “The law was also mobilized to control and restrain behaviors attributed to inherent flaws of character, such as laziness or licentiousness.”¹¹⁹

¹¹⁸ Sujit Choudhry, *Old Imperial Dilemmas and the New Nation Building: Constitutive Constitutional Politics in Multinational Polities*, 37 CONN. L. REV. 933 (2005), <http://scholarship.law.berkeley.edu/facpubs/2251>.

¹¹⁹ Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 588 (1998).

President Manuel Quezon acknowledged the limited impact of constitutional transplants. While he welcomed the influence of external forces on the forging of the Philippine nation, he was quick to express the role of resistance:

If Spain had done nothing in the Philippines but the wielding of scattered and separate elements into the consummate structure of our nationality, which has not only enabled us to assimilate another civilization such as that brought to us by the United States of America but has also prevented the basic and distinctive elements of our personality from being carried away by strange currents, thus bringing us to the triumph of our aspiration to be an independent nation; I repeat that if this had been the only work of Spain in the Philippines, it would in itself be sufficient, in spite of the mistakes which, in the words of the poet, were “crimes of the times and not of Spain,” to raise in every Filipino heart—if this has not already been done—a monument of undying gratitude to the memory of Spain side by side with that which we should erect in honor of the American people. These two civilizations, the Latin and the Anglo-Saxon, which the fortunes of war have brought to us to make the soil of our land more fruitful, have moulded our national character in a manner so different from that of neighboring nations that in addition to the results of our own efforts, it may be said in truth that to both civilizations we owe in large measure our aptitude and fitness to assume the responsibilities of the present government and of the independent State which will inevitably follow.¹²⁰

¹²⁰ President Manuel L. Quezon, Speech on Spain’s Contribution to Filipino Culture in Development (January 11, 1936), <http://www.gov.ph/1936/01/11/speech-of-president-quezon-on-spains-contribution-to-filipino-culture-and-development-january-11-1936/>.

Quezon believed that something survived Spanish and American demands and not everything was “carried away by strange currents.”¹²¹ The nation is a site of survival: “a living one that comes from taking the foreign in and remaking it into an element of oneself.”¹²²

There is a similar appraisal that is used to explain the Philippines’ 1973 Constitution. The Constitution failed because “it was unsuited to Filipino constitutional culture, and thus a bad choice, doomed to be rejected by the cultural recipient.” It is said that there is an inherent conflict between the Spanish colonial tradition (personalism/caudillismo, authoritarianism, top-down centralization, and government of men rather than law), and constitutionalism under rule of law.

...The Philippines, which was a Spanish colony until the end of the nineteenth century, started at a disadvantage as it had no organic tradition of rule of law. After Spanish colonialism, instead of having the opportunity to experiment with its own traditions, the country remained a U.S. colony for another 35 years, after which a U.S.-inspired constitution was adopted out of the blue. Beyond the general traits of former Spanish colonies, several particular Filipino cultural characteristics were inimical to a U.S.-style constitution of limited government and enshrined rights. First, the caudillo strongman tradition was particularly strong in the Philippines. Second, parallel to the Spanish colonial tradition of a government of men rather than laws, the Filipino constitutional culture was all too willing to place political expediency over constitutional principle; as long as the economy was growing, the constitution was respected; but the constitutional culture was a fair-weather friend to the formal constitution. Third, the Filipino founding evinced a certain

¹²¹ VICENTE L. RAFAEL, *THE PROMISE OF THE FOREIGN: NATIONALISM AND THE TECHNICS OF TRANSLATION IN THE SPANISH PHILIPPINES* 3 (2005).

¹²² *Id.* at 4.

schizophrenia on the subject of rights, as the constitution's emphasis on individual rights was largely alien to the Spanish and Filipino traditions, which emphasized family/communal rights and *raison d'état*.¹²³

Wenzel adds that “[t]he seeds of liberty, limited government, and rule of law, were cast on ground too thin to allow them to blossom and suggests that the Philippines might have fared better if it had respected the dynamic of the natural state, rather than attempting to force a jump over the doorstep to open access order.”¹²⁴

The survival of “Filipino cultural characteristics” would have an impact on the creation of the State. Migdal theorized that the emergence of a strong, capable state can occur only with a tremendous concentration of social control. Such a redistribution of social control cannot occur without exogenous factors first creating catastrophic conditions that undermine existing strategies of survival, which are the bases of social control. Western policies in colonial territories “led to the reestablishment of fragmented social control in societies in Africa and Asia.”¹²⁵ Whether a State ends up strong or weak depends on the distribution of social control in society.¹²⁶ In those rare instances in which strong States are able to emerge in the Third World, highly disruptive forces undermined the bases of social control.¹²⁷

The formal processes of decolonization between 1935 and 1965 did not materially affect the manner in which the provision of social services in rural communities remained largely

¹²³ Nikolai G. Wenzel, *Lessons from Constitutional Culture and the History of Constitutional Transfer: A Hope for Constitutionally Limited Government?* 20 INT’L ADVANCES ECON. RES. 213, 221 (2014).

¹²⁴ *Id.*

¹²⁵ JOEL S. MIGDAL, *STRONG SOCIETIES AND WEAK STATES: STATE-SOCIETY RELATIONS AND STATE CAPABILITIES IN THE THIRD WORLD* 262-263 (1988).

¹²⁶ *Id.* at 275.

¹²⁷ *Id.* at 276.

dependent on local-level networks of reciprocity and mutual assistance. However, the nature of these informal associations and the services they continue to provide people with, defies easy definition. They were recognizable groups in their own right that appealed to identification with a more socially circumscribed one, like a neighbourhood.¹²⁸ “As the case of informal associations and networks in the Philippines shows, there has been a long history of non-state provision of individual and community welfare that stretches back for as long as the written record exists.”¹²⁹

The social bases of control of pre-conquest Philippines remained strong after colonizers left. As in most cases in Asia, the post-independent governments repeated and intensified the abuses of their predecessors, often severely narrowing the distribution of political power, dismantling constraints, and undermining the already meagre incentives that economic institutions provided for investment and economic progress. Only in a few cases were critical junctures used to launch a process of political and economic change which paved the way for economic growth.¹³⁰

Today, multinational and U.S. agencies spend effort and money to strengthen the rule of law through changing governance in developing countries, but most often the changes fail to make a long-term difference because the underlying culture has not changed its feudalistic values.¹³¹ The United States is one of the major donors and direct assistance providers for rule of law development – ensuring that rule of law thrives in countries that receive development assistance. However, the issue is that the model is applied to countries regardless of the differences in their conditions. It is “part of the development package to countries with relatively high levels of economic

¹²⁸ Greg Bankoff, *‘For the good of the barrio’: Community associations and the state in the rural Philippines 1935-1965*, in *BEYOND EMPIRE AND NATION: DECOLONIZING SOCIETIES IN AFRICA AND ASIA, 1930S-1970S*, 178-179 (Els Bogaerts & Remco Raben eds., 2012).

¹²⁹ *Id.* at 183.

¹³⁰ DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY* 111-113 (2012).

¹³¹ *Id.* at 97.

development, and to those with relatively low levels of economic development; to countries that are politically stable and peaceful, and to those that are in the midst of armed conflict.”¹³²

Efforts to rehabilitate Afghanistan show that development aid should not routinely include the full package of rule of law development programs for countries facing these challenges due to serious concerns about whether providing such assistance will improve the effectiveness of rule of law. It has been suggested that it may be better to do only minimal rule of law development work in certain targeted areas or, depending on the circumstances, to do other development work first and leave the rule of law development work for later in the development process.¹³³ Delaying rule of law projects until the conditions are better might encourage more thoughtful rule of law development work which, in turn, will have a more meaningful impact. Nevertheless, the recommendation that there are times when rule of law development assistance should not be part of the larger assistance package does not preclude rule of law advocacy on a political level. Alkon argues that it does not prevent local actors from working towards legal reform on their own.¹³⁴ Every country that receives foreign aid deserves an individualized analysis to determine what kind of aid makes sense in the particular context of that nation and at the particular stage of

¹³² Cynthia Alkon, *The Flawed U.S. Approach to Rule of Law Development*, 117 PENN ST. L. REV. 797, 801 (2013). Rule of law development assistance involves every sector of a society, including the economy, judiciary, education system, legal professionals, and the general public. “Rule of law requires a high level of buy-in from the local population and a certain level of development for absorption of technical aid. Rule of law development assistance programs, therefore, usually engage on multiple levels throughout a society, ranging from highly technical programs for court administration and legislative reform to training for legal professionals to programs aimed at changing the attitudes of the general public.” *Id.* at 806. Rule of law development assistance is premised on two assumptions: that rule of law development assistance will help build or improve rule of law; and that rule of law development assistance will not harm the development of rule of law. *Id.* at 808.

¹³³ *Id.* at 853, 862-863. Legal scholars also criticized aid providers for being overly naïve and missing key understandings, or exporting a form of imperialism.

¹³⁴ *Id.* at 865.

development. This individualized analysis must include the possibility that certain types of aid should not be part of the process.¹³⁵

Success of legal transfers must refer in some way to changing legal behavior in the recipient country. Otherwise, there is no transplant, only an indigenous law with foreign provisions or an institution with a foreign name. Furthermore, legal imports may appear useful for one social group but useless for another. By challenging established patterns of behavior, imported laws have the capacity to create winners and losers. “For Western foreign investors in developing East Asia, rights-based legal transfers may appear authentic and useful, but for domestic entrepreneurs the same laws may seem inauthentic and imposed.”¹³⁶

Rule of Law reformers now acknowledge that it is not about institutions but “about the relationship between the state and society...Power and culture, not laws and institutions” form the roots of a rule-of-law state.”¹³⁷ “Borrowing ideas from other legal systems can be effective, but those ideas have to be tailored to the local system, adapted to it, and adopted by it: they cannot be simply incorporated wholesale.”¹³⁸

¹³⁵ Alkon, *supra* note 133, at 865.

¹³⁶ John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 40 N.Y.U. J. INT’L L. & POL. 657, 688 (2008).

¹³⁷ David Pimentel, *Rule of Law Reform in Transnational States: Bringing Method to the Madness – A Review of Advancing the Rule of Law Abroad: Next Generation Reform* by Rachel Kleinfeld, 13 SANTA CLARA J. INT’L L. 467, 475-476 (2015). There are many suggestions on how to tweak aid efforts to ensure success in transmitting the rule of law which are beyond the scope of this paper. *See e.g.*, Jane Stromseth, *Post-conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, 49 WM. & MARY L. REV. 1443, 1447-1454 (2008), David M. Mednicoff, *Can Legalism be Exported? U.S. Rule of Law Work in Arab Societies and Authoritarian Politics*, 11 ILSA J. INT’L & COMP. L. 343 (2005) (outlining possible changes for more successful attempts in introducing reforms in Arab States), and Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT’L L. 99, 128 -133 (2004) (discussing among others, the need to devise creative measures that will mitigate the resistance of vested interest groups against rule of law reform).

¹³⁸ Nedzel, *supra* note 91, at 93.

Culture

Long before they were colonized, native Filipinos fell under the influence of Hindu, Buddhist, and Confucian thoughts. They were steeped in communitarian philosophy, placing social harmony above individual rights, welfare of the community over individual satisfaction, compassion above apathy, sacrifice over self-fulfilment, and spirituality above materialism.¹³⁹ Pre-conquest notions of justice were markedly different from those introduced by the Americans in many respects. Among others, justice was predicated not so much on the individual as on the community. The community, not the individual, was the primary subject, object, and dispenser of justice. As another author put it, the Filipino concept of justice emphasized collective responsibility and its weakness lay in its very faint notion of the personal dignity or worth of the individual simply as a human being.¹⁴⁰

If these values survived 350 years of colonization, then Western concepts of constitutional governance would have difficulty taking root. It would also explain the acquiescence to blatant violations of the rights of suspected criminals because Filipinos may be more concerned with the community's well-being than the rights of the dead.

The fusion of American democratic ideology with colonialism could not have been seamlessly done. Authors write of the adoption of the American legal system without discussing difficulties generated by the colonial set-up. People around the world may have converged on Western type formal law, but their effectiveness continues to differ substantially, thus making it

¹³⁹ Pacifico Agabin, *The Influence of Philippine Indigenous Law on the Development of New Concepts of Social Justice*, in VERNON V. PALMER ET AL., MIXED LEGAL SYSTEMS, EAST AND WEST (Vernon V. Palmer et al. eds., 2015), <http://lawexplores.com/the-influence-of-philippine-indigenous-law-on-the-development-of-new-concepts-of-social-justice/>.

¹⁴⁰ Vitaliano R. Gorospe, *Sources of Filipino Moral Consciousness*, 25 PHILIPPINE STUDIES 278, 283-4 (1977).

difficult to argue that transplant countries will eventually catch up. Rather, the data suggests that the effect of transplanting law in the nineteenth century has implications for the effectiveness of legal institutions today.¹⁴¹

What happened in the Philippines challenges the “sacred assumption that transplanting U.S. institutions can produce peace and prosperity in any society at any level of development, with any pattern of social division. In the case of the Philippines, Western-style electoral democracy legitimizes, perpetuates, and often enhances ruthless exploitation, corruption, and crime.”¹⁴²

David explains the difficulty of realizing constitutional ideals that are based on alien values:

Our Constitution’s Declaration of Principles and State Policies may be read as a litany of our nation’s core values. Yet the conduct of our national life is antithetical to almost everything the Constitution celebrates. We don’t take our constitutional values seriously. It is obvious that enshrining them in the nation’s basic charter does not guarantee their realization. The problem is not their lack of clarity. The problem is their irrelevance to our national life.

The fault is not the values themselves, or in our genes or stars. It is simply that the conditions that make it possible for us to live up to our Constitution’s value aspirations are not there. We actually live by another set of values that are more congenial to the kind of society that we have, more feudal than democratic, more

¹⁴¹ Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 188–189 (2003).

¹⁴² William H. Overholt, *Duterte, democracy, and defense*, Brookings (Jan. 31, 2017), <https://www.brookings.edu/research/duterte-democracy-and-defense/>.

traditional than modern, reflecting the social instincts of a highly unequal and underdeveloped nation.¹⁴³

The introduction of Western constitutional values in the Philippines more than a century ago failed to take root. Americans pummelled Filipinos into submission in a brutal war,¹⁴⁴ and it is difficult to imagine how Filipinos could have appreciated “rule of law” in the same manner the colonizers did. This “values-transmission project” almost universally fails today as it did in the Philippines. All that was needed for the State to begin ignoring the rule of law was an election of a President who did not believe in human rights.

Even today, Filipinos look to more authoritarian forms of governance. A Pew Center poll showed that many in the Philippines support unconstrained executive power believing that a system in which a strong leader can make decisions without interference from parliament or the courts is a good form of government. 67% of the respondents were less committed to representative government and 12% were amenable to nondemocratic government. Only 15% were committed to representative government.¹⁴⁵

7. Conclusion

“The curse of decolonization was the creation of states without history, extemporized for convenience, bereft of traditional elites, or colonial peacekeepers, partitioned precariously or federalized whimsically. Hurried preparation for independence rarely created an educated or economically responsible electorate but rather fools’ democracies exploitable by demagogues, gangsters, and frauds.”¹⁴⁶

¹⁴³ RANDOLF S. DAVID, UNDERSTANDING PHILIPPINE SOCIETY, CULTURE, AND POLITICS 169 (Laura L. Samson ed., 2017).

¹⁴⁴ See generally Miller, *supra* note 97.

¹⁴⁵ Richard Wike, Katie Simmons, Bruce Stokes, & Janell Fetterolf, *Globally, Broad Support for Representative and Direct Democracy*, <http://www.pewglobal.org/2017/10/16/globally-broad-support-for-representative-and-direct-democracy/> (Oct. 16, 2017).

¹⁴⁶ FELIPE FERNANDEZ-ARMESTO, MILLENNIUM: A HISTORY OF THE LAST THOUSAND YEARS 556-557 (1995).

Carl H. Lande wrote: “Filipino political leaders, intellectuals, and citizens with few exceptions, believe in the universal validity of human rights as they are defined in the West, and are proud of having restored their own liberal democracy in 1986.”¹⁴⁷ The 1986 ouster of Ferdinand Marcos, according to one study, shows that “the democratic impulse that began with decolonisation...is finally beginning to take root in the soils of Southeast Asia.”¹⁴⁸

Duterte’s tenure puts these premises into question.

How do Filipinos sanction or acquiesce to government acts that violate the Constitution and the values they purportedly transmitted to the Philippines?

In this Article, I tried to show that constitutions do not transmit values effectively. Former colonies, such as the Philippines, cannot appreciate these values in the same way the colonizers do. Even today, rule-of-law efforts fail because they fail to consider the role of culture in governance.

Measuring Philippine commitment to the rule of law cannot be fairly done with a Western lens, simply because there is no showing that Western notions of rule of law ever took root. Given the shifting definitions of the rule of law, it may be more fair to treat it as an ideal that will never fully be achieved.¹⁴⁹ “Its presence or absence should be judged in relative terms; what is possible in an advanced Western democracy may not be possible in a developing nation. No country may rightfully claim perfect adherence to these ideals.”¹⁵⁰

¹⁴⁷ Carl H. Lande, *The “Asian Values” Debate*, 2 PUBLIC POLICY 63, 54 (1998).

¹⁴⁸ Kevin YL Tan, *The Making and Remaking of Constitutions in Southeast Asia: An Overview*, 6 SING. J. INT’L & COMP. L. 1, 41 (2002).

¹⁴⁹ Robert Stein, *Rule of Law: What Does it Mean?*, 18 MINN. J. INT’L. L. 293, 303 (2009).

¹⁵⁰ *Id.*

The rule of law is difficult to establish and no one knows how to institute and entrench it, or even whether it can be done intentionally.¹⁵¹ It has not been implemented wholesale and without reservation, even in the liberal societies where it originated.¹⁵² What makes the rule of law work is pervasive societal attitudes about fidelity to the rule of law, particularly the belief that government officials must operate within the law.¹⁵³ This is in conflict with Duterte's faith in the powers and prowess of the President to address issues without constrictions.

This is not to excuse Duterte's war on drugs. Regardless of the President's personal beliefs, and regardless of the popular interpretation, the Constitution remains in force. It is not for the President to ignore its structures, and pursuant to the oath he took as President, he must protect it. The horrors happening in the Philippines show the need for educating Filipinos about their rights. This will be a long-term project. In the meantime, the killings must come to an end.

¹⁵¹ Tamanaha, *supra* note 66, at 102.

¹⁵² *Id.* at 121.

¹⁵³ *Id.*

**HOW EDUCATIONAL INEQUALITY AND THE RIGHT TO ASSEMBLY INTERTWINED TO BRING
ABOUT THE COLLAPSE OF THE APARTHEID REGIME IN SOUTH AFRICA**

By: KODY LUCZAK

HOW EDUCATIONAL INEQUALITY AND THE RIGHT TO ASSEMBLY INTERTWINED TO BRING ABOUT THE COLLAPSE OF THE APARTHEID REGIME IN SOUTH AFRICA

KODY LUCZAK

Abstract

Within the Apartheid structure of South Africa, the education system was based upon racial status and restricted by the Bantu Education Act of 1953. However, two protests, one in 1960 and another in 1976, brought international awareness to the oppressive nature of the Apartheid regime. Ultimately, it was this awareness and subsequent action that brought about the collapse of Apartheid. This note addresses how the right to education and the right to protest intertwined to change the racial segregation and oppression that prevailed in Apartheid South Africa, as well as education after the collapse of Apartheid and modern-day challenges.

Section I provides a brief introduction. Section II explains the creation of the South African state, including the competition by European powers for ownership, the rise of slavery, and the entrenchment of racial classifications. Section III discusses the Apartheid structure, including its creation and two Acts that affected the educational system. Section IV addresses the international community's stance on the Apartheid Regime pre-1960. Section V discusses the convergence of the right to protest and education and how two events in South African history changed the international perspective towards Apartheid: the Sharpeville Massacre and the Soweto Uprising. Section VI examines the fall of Apartheid, the new Constitution's emphasis on education, and subsequent educational reforms. Lastly, Section VII provides a conclusion.

I. Introduction

The story of South Africa is a multi-faceted one: from promise to pariah, from international isolation to emerging superpower. In fact, the world may never see anything like the story of South Africa ever again. South Africa has progressed within a relatively short time-span, turning the racial-discriminatory policies of Apartheid into an elected democracy now considered the “Rainbow Nation”.

These strides would not have been possible without the international community. Undeniably, the role of the international community in the South African state was a necessary condition to the collapse of the Apartheid regime and the success of the transition to democracy and reconciliation process that followed. Specifically, as this note will illustrate, the international community placed tremendous pressure on the Apartheid regime to abandon its oppressive structure. Additionally, the Post-Apartheid South African state was reintegrated into the international community through various means, including being tasked in 1996 with the Presidency of the United Nations Conference on Trade and Development, in 1997 as the Vice-President of the United Nations General Assembly and the chair of the United Nations Commission on Human Rights, in 2003 as the elected Vice-Chairperson of the United Nations General Assembly’s Economic and Financial Committee, and in 2006 as an elected seat on the United Nations Security Council.¹ Finally, South Africa was able to display how far the country had changed when it was chosen to host a plethora of international events, including the Ninth

¹ See generally Jade L. Inglis, Post Apartheid South Africa at the United Nations: Patterns and Implications 61 (Mar. 2009) (unpublished M.A. thesis, University of Stellenbosch) (on file with the SUNScholar Research Repository, University of Stellenbosch), <https://scholar.sun.ac.za/bitstream/handle/10019.1/1603/Inglis,%20JL.pdf?sequence=1>.

United Nations Conference on Trade and Development (UNCTAD IX) in 2000, the United Nations World Conference against Racism, Xenophobia, and Related Discrimination (WCAR), and the United Nations World Summit on Sustainable Development (WSSD).²

However, the international community would have refrained from involvement if not for domestic incidences within the South African state. Until 1960, the international community refused to address the atrocities and oppression of Apartheid, claiming instead that Apartheid was a domestic policy where they had no jurisdiction.

South Africans made their voices heard by bringing the atrocities of Apartheid to light. Most notably, the right to education and the right to assembly converged during the Sharpeville Massacre and, more importantly, the Soweto Uprising to bring pressure upon the Apartheid structure. Ultimately, it was this convergence that collapsed Apartheid.

II. Historical Overview: Creation of the South African State

To fully understand the scope of the Apartheid regime, one must examine the history behind the colonization of the Cape area to learn how the racial-segregation policies that pre-dated the Apartheid structure rose to power, and remained entrenched within society until the creation of Apartheid.

a. The “Discovery” of the Cape and Competing Ownership Claims by the Portuguese, Dutch, and British Empires

In 1488, Bartholomew Dias sailed under the orders of Prince Henry of Portugal, and became the first explorer to travel around the southernmost point of Africa, discovering what is now known as Cape of Good Hope (formerly named the Cape of Storms) and the Cape of Needles.³

² See generally Inglis, *supra* note 1, at 62-63.

³ *South Africa profile – Timeline*, BBC NEWS (Aug. 9, 2017), <http://www.bbc.com/news/world-africa-14094918>; see also Harold V. Livermore, *Bartolomeu Dias: Portuguese Explorer*,

Dias landed on a bay that is presently known as Mossel Bay, about 300 miles east of present-day Cape of Good Hope; however, when Dias landed on the coastline of the bay, he was confronted with the KhoiKhoi (hereinafter, Khoi) people, the native population of the Cape.⁴ The Europeans, seeing a strategic and ideal location along the spice trade route, established a small colony at Table Bay, approximately thirty miles north of the Cape.⁵ Gradually, the Europeans expanded into areas that belonged to the Khoi, thus creating conflicts over loss of pastures and land.⁶

Tensions rose between the cultures in 1510, when Francis de Almeida sailed into Table Bay. Francis de Almeida initiated trade talks with the Khoi people; however, as talks were ongoing, de Almeida's men stole cattle and attempted to kidnap two Khoi children, thus resulting in a Khoi attack.⁷ In response, de Almeida sent one hundred and fifty soldiers to Table Bay to fight the Khoi.⁸ Conflicts with the Khoi people led the Portuguese to avoid Table Bay.⁹ From there, tensions simmered until the arrival of Jan Van Riebeeck.

Jan Van Riebeeck, a Dutch man, built the Castle of Good Hope in 1666 and established what would become modern-day Cape Town.¹⁰ Under the Dutch East India Company, Van

ENCYCLOPÆDIA BRITANNICA (May 27, 1999), <https://www.britannica.com/biography/Bartolomeu-Dias>, and *Bartolomeu Dias*, HIST. (2009), <http://www.history.com/topics/exploration/bartolomeu-dias>.

⁴ Livermore, *supra* at note 3; *Bartolomeu Dias*, *supra* note 3.

⁵ See Richard Cavendish, *Cape Town Founded*, HIST. TODAY (Apr. 4, 2002), <http://www.historytoday.com/archive/history-today/volume-52-issue-4-april-2002>, and *The Dutch Settlement*, SAHO (June 20, 2011), <http://www.sahistory.org.za/article/dutch-settlement>.

⁶ *The Dutch Settlement*, *supra* note 5.

⁷ *The Freedom struggle in Cape Town: Early struggles, contact and conflict in the Cape Colony*, SAHO (June 30, 2011), <http://www.sahistory.org.za/article/early-struggles-contact-and-conflict-cape-colony>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *The Castle of Good Hope, oldest surviving colonial building in South Africa, is completed*, SAHO (Mar. 16, 2011), <http://www.sahistory.org.za/dated-event/castle-good-hope-oldest-surviving-colonial-building-south-africa-completed>.

Riebeeck allowed employees to live at the castle. As more employees lived there, the castle became the center of activity at the Cape, and Khoi natives started to live on the bordering lands of the Castle. To counteract this movement, the Dutch established natural barriers, such as thorn bushes, in an attempt keep the Khoi away.¹¹ As a result of the rising tensions caused by the actions of the Dutch, two KhoiKhoi-Dutch Wars occurred, resulting in the expansion of the Dutch into the Khoi land.¹²

The Dutch maintained control of the Cape until a second battle during the Napoleonic War, resulting in the British claiming control in 1806.¹³ In 1814, the colony became a permanent British establishment upon the signing of the Treaty of Vienna, officially becoming Cape Town.¹⁴

b. The Need for Slaves, and the Rise of Racial Classifications

While the building of - and competition for - Cape Town was occurring, an underlying issue rose to the forefront of society: slavery and racial classifications.

Since explorers first began landing in the Cape area, the Khoi natives were considered inferior based upon cultural divides. Most Europeans had never seen a person who would not be classified as ‘White’, and because of this, Europeans believed that they were superior to the natives and they had the right to take the lands in the Cape area to establish ports along the trade route for economic gains.¹⁵

¹¹ *The Freedom struggle in Cape Town: Establishment of the Cape and its impact on Khoikhoi and Dutch*, SAHO (June 30, 2011), <http://www.sahistory.org.za/article/establishment-cape-and-its-impact-khoikhoi-and-dutch>.

¹² *Id.*

¹³ *Colonial history of Cape Town: English Settlement*, SAHO (June 30, 2011), <http://www.sahistory.org.za/article/english-settlement>. See also *Battle of Trafalgar*, ENCYCLOPÆDIA BRITANNICA (July 20, 1998), <https://www.britannica.com/event/Battle-of-Trafalgar-European-history>.

¹⁴ *Colonial history of Cape Town: English Settlement*, *supra* note 13.

¹⁵ See generally Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT’L L. 1113, 1126 (1995).

However, to build the Cape Colony both quickly and efficiently, Van Riebeeck needed labor. To satisfy this need, a slave voyage was established in 1654, and the two ships that were sent out traveled from the Cape to Mauritius and Madagascar.¹⁶ Although the result of this voyage only produced two slaves, the voyage established connections that became the first steps in the Colony's extensive involvement in the Slave Trade.¹⁷ By 1793, there were 14,747 slaves in the Cape Colony, which totaled more than the number of free citizens.¹⁸ Slavery served as the backbone of the work force until the British seized control in 1806 and banned its use in 1807.¹⁹

Even though slavery was officially banned, racial demarcation had become entrenched within the colony and the Europeans were still able to restrict the Natives' rights. In particular, towns, districts, and townships were restricted by race and skin color. Finally, in 1809, the government implemented the Caledon Code, better known as the Hottentot Proclamation.²⁰ Through this proclamation, the government-imposed restrictions on 'Blacks' and their right to movement, mandating that they had to carry passes to move between areas.²¹

In 1857, these rights were further restricted when the government passed the Kaffir Pass Act and Kaffir Employment Act. These Acts prevented any African from being inside the Cape Colony unless they were there for work.²² In order to acquire work, the person had to sign a

¹⁶ *History of slavery and early colonization in South Africa*, SAHO (Apr. 2, 2015), <http://www.sahistory.org.za/article/early-cape-slave-trade>.

¹⁷ *Id.*

¹⁸ Joanne Katz & David Tushaus, *Terrorism and Human Rights: The South Africa and Northern Ireland Experience*, J. INST. JUST. & INT'L STUD. 182, 183 (2008).

¹⁹ *Colonial history of Cape Town: Slavery and Emancipation of Slaves*, SAHO (June 30, 2011), <http://www.sahistory.org.za/article/slavery-and-emancipation-slaves>.

²⁰ Keith Breckenridge, *Power Without Knowledge: Three Nineteenth Century Colonialisms in South Africa*, 26 J. NATAL & ZULU HIST., 6-8 (2008), <http://wiser.wits.ac.za/sites/default/files/Breckenridge2008.pdf>.

²¹ *Id.* at 7.

²² See Pdraig O'Malley, *1857. Kaffir Pass Act No 23*, NELSON MANDELA CTR. OF MEMORY, <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01673.htm>

contract that included nearly slave-like conditions.²³ Simply put, these Acts were enacted to keep the number of Africans in the Cape so low that the government could avoid racial uprising.

Furthermore, the Cape also faced a major immigration influx from India and other Eastern Asian countries such as China.²⁴ This immigration influx was two-fold: on the positive side, the immigrants would do the jobs those classified as ‘White’ would not perform, under near slave-like conditions. However, the negative side of this influx was that it led to an increase in racial discrimination.

III. The Birth of the Apartheid Regime

Upon the rise of the Nationalist party in the 1940s,²⁵ strategists within the party invented a new system to cement control over both the economic and social systems within South Africa: Apartheid. By its very nature, Apartheid restricted human rights simply based upon skin color.

a. The Creation and Overview of the Apartheid Structure

Generally, Apartheid, which in the Afrikaans language means “the state of being apart”, was a policy pursued by the White-minority controlled government over people of mixed race in South Africa.²⁶ Through Apartheid, the government sought the separate development of South Africa’s varying races through institutionalized social, economic, political, and legal segregation.²⁷

(last visited Nov. 1, 2017), and 1857. *Kaffir Employment Act No 27*, NELSON MANDELA CTR. MEMORY,

<https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01673.htm> (last visited Nov. 1, 2017).

²³ See Pdraig O’Malley, 1809. ‘*Hottentot Proclamation*’, NELSON MANDELA CTR. MEMORY, <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01673.htm> (last visited Nov. 1, 2017).

²⁴ See generally *A history of Indians in South Africa Timeline: 1654-2008*, SAHO (Mar. 21, 2011), <http://www.sahistory.org.za/topic/history-indians-south-africa-timeline1654-2008>.

²⁵ Elizabeth S. Landis, *South African Apartheid Legislation I: Fundamental Structure*, 71 YALE L.J. 1, 1 n.2 (1961).

²⁶ Inglis, *supra* note 1, at 56.

²⁷ *Id.*

These Apartheid era laws did, and continue to, have a long-lasting impact and alter the dynamics of South Africa.²⁸

Because the Apartheid structure was based upon racial subgroups, a general understanding of the groups is necessary. ‘White’ people are usually classified culturally as English or Afrikaners, including descendants of the early Dutch settlers, and made up the United, Labor, and Liberal parties, while the Afrikaners constituted the “the hard core governing Nationalist Party”.²⁹ ‘Black’ people consisted of the “Bantus” (who are referred to as ‘natives’ or ‘Africans’), the yellow-skinned Bushmen, and the Hottentots, who were the region’s only aboriginal inhabitants.³⁰ ‘Coloured’ people are descendants of unions between Cape Malays or Europeans and Hottentots or Bantus.³¹ Finally, the ‘Yellow’ people refers to those of Indian or Pakistani origin, but ‘Indian’ commonly refers to the broad scope of Asians as a whole.³² However, membership in a particular racial group is not absolute due to both earlier intermixtures and oddities within legislative drafting.³³

b. The Group Areas Act

The most notable of the Apartheid laws were a set of laws that, combined, became known as the Group Areas Act. This act was established to keep those who were not ‘White’ out of the

²⁸ See generally Rich Elfers, *Apartheid impacts are still felt in South Africa*, THE COURIER-HERALD (Oct. 17, 2012, 6:23 PM), <http://www.courierherald.com/opinion/174619881.html>.

²⁹ Landis, *supra* note 25, at 4.

³⁰ *Id.* at 4-5.

³¹ *Id.* at 5.

³² *Id.*

³³ *Id.* at 16.

developed areas, and the city itself.³⁴ Ultimately, these acts led to many forced removals of one racial classification, mostly non-‘Whites’, to another area within the country.³⁵

In 1950, the Act was passed; it divided urban areas into racially segregated zones where one specific race could live and work.³⁶ The act also made it a criminal offense for a member of one racial group to reside on or own land in an area set aside by proclamation for another race.³⁷ Essentially, the act established separate parts in every region of South Africa which restricted each race to one of these areas, and spoke to the ultimate objective of Apartheid: areas free from any members of the undesired races.³⁸

The result of the Act was that the most developed areas were reserved for the ‘White’ people, while the ‘Blacks’, ‘Indians’, and ‘Coloureds’ were assigned to rural outskirts of the major cities.³⁹ 84% of the available land was granted to ‘White’, who accounted for approximately 15% of the total population; the remaining 16% of land was then occupied by 80% of the population.⁴⁰ Thus, overcrowding, disease, food shortages and other problems prevailed.⁴¹

A well-known example is the forced removal of District Six. Established in 1867, District Six was a mixed community consisting of freed slaves, merchants, artisans, laborers, and

³⁴ *Group Areas Act*, SOUTH END MUSEUM (last visited Nov. 8, 2017), http://www.southendmuseum.co.za/index.php?option=com_content&view=article&id=6&Itemid=6 [hereinafter *Group Areas Act*].

³⁵ See generally Selaelo T. Kgatla, *Forced Removals and Migration: a Theology of Resistance and Liberation in South Africa*, 41 SOUTHERN AFR. J. MISSIOLOGY 120, 120 n.2 (Aug. 2013), http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95072013000800003.

³⁶ Pádraig O’Malley, 1950. *Group Areas Act No 41*, NELSON MANDELA CTR. MEMORY, <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01839.htm> (last visited Nov. 8, 2017).

³⁷ *Id.*

³⁸ Landis, *supra* note 25, at 21.

³⁹ *Group Areas Act*, *supra* note 34.

⁴⁰ *Id.*

⁴¹ *Id.*

immigrants with close ties to Cape Town and the port.⁴² Slowly, the process of removals and marginalization started. In 1966, District Six was ultimately declared a ‘White’ area under the Group Areas Act, about sixty years after the ‘Black’ population were forced out.⁴³ In less than twenty years, more than sixty thousand people were forcibly removed and relocated to the barren area known as the Cape Flats.⁴⁴ District Six houses and infrastructure were flattened and destroyed to make way for ‘White’ economic development and expansion. Those forcibly removed had to start anew on barren land, given nothing to begin with after years of living and establishing a life in District Six.

c. Bantu Education Act of 1953

One of the main goals of Apartheid was to limit and deprive ‘Black’ Africans access to the economy.⁴⁵ One of the ways the Nationalist Party accomplished this goal was to quickly implement an education system segregated on race, which immediately began following their victory in 1946. This system was formalized through the Bantu Education Act of 1953, which established separate and unequal systems of education in South Africa.⁴⁶ The Act transferred educational authority from provincial control to the national government through the Department of Native Affairs.⁴⁷

⁴² THE DISTRICT SIX MUSEUM, WWW.DISTRICTSIX.CO.ZA (last visited Nov. 12, 2017).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Elizabeth A. Hoffman, *A Wolf In Sheep’s Clothing: Discrimination Against the Majority Undermines Equality, While Continuing to Benefit Few Under the Guise of Black Economic Empowerment*, 36 SYRACUSE J. INT’L. L. & COM. 87, 90 (2008).

⁴⁶ Joanne Fedler, *Legal Education in South Africa*, 72 OR. L. REV. 999, 1000 n.1 (1993).

⁴⁷ Scott Foreman-Murray, Comment, *Drafting the Tools for Progress: A Comparative Look at a Constitutional Right to Education*, 21 TUL. J. INT’L & COMP. L. 135, 142 (2012); Alfreda A. Sellers Diamond, *Constitutional Comparisons and Converging Histories: Historical Developments in Equal Educational Opportunity Under the Fourteenth Amendment of the United States Constitution and the New South African Constitution*, 26 HASTINGS CONST. L.Q. 853, 872 (1999).

As a result, education became another way the Apartheid structure could take away the rights of the ‘Black’ population and the ‘White’ minority could control the ‘Black’ majority.⁴⁸

All African schools were required to be registered, and registration could be denied if the school was considered to be “not in the interest of the Bantu people or any section of such people, or is likely to be detrimental to the physical, mental or moral welfare of the pupils.”⁴⁹ The Minister of Native Affairs retained the power to make regulations concerning the code of discipline for teachers, the courses of training, the medium of instruction, the control of funds, and the establishment and composition of school boards.⁵⁰

This policy also required control over schools run by religious missions, as they had been mainly responsible for Africa education. In 1954, all religious bodies which had previously controlled and ran Bantu schools were given a choice to either transfer control to the Government, or face a decrease, and eventual abolishment, of State subsidies.⁵¹ In response, 90% of approximately forty religious bodies transferred their schools to the Government and only 10% elected to remain private.⁵² By 1958, the State subsidies had been abolished for the remaining 10%.⁵³

Under this system, ‘Black’ South Africans were educated only for manual labor and service to the ‘White’ population, typically trained to become artisans or tradesmen. This limited job opportunities as semi-skilled laborers, resulting in personal limited economic growth.⁵⁴ In fact,

⁴⁸ See Foreman-Murray, *supra* note 47, at 142.

⁴⁹ Special Comm. Against Apartheid, Report of the Special Comm. on the Policies of Apartheid of the Gov’t of the Republic of S. Afr., ¶ 285, U.N. Doc. A/5497 (Sept. 16, 1963).

⁵⁰ *Id.*

⁵¹ *Id.* ¶ 287.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Foreman-Murray, *supra* note 47, at 142; Hoffman, *supra* note 45, at 90.

during the floor debates of the Bantu Education Act, Dr. H.F. Verwoerd, Minister of Native Affairs, stated “[T]here is no place for him [“Black” South African] in the European community above the level of certain forms of labour.”⁵⁵

This policy also extended into higher education by discriminating based on racial and tribal lines, and removing African colleges from urban areas.⁵⁶ Specifically, the University College of Fort Hare Transfer Act of 1959 allowed the Government to take control of the Fort Hare College, where a new all-‘White’ college council was established.⁵⁷ Further, the Extension of the University Education Act of 1959 provided for the establishment of separate university colleges for non-‘Whites’.⁵⁸ ‘White’ people could not attend college for non-‘Whites’, and after all students finished their current studies, non-‘Whites’ were forbidden to attend any other universities.⁵⁹

Pursuant to the national policy, educational services for non-‘White’ South Africans reflected deliberate and continuing disparities in funding and facilities.⁶⁰ Educational statistics reflected gross inequalities in per capita spending, pupil teacher ratios, teacher pay scales, school facilities, compulsory education requirements, school attendance practices, secondary school matriculation rates, and university entrance examinations.⁶¹ In 1953, the Bantu Education Act was passed; the government spent \$180 on each ‘White’ child in school while spending only \$25 on each ‘Black’ child.⁶² In short, ‘White’ continued to enjoy a privileged education in a superior

⁵⁵ Sellers Diamond, *supra* note 47, at 873.

⁵⁶ Special Comm. Against Apartheid, *supra* note 49, ¶ 290 (statement of Dr. H.F. Verwoerd) (“Deliberate attempts will be made to keep the institutions for advanced education more and more away from the urban environment and to establish them as far as possible in the native reserves”).

⁵⁷ *Id.* ¶ 291.

⁵⁸ *Id.*

⁵⁹ *Id.* ¶ 292.

⁶⁰ Sellers Diamond, *supra* note 47, at 874.

⁶¹ *Id.* at 874-75.

⁶² Fedler, *supra* note 46.

educational system, while non-‘Whites’ suffered in an inferior system, equipped with inadequate infrastructure, overcrowding, under-qualified teachers, and minimal textbooks.⁶³

Through Apartheid legislation, specifically education segregation, the ‘White’ government succeeded in creating a “sub-par class of citizens” consisting of non-‘Whites’, while retaining both economic and political control for themselves. Most non-‘Whites’ were unable to continue their education beyond elementary school, in turn disqualifying them from jobs and resulting in a stagnation in movement up the economic ladder.⁶⁴

The Government claimed that the transfer of African education to its control resulted in expansion of educational opportunities. Specifically, they cite the number of pupils increasing from 938,000 to 1.6 million in 1961. However, [1] the Government’s share in financing African education was stagnant, meaning increases in expenditure was provided by direct taxes on Africans, resulting in a decrease in per capita expenditure on education;⁶⁵ [2] of the 6,972 schools for Africans, only 169 were government schools. In 1961, it was estimated that almost one-third of the African school-aged children were on farms, and that existing facilities provided for only approximately one-quarter of them;⁶⁶ [3] in 1961, with a total enrollment of 1.6 million, only 839 pupils sat for matriculation for higher primary grades (the second four years of primary school) and only 212 passed;⁶⁷ and [4] the increases in university enrollment are mainly in extension or

⁶³ Kevin Hopkins, Commentary, *Assessing the World’s Response to Apartheid: A Historical Account of International Law and Its Part in the South African Transformation*, 10 U. MIAMI INT’L & COMP. L. REV. 241, 242 (2001).

⁶⁴ Sellers Diamond, *supra* note 47.

⁶⁵ Special Comm. Against Apartheid, *supra* note 49, ¶ 298.

⁶⁶ *Id.* ¶¶ 299-300.

⁶⁷ *Id.* ¶ 301.

correspondence courses in the University of South Africa, and in non-degree courses at tribal colleges.⁶⁸

Inevitably, ‘Blacks’ saw their education, and the disparity in state spending on schooling, as inferior. ‘Black’ youth, deprived of their right to education, began to fight back and were often at the front of the revolt against Apartheid, protesting the educational inequalities by boycotting classes as early as the ages of five or six.⁶⁹ A report in 1986 by the Lawyers Committee for Human Rights that documented ‘Black’ children’s involvement in protests concluded that [1] children had been the target of violence and singled out for arrests; [2] many children were killed by, among others, “non-lethal” weapons, tear gas, and rubber bullets; [3] The South African Defense Force, which was deployed in certain townships, was responsible for many abuses to children; [4] “very young children” had been arrested and detained without parental involvement; [5] many children died while in detention; and [6] many of the ‘Black’ children were subjected to the aforementioned, as well as other violent confrontations, at their schools.⁷⁰

Undeniably, ‘Black’ children during Apartheid were treated far worse than their ‘White’ counterparts in terms of the quality of education they received. However, it was these students, the ones the government failed to provide educational rights, who would be conductors in bringing about international awareness to the oppression occurring within South Africa.

IV. International Stance on the Apartheid Regime

From the beginning of the Apartheid regime in South Africa, the international community declined to forcefully act. The community accepted the South African government’s argument that

⁶⁸ Special Comm. Against Apartheid, *supra* note 49, ¶ 304.

⁶⁹ Sellers Diamond, *supra* note 47, at 875-76.

⁷⁰ *Id.* at 876.

Apartheid was a domestic policy, meaning that the international system had no jurisdiction for involvement, yet stated that racial harmony should be brought about.⁷¹

The United Nations was founded in 1945 to: [1] “save succeeding generations from the scourge of war”; [2] “reaffirm faith in fundamental human rights, and in the dignity and worth of the human person”; [3] “promote social progress and better standards of life in larger freedom”; [4] “practice tolerance and live together in peace with one another as good neighbours”; [5] “unite our strength to maintain international peace and security”; and [6] “employ international machinery for the promotion and social advancement of all peoples”.⁷²

In particular, the United Nations has a four-fold purpose, three of which are particularly relevant to this note. First, the United Nations attempts to “maintain international peace and security” by partaking in “collective measures for the prevention and removal of threats to peace.”⁷³ Second, it seeks to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination” of the people.⁷⁴ Third, the United Nations attempts “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁷⁵ Notably, the United Nations charter specifically states “The Organization is based on the principle of the sovereign equality of all its Members.”⁷⁶

⁷¹ See generally André Mbata Mangu, *The Historic Contribution of the United Nations to the Resolution of Conflicts in Southern Africa*, AFRICAN CTR. CONSTRUCTIVE RESOLUTION DISPUTES (ACCORD) (Aug. 19, 2011), <http://www.accord.org.za/ajcr-issues/the-historic-contribution-of-the-united-nations-to-the-resolution-of-conflicts-in-southern-africa/>.

⁷² U.N. Charter Preamble.

⁷³ *Id.* at art. 1, ¶ 1.

⁷⁴ *Id.* ¶ 2.

⁷⁵ *Id.* ¶ 3.

⁷⁶ *Id.* at art. 2, ¶ 1.

There are six established “principal organs of the United Nations: a General Assembly, the Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat.”⁷⁷ For the purposes of this note, only a brief overview and understanding of the General Assembly and the Security Council are necessary.

First, the General Assembly consists of all Members of the United Nations,⁷⁸ and may consider the general principles of co-operation and any questions relating to the maintenance of international peace and security.⁷⁹ However, any recommendations or resolution rendered by the General Assembly is not binding on the United Nations member states.⁸⁰

Second, the Security Council consists of fifteen Members of the United Nations, with China, France, Russia, the United Kingdom, and the United States of America holding permanent seats.⁸¹ The other ten seats on the Council are elected and serve for a term of two years.⁸² The five permanent seats carry a veto vote, meaning that any resolution or decision can be derailed by one of these votes.⁸³ Decisions made by the Security Council are binding on all United Nation member states.⁸⁴ Specifically, the Security Council may take enforcement measures upon a determination

⁷⁷ U.N. Charter, *supra* note 72, at art. 7, ¶ 1.

⁷⁸ *Id.* at art. 9, ¶ 1.

⁷⁹ *Id.* at art. 11, ¶¶ 1-2.

⁸⁰ Mangu, *supra* note 71; *see generally id.* at art. 14.

⁸¹ U.N. Charter, *supra* note 72, at art. 23, ¶1.

⁸² *Id.* ¶ 2.

⁸³ *See generally id.* at art. 27, ¶ 3 (interpreting the phrase “including the concurring votes of the permanent members” to mean that any permanent member can prevent adoption of a resolution).

⁸⁴ *Id.* at art. 24, ¶ 1 (“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”). *See also id.* at art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

that a situation poses a threat to or constitutes a breach of international peace and security or as an act of aggression.⁸⁵

The issue of Apartheid in South Africa arose in the United Nations during the General Assembly's very first session on June 22, 1946 by the Indian government, regarding the treatment of immigrants of 'Indian' descent living within the South African state.⁸⁶ At the time, the South African government responded by claiming that Apartheid was part of the internal affairs of the state, and therefore, the United Nations had no jurisdiction over the matter.⁸⁷ However, after an increase in rising concerns, the General Assembly in 1950 expressly acknowledged that "a policy of 'racial segregation' (*Apartheid*) is necessarily based on doctrines of racial discrimination", and urged discussions to change the policies within the South African state.⁸⁸

V. The Convergence of the Right to Protest and the Right to Education

Two events in the fight against Apartheid changed the international community's stance on Apartheid: the Sharpeville Massacre and the Soweto Uprisings. While Sharpeville drew international attention to the oppressive-nature of Apartheid, Soweto demanded international action.

⁸⁵ U.N. Charter, *supra* note 72, at art. 39. *See also* U.N. Charter, *supra* note 72, at art. 41 ("The Security Council may decide what measures not involving the use of armed force are to be employed..."), and U.N. Charter, *supra* note 72, at art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.").

⁸⁶ *The United Nations: Partner in Struggle against Apartheid*, U.N., <http://www.un.org/en/events/mandeladay/apartheid.shtml> (last visited Apr. 28, 2018).

⁸⁷ *United Nations and Apartheid Timeline 1946-1994*, SAHO (Mar. 20, 2011), <http://www.sahistory.org.za/topic/united-nations-and-apartheid-timeline-1946-1994>.

⁸⁸ *See* G.A. Res. 395 (V) (Dec. 2, 1950).

a. Sharpeville Massacre

On March 21, 1960, the Pan-African Congress (PAC) organized a nationwide protest against the enacted pass laws. These pass laws required those classified as ‘Black’ or ‘Coloured’ to carry a reference book at all times, which needed to be produced upon demand.⁸⁹ Generally, these pass laws were a way for the ‘White’ minority to control the ‘Black’ majority by limiting their movements into certain areas of the cities.

The protest turnout was generally low across the country; however, in Sharpeville, between 5,000 and 7,000 people participated, gathering outside of the Sharpeville police station.⁹⁰ The plan called for a sustained, self-controlled, and non-violent protest.⁹¹

The demonstrators, from all accounts, complied with the non-violent protest.⁹² However, a scuffle at the front gate caused police to fire into the crowd, causing a mass flight by the protestors.⁹³ The aftermath left sixty-eight ‘Black’ Africans dead and 186 wounded.⁹⁴

Black reaction to the massacre started in Johannesburg and quickly spread across the South African state.⁹⁵ Mass-gatherings, surrenders for arrest, and the public burning of pass books were met with indiscriminate violence on ‘Blacks’ by ‘White’ policemen.⁹⁶ As a result, a state of emergency was declared on March 30, 1960.⁹⁷

⁸⁹ See Breckenridge, *supra* note 20, at 5-9.

⁹⁰ Katz & Tushaus, *supra* note 18, at 188; *see also* 21 March, 1960: Scores die in Sharpeville shoot-out, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/march/21/newsid_2653000/2653405.stm (last visited Apr. 28, 2018).

⁹¹ Hopkins, *supra* note 63, at 247.

⁹² *Id.*; *see generally* Katz & Tushaus, *supra* note 18, at 188.

⁹³ Katz & Tushaus, *supra* note 18, at 188; Hopkins, *supra* note 63, at 247.

⁹⁴ Hopkins, *supra* note 63, at 247.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

Reports from sources within South Africa described the event as a massacre, and as one of the first and most violent demonstrations in the Apartheid Opposition movement.⁹⁸ One newspaper quoted the local area police commander at Sharpeville saying, “It all started when hordes of natives surrounded the police station...If they do these things they must learn their lesson the hard way,”⁹⁹ and one policeman describing the scene being “like a world war battlefield.”¹⁰⁰ One police officer even reportedly “instructed an African to collect pieces of a mangled body in a hat with a shovel and then spread sand over pools of blood in Sharpeville Road.”¹⁰¹

Because of these reports about the aftermath of the massacre, the international community no longer viewed Apartheid as a domestic policy. On March 25, 1960, representatives from twenty-nine countries (including India, Pakistan, and a variety of Middle-Eastern countries) requested an emergency meeting of the Security Council of the United Nations to consider the “situation arising out of the large-scale killings of unarmed and peaceful demonstrators against racial discrimination and segregation in the Union of South Africa.”¹⁰² In particular, these

⁹⁸ Harriet Alexander, *Nelson Mandela: How The Telegraph's front pages covered his life*, TELEGRAPH (Dec. 6, 2013, 12:59 PM GMT), <http://www.telegraph.co.uk/news/worldnews/nelson-mandela/10500434/Nelson-Mandela-How-The-Telegraphs-front-pages-covered-his-life.html> (focusing on The Daily Telegraph's front page on March 22, 1960 covering the Sharpeville Massacre); *see generally From the archive, 22 March 1960: Dozens killed in Sharpeville*, GUARDIAN (Mar. 22, 2010, 13:19 EDT), <https://www.theguardian.com/theguardian/2010/mar/22/sharpeville-massacre-eyewitness-account>.

⁹⁹ *Police Fire Kills 63 Africans*, GUARDIAN (Mar. 22, 1960, 06:29 EST), <https://www.theguardian.com/world/1960/mar/22/southafrica.fromthearchive>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² U.N. DEP'T OF POL. AFF., REPERTOIRE OF THE PRACTICE OF THE SECURITY COUNCIL: SUPPLEMENT 1959-1963, at 155-56, U.N. DOC. ST/PSCA/1/Add.3, U.N. Sales No. 65.VII.1 (1965) [hereinafter U.N. DEP'T OF POL. AFF.].

countries believed that this situation could dramatically increase international frictions and endanger international peace and security.¹⁰³

The Security Council agreed to discuss the question. At this time, South Africa's representative argued that the discussion was in violation of Article 2 of the Charter of the United Nations,¹⁰⁴ and in conflict with a unanimous decision signed in 1945 that stated nothing contained in the Charter could be construed to give the United Nations authority to intervene in domestic matters of member states.¹⁰⁵ Further, they argued that Article 34 of the Charter¹⁰⁶ made it clear that there had to be more than one party to a dispute, and not 'purely internal' situations.¹⁰⁷

In response to South Africa's "domestic matter" argument, nine countries responded that Article 2, namely 2(7), could not be invoked where "the violation of human rights was so serious that the United Nations organs could not disregard it without failing in their duties as defined in

¹⁰³ U.N. DEP'T OF POL. AFF., *supra* note 102.

¹⁰⁴ Article 2 states, in part, that "the Organization is based on the principles of the sovereign equality of all its Members." U.N. Charter, *supra* note 72, at art. 2, ¶ 1. However, South Africa argued the discussion violated paragraph 7, which states "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter..." *Id.* ¶ 7.

¹⁰⁵ U.N. DEP'T OF POL. AFF., *supra* note 102, at 156.

¹⁰⁶ Article 34 states, "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." U.N. Charter, *supra* note 72, at art. 34.

¹⁰⁷ U.N. DEP'T OF POL. AFF., *supra* note 102, at 156.

Articles 1,¹⁰⁸ 55,¹⁰⁹ 56¹¹⁰.¹¹¹ These nine responding countries argued that the situation regarding Apartheid and racial discrimination in South Africa had deteriorated substantially since the issue was first brought to the United Nations, and that the repressive measures undertaken by the South African government posed a serious threat to international peace and security.¹¹² They reasoned that a situation which had led to international friction and was likely to endanger international peace and security could never be construed as falling within the domestic jurisdiction of any one nation; in addition, there was an actual dispute between South Africa and the African-Asian states which might give rise to a conflict that would threaten the order in the African continent.¹¹³

On April 1, 1960 during the 856 meeting, the Security Council, adopted an Ecuadorean resolution with no member voting against the it; the resolution urged the Council to reaffirm opposition of the United Nations to the Apartheid policy, and that such a policy might endanger international peace and security.¹¹⁴ In the Resolution, the Security Council recognized that the situation in South Africa “has been brought about by the racial policies of the Government”, “deplores the policies and actions of the Government of the Union of South Africa which have

¹⁰⁸ Article 1 states the purposes of the United Nations, which are: “To maintain international peace and security”, “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”, and “To achieve international co-operation...in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinctions as to race, sex, language, or religion.” U.N. Charter, *supra* note 72, at art. 1, ¶¶ 1-3.

¹⁰⁹ Article 55 discusses several different aspects that the United Nations will promote in order to create conditions of stability and well-being, which include “conditions of economic and social progress and development”, “solutions of international economic [&] social...problems”, and “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” *Id.* at art. 55.

¹¹⁰ Article 56 states, “All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.” *Id.* at art. 56.

¹¹¹ U.N. DEP’T OF POL. AFF., *supra* note 102, at 156.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 156-57.

given rise to the present situation”, and called upon the Government of South Africa “to initiate measures aimed at bringing about racial harmony based on equality in order to ensure that the present situation does not continue or recur, and to abandon its policies of apartheid and racial discrimination.”¹¹⁵ This marked the first time that the United Nations, through the Security Council, took action regarding the oppressive and discriminatory policies of Apartheid. The South African government responded by banning the Pan-African Congress and the African National Congress under the Unlawful Organizations Act on April 9, 1960.¹¹⁶

On November 6, 1962, the General Assembly of the United Nations, citing the Security Council’s resolution, established the Special Committee on the Policies of the Apartheid of the Government of the Republic of South Africa – later renamed the Special Committee Against Apartheid.¹¹⁷ The Special Committee consisted of representatives of Member States that were nominated by the President of the General Assembly.¹¹⁸ The purpose of the Special Committee was to keep the racial policies of the Government of South Africa under review, and report to either the General Assembly, the Security Council, or both when appropriate.¹¹⁹ Additionally, the Resolution requested Member States of the General Assembly to bring about the end of Apartheid policies by: [1] breaking off and refraining from diplomatic relations with South Africa; [2] closing their ports to any ship hoisting the South African flag; [3] prohibiting their ships from entering South Africa; [4] boycotting all South African goods and refraining from exporting goods to South Africa; and [5] refusing landing and passage facilities to all aircrafts belonging to either the

¹¹⁵ U.N. DEP’T OF POL. AFF., *supra* note 102, at 157.

¹¹⁶ Katz & Tushaus, *supra* note 18, at 188.

¹¹⁷ G.A. Res. 1761 (XVII), at 9 (Nov. 6, 1962).

¹¹⁸ *Id.* ¶ 5.

¹¹⁹ *Id.* ¶ 5(a)-(b).

Government of South Africa or companies registered under South Africa.¹²⁰ Until the fall of Apartheid, this Committee maintained yearly reports that prevented the issue of Apartheid from falling under the radar in the international community.

While this deadly protest sparked the international awareness necessary to begin dismantling the system of Apartheid, it also marked the switch domestically for ‘Blacks’ to transition from strategies of peaceful resistance to other hostile means, to collapse the ‘White’-minority government.¹²¹ As Desmond Tutu stated years later, “[Sharpeville] told us that even if we protested peacefully we would be picked off like vermin and the ‘Black’ life was of little consequence.”¹²² The message to ‘Blacks’ was unmistakable: non-violent mass mobilization would not be tolerated.

b. Soweto Uprising

Even though Sharpeville became a symbol to ‘Blacks’ of the oppression the ‘White’ government was fully prepared to carry out, it was replaced in 1976 by the student-led protests in Soweto as the “byword for martyrdom and protest.”¹²³ It was here where South African’s right to assembly and the separation in the educational system converged, resulting in the beginning of the end for the Apartheid System.

In 1974, the government’s Department of Bantu Education passed the Afrikaans Medium Decree, stating that all ‘Black’ schools had to use Afrikaans as one of the languages of instruction

¹²⁰ G.A. Res. 1761, *supra* note 117, ¶ 4(a)-(e).

¹²¹ Alan Cowell, *Sharpeville, 25 Years Later, Recalls A Fateful Day*, N.Y TIMES (Mar. 21, 1985), <http://www.nytimes.com/1985/03/21/world/sharpeville-25-years-later-recalls-a-fateful-day.html>.

¹²² Desmond Tutu, *Tutu: We thank God for Madiba*, MAIL & GUARDIAN (Dec. 6, 2013, 06:00), <http://mg.co.za/article/2013-12-06-00-tutu-we-thank-god-for-madiba,%20archived%20at%20http://perma.cc/ST5F-GGKH>.

¹²³ See generally Cowell, *supra* note 121.

in secondary schools.¹²⁴ Under this Decree, both English and Afrikaans were used equally as the official languages of instruction from the last year of primary school until completion of high school.¹²⁵ The decree reflected, among others, the rationales that [1] “by far the majority of people in the Republic speak Afrikaans...”; [2] “White hospital personnel are mainly Afrikaans speaking”; [3] African schools were “strategic sites” where Afrikaner control could be implanted by using Afrikaans as a medium of instruction; and [4] “the police, with whom Bantu [“Blacks”] make a lot of contact, are almost all Afrikaans speaking.”¹²⁶

African schools objected to the decree on the basis that (a) ‘Black’ children did not speak the language, and (b) symbolically, Afrikaans was “the language of the oppressor”.¹²⁷ On January 3, 1975, the African Teachers’ Association of South Africa (ATASA) protested against the Department of Bantu Education, and the widest-circulating newspaper in Soweto endorsed ATASA’s position, stating: “Why should we in the urban areas have Afrikaans – a language spoken nowhere else in the world and which is still in a raw state of development, in any case – pushed down our throats?”¹²⁸ The Department of Bantu Education dismissed any such protests.¹²⁹ These dismissals effectively foreclosed South Africans from being able to redress their grievances without resorting to mass mobilization and protests.

¹²⁴ Lauren M. Spitz, *Implementing the U.N. Convention on the Rights of the Child: Children’s Rights Under the 1996 South African Constitution*, 38 VAND. J. TRANSNAT’L L. 853, n.288 (May 2005); see also Conor Gaffey, *South Africa: What You Need to Know About the Soweto Uprising 40 Years Later*, NEWSWEEK (June 16, 2016, 10:41 AM), <http://www.newsweek.com/soweto-uprising-hector-pieterse-memorial-471090>.

¹²⁵ Sifiso Mxolisi Ndlovu, *The Soweto Uprising*, in THE ROAD TO DEMOCRACY IN SOUTH AFRICA: VOL. 2, 1970-1980, 317, 327 (S. African Democracy Educ. Tr. ed., 2007).

¹²⁶ *Id.* at 325.

¹²⁷ Gaffey, *supra* note 124.

¹²⁸ Ndlovu, *supra* note 125, at 331.

¹²⁹ *Id.*

In 1975, a sharp drop in the price of gold disrupted the South African economy, resulting in African schools becoming desperate for money.¹³⁰ As a result, the government spent only R42 (approximately \$3.20 USD) on African students while spending R644 (approximately \$48 USD) on ‘White’ students.¹³¹ Gross inequalities became prevalent – government expenditure on African education was less than one-fourth of the expenditure of ‘White’ education, while the student-teacher ratio in African schools was fifty-four compared to twenty in ‘White’ schools.¹³² To further illustrate the inequality, Africans were required to pay fees and purchase textbooks, while the education for ‘White’ students were entirely free.¹³³

As a result of these inequalities paired with enforcement of Afrikaans as the medium of instruction, students at the Phefeni secondary school went on strike on May 17, 1975.¹³⁴ In solidarity, students at six other Soweto schools joined the protest, putting the number of students on strike at five thousand.¹³⁵ While police reportedly tried to intimidate the students in order to break the strike, the students never wavered.¹³⁶ In addition, many people warned that a conflict was inevitable unless the regime withdrew the Afrikaans Medium Decree; nevertheless, authorities persisted in attempting to suppress the student protests.¹³⁷

On June 16, 1976, students in Soweto staged a walkout of their schools in protest of the decision that Afrikaans be used as the primary medium of instruction for several subjects.¹³⁸ The

¹³⁰ Ndlovu, *supra* note 125, at 323.

¹³¹ *Id.*

¹³² Special Comm. Against Apartheid, *First Special Report: The Soweto massacre and its aftermath*, ¶ 23, U.N. Doc. A/31/22/Add.1 (Aug. 3, 1976) [hereinafter *First Special Report*].

¹³³ *Id.* ¶ 27.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *First Special Report*, *supra* note 132, ¶ 28.

¹³⁸ Fedler, *supra* note 46, at n.7.

protest culminated in ten thousand African students peacefully demonstrating while marching from their schools to the nearby stadium.¹³⁹ However, police opened fire with live rounds and tear gas, killing students and children indiscriminately.¹⁴⁰ For two days, violence and chaos ensued and approximately five hundred people were killed.¹⁴¹ A police officer told the press, “We fire into them. It is no good firing over their heads.”¹⁴²

While the protests started in Soweto, they quickly spread to other areas. On June 17, 1976, several hundred students at a Johannesburg university held demonstrations, but were attacked by the police along with “white vigilantes”, resulting in serious injuries.¹⁴³ Demonstrations in support of the Soweto students also spread to a plethora of townships and universities near Johannesburg, Pretoria, Krugersdorp, Klerksdorp and other prominent cities.¹⁴⁴

The response from the United Nations was immediate. During the Security Council’s meeting on June 19, 1976, the Council passed Resolution 392, which included language that the Council was “deeply shocked over large-scale killings and wounding of Africans in South Africa, following the callous shooting of African people including students demonstrating against racial discrimination on 16 June 1976,” and “convinced that this situation was brought about by the continued imposition by the South African Government of *apartheid* and racial discrimination, in defiance of the resolutions of the Security Council and the General Assembly.”¹⁴⁵ The Resolution “strongly condemn[ed] the South African Government for its resort to massive violence against

¹³⁹ *First Special Report*, *supra* note 132, ¶ 16; *see also* Gaffey, *supra* note 124.

¹⁴⁰ *First Special Report*, *supra* note 132, ¶¶ 16-17; *see also* James Maguire, *Children of the Abyss: Permutations of Childhood in South Africa’s Child Justice Act*, 15 NEW CRIM. L. REV. 68, 69 (2012).

¹⁴¹ Maguire, *supra* note 140.

¹⁴² *First Special Report*, *supra* note 132, ¶ 17.

¹⁴³ *Id.* ¶ 18.

¹⁴⁴ *Id.* ¶ 19.

¹⁴⁵ S.C. Res. 392 (June 19, 1976).

and killings of the African people including schoolchildren and students and others opposing racial discrimination.”¹⁴⁶ Additionally, it reaffirmed the policy of apartheid as a “crime against the conscience and dignity of mankind”, repeated its call for the South African government to “urgently end the violence against the African people” and to take immediate steps to bring about the end of racial discrimination and apartheid.¹⁴⁷ Finally, the Security Council “recognized the legitimacy of the struggle of the South African people for the elimination of apartheid and racial discrimination.”¹⁴⁸

In response to Resolution 392, the South African Government made partial concessions on the issue of Afrikaans instruction, announcing the decision that the medium of instruction would be left to the school principals in conjunction with the school board and committees.¹⁴⁹ Ultimately, the Government continued the systemic repression against the African people and all opponents of Apartheid.¹⁵⁰

Even though calls and demands for Apartheid to end went unanswered, the pressure from 1976 until the early 1990s continued to chisel away at the Apartheid foundation, and ultimately led to its collapse.

¹⁴⁶ S.C. Res. 392, *supra* note 145, ¶ 1.

¹⁴⁷ *Id.* ¶¶ 3, 5.

¹⁴⁸ *Id.* ¶ 4.

¹⁴⁹ *First Special Report*, *supra* note 132, ¶ 5.

¹⁵⁰ *Id.* ¶ 30.

VI. Education After the Fall of Apartheid: The 1996 Constitution and Education Reform

In a February 1990 speech to Parliament, South African President F.W. de Klerk announced that he was lifting the ban on the ANC and other ‘Black’ liberation parties, allowing freedom of the press and releasing political prisoners, including Nelson Mandela.¹⁵¹ De Klerk also agreed to democratic elections for the country.¹⁵² This overhaul to the Apartheid system was brought about in direct response to the internal unrest and widespread condemnation from the international community.¹⁵³ Subsequently, Nelson Mandela was elected South Africa’s first black President in April 1994.¹⁵⁴

To commemorate this new change in South Africa, a new constitution was also made. The Constitution of the Republic of South Africa Act 200 of 1993 served as an interim constitution.¹⁵⁵ Under this interim constitution, the right to assembly, demonstration, and petition were explicitly included, stating “Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.”¹⁵⁶

The interim constitution also stated that every person shall have a right to education.¹⁵⁷ This included the right to [1] basic education and equal access to educational institutions; [2] instruction in the language of his or her choice where it is reasonably practicable; and [3] establish,

¹⁵¹ *The End of Apartheid*, U.S. DEPT. STATE, <https://2001-2009.state.gov/r/pa/ho/time/pcw/98678.htm> (last visited Apr. 28, 2018); *see generally* Simon Osborne, *FW de Klerk: The day I ended apartheid*, INDEPENDENT (Feb. 2, 2010), <http://www.independent.co.uk/news/world/africa/fw-de-klerk-the-day-i-ended-apartheid-1886128.html>.

¹⁵² *The End of Apartheid*, *supra* note 151.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ S. AFR. (INTERIM) CONST., 1993.

¹⁵⁶ *Id.* at § 16.

¹⁵⁷ *Id.* at § 32.

where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.¹⁵⁸

The interim constitution was replaced in 1996 by the Constitution of the Republic of South Africa Act, 1996.¹⁵⁹ Notably, the Constitution establishes eleven official languages of the Republic.¹⁶⁰ Further, the Constitution “recognis[es] the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.”¹⁶¹ Finally, the national and provincial governments must regulate and monitor the use of the official languages to ensure their equitable treatment.¹⁶²

The Constitution, while using the same language for the right to assembly, expanded the right to education. First, the Constitution grants everyone the right to a basic education, including adult basic education, and further education, which the state must make progressively available and accessible through reasonable measures.¹⁶³ In a seemingly direct rebuke of the Bantu Education Act of 1953 and the Afrikaans Medium Decree in 1974, everyone has the right to receive education in the official language or languages of their choice in public educational institutions (where reasonably practicable).¹⁶⁴ Finally, everyone has the right to establish and maintain, albeit at their own expense, independent educational institutions that [1] do not discriminate on the basis

¹⁵⁸ S. AFR. (INTERIM) CONST., *supra* note 155, ¶ 32.

¹⁵⁹ S. AFR. CONST., 1996.

¹⁶⁰ *Id.* at § 6(1). The official languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa, and isiZulu.

¹⁶¹ *Id.* at § 6(2).

¹⁶² *Id.* at § 6(4).

¹⁶³ *Id.* at § 29(1)(a)-(b).

¹⁶⁴ S. AFR. CONST., *supra* note 159, at § 29(2).

of race; [2] are registered with the state; and [3] maintain standards that are not inferior to standards at comparable public educational institutions.¹⁶⁵

After the 1994 election, educational reform was a central part of the country's reconstruction and development. There were two main reasons for this. The first was to overcome the damage of Apartheid, the educational system had to build a new class of citizens based upon equality. Second, the economic and social results of Apartheid created substantial challenges for the future that demanded education to be at the forefront.¹⁶⁶ In fact, the Department of Education's mission statement reflects these goals: "Our vision is of a South Africa in which all people have equal access to lifelong education and training opportunities which will contribute towards improving the quality of life and build a peaceful, prosperous and democratic society."¹⁶⁷

To achieve this goal, South African policy initiatives focused on the substance of the educational experience rather than other factors.¹⁶⁸ The South African School Act of 1996 provided a "uniform system for the organisation, governance and funding of schools."¹⁶⁹ The Act mandates compulsory attendance for children between the ages of seven and fifteen, or the ninth grade.¹⁷⁰ Further, public schools must admit students and serve their educational requirements without unfairly discriminating in any way, including the ability to pay school fees, race, or tests

¹⁶⁵ S. AFR. CONST., *supra* note 159, at § 29(3).

¹⁶⁶ See *Education in South Africa: Achievements since 1994*, DEP'T EDUC. (S. AFR.) (May 2001), <http://www.dhet.gov.za/Reports%20Doc%20Library/Education%20in%20South%20Africa%20Achievements%20since%201994.pdf> [hereinafter *Education in South Africa*].

¹⁶⁷ *Id.* at 6.

¹⁶⁸ Sellers Diamond, *supra* note 47, at 899.

¹⁶⁹ See South African Schools Act 84 of 1996 [hereinafter South African Schools Act].

¹⁷⁰ *Id.* at § 3(1).

for admission.¹⁷¹ Finally, the Act provides for two types of schools – public schools and independent schools.¹⁷²

Curriculum 2005 also “shifted the emphasis and nature of the desired outcomes and learning areas, and called for ‘radically new approaches’”, which redefined the roles of teachers, students, textbooks, and exams.¹⁷³ Implementation began in 1998 and lasted until 2002, and a review in May 2000 found, *inter alia*, [1] there were basic flaws in the structure and design of the policy; [2] lack of alignment between curriculum and assessment policies; [3] training programs were often inadequate; [4] learning support materials differed in quality and were often unavailable; [5] follow-up support for teachers and schools were insufficient; and [6] timeframes for implementation were unmanageable and unrealistic.¹⁷⁴ However, the Government took these results to refine the “outcomes-based education”.¹⁷⁵

Education has improved since the fall of Apartheid, but there is much work still left to be done. For example, pass-rates on end-of-school exams have also steadily increased, reaching 78.2% in 2014, but this number is calculated by those who actually sat for the exam.¹⁷⁶

In early 2017, the South African Director-General of Basic Education released a statement that ‘Blacks’ have become “substantially more likely” to access early childhood development, complete primary school, complete end-of-school exams, and are more likely to complete a

¹⁷¹ South African Schools Act, *supra* note 169, at § 5(1)-(2).

¹⁷² *See generally id.* at §§ 34-51.

¹⁷³ *See Education in South Africa*, *supra* note 166, at 26.

¹⁷⁴ *Id.* at 27.

¹⁷⁵ Philippa Garson, *Curriculum 2005 to go ahead?*, MAIL & GUARDIAN (May 7, 2005), <http://mg.co.za/article/2005-05-07-curriculum-2005-to-go-ahead>.

¹⁷⁶ Lee Rusznyak, *South African education still fails many 20 years after apartheid*, THE CONVERSATION (May 7, 2014, 1:02 AM EDT), <http://theconversation.com/south-african-education-still-fails-many-20-years-after-apartheid-22069>.

university degree in comparison to twenty years ago.¹⁷⁷ Further, the number of ‘Black’ graduates per year has increased from 3,400 graduates in 1986 to 63,000 graduates in 2012.¹⁷⁸ From 2008, the number of ‘Black’ matriculants qualifying for university admissions doubled to 120,000.¹⁷⁹ Additionally, by 2012, the higher education system produced 1.8 ‘Black’ graduates for every ‘White’ graduate.¹⁸⁰

While these statistics are promising in attempts to create an educational system that supports and provides for people of all races, it must be noted that work is still needed to accomplish equality. As Director-General Mweliso Mkhomo said in closing out his report, “There is still a long way to go in reducing educational inequalities in South Africa, and education system change necessarily takes time[.]”¹⁸¹

VII. Conclusion

As Archbishop Desmond Tutu stated in 2013 in a letter to Stanford University students,

In South Africa, we could not have achieved our freedom and just peace without the help of people around the world, who through the use of non-violent means...encouraged their governments and other corporate actors to reverse decades-long support for the Apartheid regime. Students played a leading role in that struggle[.]¹⁸²

As illustrated in this note, students became a catalyst for international awareness in the fight against the inequality and oppressive nature of the Apartheid system. By exercising their right to assembly

¹⁷⁷ Matanzima Mweliso Mkhomo, *Dispelling myths on education outcomes*, S. AFRICAN GOV’T (Jan. 31, 2017), <http://www.gov.za/blog/dispelling-myths-education-outcomes>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Letter from Desmond Tutu, Nobel Peace Laureate Archbishop, to the Associated Students of Stan. U. (Mar. 3, 2013), <https://sjp.stanford.edu/2013/03/desmond-tutu-heartily-endorses-divestment-move/>.

in protesting educational decrees, the rights of assembly and education became intertwined, ultimately leading to international action.

From that convergence, international pressure on the South African government lead to the ultimate collapse of the racially-segregated society that the government created. From that collapse, the new South African government has been able to restructure the educational system to ensure that all students, regardless of their skin color, have access to educational opportunities. While further measures still need to be chased in the pursuit of equal education, South Africa is on the right path in obtaining this goal.

Cover Up or Strip Down: An Analysis of France, the ‘Burkini Ban’, and Secularism

By: Chantale Moore

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Abstract

Several countries around the world have been experiencing an increase in terrorist activities within their borders. France is no exception, as the country was thrust into the international spotlight during the summer of 2016 due to terrorist attacks by ISIS jihadists. The story was covered by prominent news outlets, including those outside of France. These were tragic events that resulted in the loss of lives, but the response that followed from the French legislature after the dust settled was disproportionate. Several French municipalities enacted legislation banning women from wearing ‘burkinis’ – one of the newest trends in swimwear for women who practice the Muslim faith. The legislation is more infamously known as the ‘burkini ban’ by both advocates and opponents for its apparent targeting and treatment towards women who not only wear ‘burkinis’, but also to those who wear burqas in general. The mayors of these French municipalities stated that the ban was temporary and put in place for the safety of the public. However, the ban against the swimwear shocked the global conscience, because the laws were not only put into place during a time of divisiveness, high tension, and fear among the public, but it also seemed as if the French legislature was directly retaliating against its citizens of Muslim faith for the attacks.

This note examines the foundation of Islamophobic sentiments in France and how they have flourished into what they are today, as well as detailing the specific events that led up to the enactment of the ‘burkini ban’. The goal of this note is to show that denying a subgroup their rights to express their religious beliefs is an infringement on human rights and the dignity of that subgroup. It will also look at France’s response and policies that are supposedly targeting ISIS and terror, and compare it to the U.S. approach – another secular, first world country – regarding the so called ‘Muslim ban’, and how Islamophobic prejudices have also impacted the legislative sphere and laws.

Section one will look at the history of France’s political stance on the separation of church and state and how that affects its social policies and laws, as well as how the 9/11 attacks in the U.S. and the emergence of ISIS have incited a divisive anti-Islamic rhetoric in France. Section two will discuss the ‘burkini ban’ itself, the immediate events and reasons as to why it was enacted in several municipalities, the backlash and support that it garnered from both the French population and other countries, and why the ban was ultimately overturned by France’s highest court. Section three will address the harmful social, economic, and political repercussions – both immediately present and those in the future – that might be the result of this ‘burkini ban’ that will greatly affect the French population, especially Muslim women. Finally, section four will address the so-called ‘Muslim ban’ that was put into place in the U.S., and compare it to that of the French ‘burkini ban’, while also assessing its harms and repercussions.

I. Religious and Political History of France

The enactment of the ‘burkini ban’ caught the attention of many as news of it trickled through the media, the web, and word of mouth. To those outside of France, the ban appeared to be an illogical, absurd, and oppressive way to handle the threat of radical Islamic terrorism.¹ Although snippets of details on the ‘burkini ban’ were released in the media throughout the summer of 2016, it was clear by the way that the media reported the story that although the law may have been neutral in its exact wording, the outcome was, at the very least, disproportionately against Muslim women who wear religious garbs meant to cover their bodies, such as headscarves and burqas. Thus, two main questions came to light: 1) Was the ban really meant to protect the citizens of France, as it claimed to do, or did it represent an unfair targeting of certain people based on religious and ethnic backgrounds; and 2) If it did unfairly target a certain group of people, was it within the French legislatures’ powers to do so?

A. Historical and Political Background of France

In order to fully understand the dynamics in French society, one must first look at its history. France has a long record of separating politics and religion. In 1789 during the beginning of the French Revolution, Catholicism was the official religion of France, and the French Catholic Church – known at the time as the Gallican Church – listened to the pope of the Roman Catholic Church as its leader.² With this power, the French Catholic Church was able to negotiate deals with the French monarch, which allowed the Church considerable autonomy in exchange for

¹ *Disdain in Britain, US for French burkini ban*, HINDUSTAN TIMES (last updated Aug. 20, 2016, 20:34 IST), <http://www.hindustantimes.com/world-news/disdain-in-britain-us-for-french-burkini-ban/story-bktQXtF7kJaelDogPzCwvI.html>.

² Gemma Betros, *The French Revolution and the Catholic Church*, HIST. TODAY (Dec. 2010), <http://www.historytoday.com/gemma-betros/french-revolution-and-catholic-church>.

privileges and benefits to the monarch.³ Despite the fact that a majority of the people living in France at the time were Catholic,⁴ there was still constant tension between the French populace and the Catholic Church because it was seen as upholding “the inequities and injustices of the ruling classes within France.”⁵ Tensions were exacerbated during the Enlightenment period in the 1780s, when the Church came under fire from many *philosophes* due to the Church’s power, influence, and lack of tolerance for other religious minorities.⁶ *Philosophes* such as Voltaire also took issue with the Church forcing young women into lifelong vows to become nuns against their will, praying all day in the monasteries instead of being useful for the good of the nation, and most importantly, the Church’s wealth through the collection of tithe and land.⁷ The value of religion and its place in French society for “promoting moral and social order” was appreciated,⁸ but the ire that the Church drew among the populace became directed towards Catholic nuns because they were the representatives of the Church that were most prominently in the public eye.⁹ They performed as teachers, healers, and “providers of social welfare.”¹⁰ Catholic nuns wore their traditional religious habits – usually a plain tunic with a cowl and veil – which were seen as a restriction on their freedoms, so the political regime at the time ‘liberated’ them “from their lifelong vows of poverty, chastity, obedience and their religious habit.”¹¹ However, those that did

³ Betros, *supra* note 2.

⁴ *Id.*

⁵ Carmen Mangion, *Bad Habits? France’s ‘Burkini ban’ in Historical Perspective*, HIST. WORKSHOP (Oct. 4, 2016), <http://www.historyworkshop.org.uk/bad-habits-frances-burkini-ban-in-historical-perspective/>.

⁶ Betros, *supra* note 2.

⁷ *Id.*

⁸ *Id.*

⁹ Mangion, *supra* note 5.

¹⁰ *Id.*

¹¹ *Id.*

object to ‘being set free’ were jailed and officially forced to remove their religious habits in 1792 when it was outlawed.¹² In addition, the new Republic in the early 1790s, known as the Convention, was so suspicious of any form or practice of Catholicism that it started a movement that banned public worship and removed all visible signs of Christianity, including crosses, church bells, statues, and religious art.¹³ However, after failing to completely remove or replace Catholicism with other state supported religious beliefs, the Convention had to backtrack on its stance, and Catholicism slowly made its return.¹⁴ When Napoleon rose to power in 1799, he tried to use religion and the Church to promote his rule throughout France. He signed a document named the Concordat with Rome, which decreed that Catholicism was once again to be known as the religion of the majority of the French citizens; however, it also required for the Church to be under the authority of the state, for all clergy to swear an oath of loyalty to the government, and all instructions from Rome to be approved by the government.¹⁵ This relationship did not go well, and Napoleon was soon excommunicated in 1808 after the occupation of Rome, which then led Napoleon to retaliate by having the pope arrested and held in France as his prisoner.¹⁶

B. The French Constitution and the Formation of *Laïcité*

The events during the 19th century embedded distrust and tensions against the Catholic Church. Those sentiments were strongly echoed in France’s 1905 Constitution, when the country officially separated church and state and embraced a principle of ‘*laïcité*’ – secularism which prohibits public religious expression, but still allows the people to privately practice their religion

¹² Mangion, *supra* note 5.

¹³ Betros, *supra* note 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

of choice – in an attempt to limit or eliminate the influence of the Catholic Church.¹⁷ However, there were no real standards that were put into place to dictate exactly what a ‘*laïcité*’ society would look like, much less how it was going to be implemented and enforced. The French courts especially struggled with how to handle this ambiguous standard when it came to cases involving religion and schools. There were several cases between the years of 1980 and the early 2000s regarding students wearing religious headwear; it was unclear whether ‘*laïcité*’ applied to the prohibition of all religious signs, or whether conspicuous symbols, such as the burqa for Islamic women, were the only things that were prohibited in schools.¹⁸

C. The Emergence of the ‘Headscarf Ban’

In an effort to rectify any ambiguities or confusions, the Minister of Education called for a decision to be made about how the principle of ‘*laïcité*’ should apply in practice in early 2003.¹⁹ President Jacques Chirac set up an investigative committee, known as the Stasi commission, in July of 2003 to decide on the matter.²⁰ The Stasi commission concluded that ostentatious displays of religion – such as headscarves, turbans, and yarmulkes – violated the secular rules for the French school system, but recommended that students be allowed to wear discreet symbols of their

¹⁷ Mangion, *supra* note 5.

¹⁸ Compare Laetitia Van Eeckhout, *Rétrocontroverse: 1989, la République laïque face au foulard islamique*, LE MONDE (Feb. 8, 2007), http://www.lemonde.fr/idees/article/2007/08/02/retrocontroverse-1989-la-republique-laique-face-au-foulard-islamique_941317_3232.html#meter_toaster, with Appendix A: *Religious Attire in France and Turkey*, HUM. RTS. WATCH (Oct. 1999), https://www.hrw.org/reports/1999/uzbekistan/uzbek-08.htm#P693_151909 [hereinafter Appendix A].

¹⁹ Nusrat Choudhury, *From the Stasi Commission to the European Court of Human Rights: L'affaire Du Foulard and the Challenge of Protecting the Rights of Muslim Girls*, COLUM. J. OF GENDER & L. (2007), <https://www.questia.com/library/journal/1G1-162576736/from-the-stasi-commission-to-the-european-court-of>.

²⁰ *Id.*

religious faith to allow students the chance to still express themselves and their religious beliefs.²¹ Some examples of discreet displays that were given were small crosses, Stars of David, or Fatima's hands.²² In December of 2003, President Jacques Chirac chose to implement the Stasi commission's proposal, and in March of 2004, the official prohibition named "Law 2004-228" was enacted.²³ The law is an amendment made to the French Code of Education and generally focuses on religious symbols. However, since the cases that brought the issue to the forefront and sparked public debate mostly dealt with Islamic headscarves, the amendment was quickly and infamously dubbed by the public as 'the headscarf ban.'²⁴ The amendment also only applies to public primary and secondary schools, but is still seen as an overall attempt made by the French government to protect the French populace from "the threat of Islamic fundamentalism."²⁵

D. The Public Reception to the 'Headscarf Ban'

The public reception has been filled with mixed reviews. Those who hold positive sentiments for the law believe that it is necessary to uphold the separation of church and state in

²¹ *Commission de Reflexion Sur L'Application du Principe de Laïcité Dans La Republique*, STASI COMMISSION (Dec. 11, 2003), <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/034000725.pdf> [hereinafter Stasi Commission].

²² Stasi Commission, *supra* note 21, at 68.

²³ Dawn Lyon & Debora Spini, *Unveiling the Headscarf Debate*, 12 FEMINIST LEGAL STUD. 333, 334 (2004).

²⁴ *Id.*

²⁵ John Henley, *French MPs vote for veil ban in state schools*, The Guardian (Feb. 11, 2004, 3:35 EST), <https://www.theguardian.com/world/2004/feb/11/schools.schoolsworldwide>; *see also* Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 15, 2004 Regulating, In Application of the Principle of Secularism, the Wearing of Signs or Dress Manifesting a Religious Affiliation in Schools, Colleges and High Schools] Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190 [hereinafter Loi 2004-228].

schools, as well as find a need to protect France's secular system from the threat of immigrants imposing their religious beliefs and not conforming to French society.²⁶ Those who agree also claim that the law would protect Muslim girls who are being forced or pressured to wear headscarves by their parents; in essence, Law 2004-228 gives the young girls a legal out to not comply with their parents' wishes.²⁷ Others that disapprove of the law state that it is in direct violation of basic human and constitutional rights, such as freedom of expression, freedom to wear what you want, and freedom to freely practice religion.²⁸ Opponents additionally state that the law has racist implications, and it unfairly stigmatizes and discriminates against Muslim women.²⁹ It is interesting to point out that much of the arguments made for and against this law were also made during the French Revolution towards Catholicism and Catholic nuns in their habits. The irony of this brings an important saying to the forefront: 'if you don't learn from your past, you are doomed to repeat it'.

E. The Expansion of the 'Headscarf Ban' and the Birth to the 'Burqa Ban'

Around 2009, there was a rise of radical Islamic terrorist concerns and safety in France. The President at the time, Nicolas Sarkozy, pushed for a new type of ban that expanded past the limited context of public elementary and secondary schools. He wanted a ban that prohibited the concealment of faces in public spaces, which included any type of face-covering headgear such as

²⁶ *France: Headscarf Ban Violates Religious Freedom*, HUM. RTS. WATCH (Feb. 26, 2004, 7:00 PM EST), <https://www.hrw.org/news/2004/02/26/france-headscarf-ban-violates-religious-freedom>.

²⁷ *Id.*

²⁸ Steven Erlanger, *Parliament Moves France Closer to a Ban on Facial Veils*, N.Y. TIMES (July 13, 2010), <http://www.nytimes.com/2010/07/14/world/europe/14burqa.html>.

²⁹ *Id.*

masks, helmets, burqas, full body and veil coverings, niqabs, and so on.³⁰ Exceptions to this rule apply only if: 1) the concealment is prescribed or authorized by legislative or regulatory provisions; 2) if it is for health or professional reasons; or 3) if the concealment was for the purpose of celebrating holidays, artistic or sporting events, or for other traditional special events.³¹ The justification for this law mirrored Law 2004-228: to protect women from being forced to wear veils and headcovers, and to protect the French secular society and the population as a whole.³² Any woman who chose to defy the ban received a fine of 150 euros (approximately \$162) or a course for citizenship lessons, while any man who forced a woman to be veiled would be fined 30,000 euros (approximately \$32,252) and jail time.³³ It was estimated that the law would only affect about 2,000 Muslim-French women who were currently covering their faces.³⁴ The bill was adopted by both the National Assembly and the Senate in 2010 with broad popular support in the country and enacted in April 2011 as ‘LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public (1)’, or ‘Act No. 2010-1192 of 11 October 2010 prohibiting concealment of the face in the public space (1)’ (LOI n° 2010-1192).³⁵ Although there was a space of time between when the law was approved and when the law took effect, the

³⁰ Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 Prohibiting Concealment of the Face in the Public Space] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344 [hereinafter Loi 2010-1192]; *see also European Court upholds French full veil ban*, BBC NEWS (July 1, 2014), <http://www.bbc.com/news/world-europe-28106900>.

³¹ **Loi 2010-1192**, *supra* note 30, at art. 2(II).

³² *French Senate approves 'Burka ban'*, THE TELEGRAPH (Sep. 14, 2010, 7:43 PM BST), <http://www.telegraph.co.uk/news/worldnews/europe/france/8002914/French-Senate-approves-Burka-ban.html>.

³³ *Id.*

³⁴ *Legislation under way to ban full-face veil from public places*, FRANCE 24 (last updated Apr. 22, 2010), <http://www.france24.com/en/20100421-france-legislation-ban-full-face-veil-public-places/>.

³⁵ **Loi 2010-1192**, *supra* note 30.

repercussions were seen almost immediately.³⁶ About 91 Muslim-French women had already been stopped in the streets by French police and handed a fine for wearing niqabs in public within the first few months since the law's promulgation.³⁷ That number was expected to rise, as there seemed to be many Muslim-French women who opposed the rule and wanted to challenge it.

During the same month that the law was put into force, a landmark case was brought to the European Court of Human Rights (the ECHR), which is an international court made by the Council of Europe that “rules on individual or state applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.”³⁸ The case was brought by a Pakistani woman, who argued that the law violated several articles of the Convention, along with women's basic human rights such as freedom of religion and expression.³⁹ However, the ECHR ruled in 2014 that LOI n° 2010-1192 did not violate the Convention and deferred the claims made by the French legislature that the ban was necessary for “living together” harmoniously, although the ECHR held serious doubts about the law's true nature.⁴⁰ This ruling by the ECHR helped to set the stage for the ‘burkini ban’ that came into play only two years later.

³⁶ Erlanger, *supra* note 28.

³⁷ *France imposes first niqab fines*, BBC NEWS (Sept. 22, 2011), <http://www.bbc.com/news/world-europe-15013383>.

³⁸ *European Court of Human Rights*, COUNCIL OF EUR. (last updated 2016), http://www.coe.int/t/democracy/migration/bodies/echr_en.asp.

³⁹ Saïla Ovald Chaib & Lourdes Peroni, *S.A.S. v. France: Missed Opportunity to do Full Justice to Women Wearing a Face Veil*, STRASBOURG OBSERVERS (July 3, 2014), <https://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/>; see also *S.A.S. v. France*, App. no. 43835/11, Eur. Ct. H.R. (July 1, 2014).

⁴⁰ Chaib & Peroni, *supra* note 39.

As a recap, France has a longstanding history with the separation of religion and politics, which is depicted in several instances in France's past. Some examples of this is seen in France's Constitution and adoption of '*laïcité*', as well as in legislation like the 'headscarf ban' in public schools and the 'burqa ban' for public spaces. The above-mentioned examples all share some similar justifications in their enactment: 1) to protect the public from religious fundamentalism; 2) to protect women from being forced to wear veils and headcovers; and 3) to protect France's secular society.

This note will now examine the events that led up to the 'burkini ban' and how the three justifications mentioned above were used to imbue the ban with the force of law.

II. France's implementation of the 'burkini ban'

The tipping point for the 'burkini ban' was a terrorist attack on July 14, 2016, in the city of Nice, and also attacks in Normandy days later, by militants professing their loyalty to ISIS.⁴¹ July 14 is also an important national holiday known as Bastille Day, which is France's Independence Day from the *ancien régime*; it also represents the beginning of the French Revolution,⁴² symbolizes liberty and the end of absolute monarchies, and celebrates the creation

⁴¹ Aurelien Breeden & Lilia Blaise, *Cannes, Citing Security Risks, Bans Full-Body 'Burkinis' From Its Beaches*, N.Y. TIMES (Aug. 12, 2016), http://www.nytimes.com/2016/08/13/world/europe/cannes-muslims-burkini-ban.html?_r=1; see also Alissa J. Rubin et al., *Scores Die in Nice, France, as Truck Plows Into Bastille Day Crowd*, N.Y. TIMES (July 14, 2016), <http://www.nytimes.com/2016/07/15/world/europe/nice-france-truck-bastille-day.html>.

⁴² *Bastille Day: French Holiday*, BRITANNICA (last updated February 9, 2015), <https://www.britannica.com/topic/Bastille-Day>; Laura K. Lawless, *Bastille Day – French National Holiday*, THOUGHT CO. (last updated Sept. 23, 2016), <https://www.thoughtco.com/bastille-day-french-national-holiday-1368566> [hereinafter *Bastille Day*].

of the nation's First Republic.⁴³ The attack by the ISIS jihadists left a poignant and somber feeling among the French citizens as the message of hatred and divisiveness was delivered on such a day meant for celebration. As a response to the attacks, the mayor of Cannes enacted a temporary ordinance from July 28 to August 31 to ban 'burkinis' on public beaches.⁴⁴ The mayor believed that "beach attire that ostentatiously displays a religious affiliation, while France and places of worship are the target of terrorist acts, is likely to create risks to public order."⁴⁵ The burkini itself had been around since about 2004, so although it gained major support and popularity from people purchasing the swimwear out of defiance for the law, it was not a new product.⁴⁶ That being said, even though the ordinance was dressed up as one placed for the protection of the citizens, in practice, it took the form of the legislature outwardly punishing French-Muslim citizens because of the actions of a few.

A. The Enactment of the 'Burkini Ban' In Several Municipalities of France

Other nearby cities began to implement their own bans. In total, about 30 additional municipalities had joined in. The bans were met with much criticism,⁴⁷ and many people from

⁴³ *Terror attack kills scores in Nice, France, Hollande says*, CNN (updated July 15, 2016, 12:26 AM), <http://www.cnn.com/2016/07/14/europe/nice-france-truck/index.html>; *Bastille Day*, *supra* note 42.

⁴⁴ Breeden & Blaise, *supra* note 41.

⁴⁵ *Id.*; Tara John, *France's Highest Court Overturns a Burkini Ban*, TIME (Aug. 26, 2016), <http://time.com/4468202/france-overturn-burkini-ban/>.

⁴⁶ Aheda Zanetti, *I created the burkini to give women freedom, not to take it away*, THE GUARDIAN (Aug. 24, 2016), <https://www.theguardian.com/commentisfree/2016/aug/24/i-created-the-burkini-to-give-women-freedom-not-to-take-it-away>; Mike Ives, *'Burkini' Inventor Says Sales Have Skyrocketed on Heels of Controversy*, N.Y. TIMES (Aug. 24, 2016), <https://www.nytimes.com/2016/08/25/world/australia/burkini-ban-france-aheda-zanetti.html>.

⁴⁷ Sheena McKenzie, *How people around the world are saying no to France's burkini ban*, CNN (Aug. 26, 2016), <http://www.cnn.com/2016/08/26/europe/burkini-ban-global-reaction/index.html>; *see also How the world is reacting to France's burkini bans*, THE LOCAL FR. (Aug. 18, 2016),

around the world voiced their outrage and confusion via social media. They posted pictures of nuns in France that were in their full habits playing in the ocean, and people ‘sunbathing’ while wearing full motorcycle suits and face-covering helmets on French beaches – both of which are considered banned according to LOI n° 2010-1192 – to highlight the hypocrisy and uneven treatment of women who wore the ‘burkinis’.⁴⁸ Despite the public outcry, some French mayors defended their bans, stating that such images were misleading and the law was being equally applied to everyone, including nuns in habits.⁴⁹

One specific municipality was Villeneuve-Loubet in Nice, France, in which the mayor also cited hygienic reasons and the preservation of public order as his justification.⁵⁰ Specifically, article 4.3 of the decree stated:

“[T]he access to beaches is prohibited on the territory of the commune, from the 15th of June till the 15th of September, to anyone not wearing adequate clothes in accordance with the usual standards of behaviour and with the principle of secularism, as well as respecting the hygiene and safety rules governing the use of public sea waters. It is strictly prohibited to wear, while bathing on

<http://www.thelocal.fr/20160818/mockery-and-debate-how-the-world-reacted-to-frances-burqini-bans>.

⁴⁸ McKenzie, *supra* note 47.

⁴⁹ Mangion, *supra* note 5.

⁵⁰ *Burkini Ban: Villeneuve-Loubet Follows Cannes In Banning Full-Body Swimsuits*, SKYNEWS (Aug. 14, 2016), <http://news.sky.com/story/burkini-ban-villeneuve-loubet-follows-cannes-in-banning-full-body-swimsuits-10534164>.

the territory of the commune, clothing whose connotation violates the above-mentioned principles.”⁵¹

In other words, people who wore beach attire that conspicuously showed their religious affiliations were not allowed to go on the beach. Furthermore, the hygiene justification was left vague, but the implications for conformity to French and other Western values can be inferred. Sharia laws specifically dictate hygienic rules to rid oneself of ‘ritual impurities’; on the other hand, Western ideology denotes showers and baths as a means to simply wash up, smell good, and so on.⁵² This law was in direct conflict with the concept of the ‘burkini’, because it was made for women to feel comfortable going to beaches without feeling the pressure to show their skin in public.⁵³ The more that people reviewed the ban and its implications, the more the so-called neutral wording began to reveal their underlying nature as discrimination toward women that prescribed to certain religious affiliations, such as Catholicism and Islam.

B. S.A.S. V. France: The ‘Burkini Ban’ Is Legally Challenged For the First Time

Litigation immediately followed the enactment of the decree. Two human rights groups – the Human Rights League (LDH), an anti-Islamophobia association, and the Collective Against Islamophobia in France (CCIF) – both stated that the mayor’s decree was a violation of “basic

⁵¹ Philippe Cossalter, *The French burkini case: “Uncover this breast that I cannot not behold”*, REVUE GÉNÉRALE DU DROIT (May 9, 2016), <http://www.revuegeneraledudroit.eu/blog/2016/09/05/the-french-burkini-case-uncover-this-breast-that-i-cannot-not-behold/>.

⁵² *Laws of Religion: Laws of Islam Concerning Ritual Purity and Cleanliness*, RELIGION RES. SOC’Y (last updated July 17, 2017), <http://www.religiousrules.com/Islampurity00table.htm>.

⁵³ Zanetti, *supra* note 46.

freedoms of dress, religious expression and movement.”⁵⁴ The case was initially brought in a local lower court – the Administrative Tribunal of Nice – in Villeneuve-Loubet through urgent applications, praying for relief in the form of suspending the ‘burkini ban’ in Villeneuve-Loubet.⁵⁵ In France, these types of applications are considered as summary procedures – similar to ‘a stay’ in U.S. courts to temporarily stop a judicial proceeding through a court order – and allows for judges to order an adoption of certain measures. Usually the judge “restricts himself to the suspension of the administrative act whose legality is being questioned: the concerned act remains inapplicable as long as a final decision regarding its legality hasn’t been taken by the administrative tribunal in charge of judging the merits of the case.”⁵⁶ In order for the administrative court to act on urgent applications brought to them, the petitioners must show that their case meets two requirements: 1) it must be an emergency situation within the meaning of article L. 521-2 of the Code of Administrative Justice; and 2) a situation that shows a serious and clearly illegal infringement of a fundamental freedom.⁵⁷

The ruling, which was given by a panel of three judges on August 22, denied the requests and upheld the ban in Villeneuve-Loubet.⁵⁸ In its decision, the administrative court attacked the

⁵⁴ *French burkini bans face legal challenges as tension mounts*, FOX NEWS (Aug. 25, 2016), <http://www.foxnews.com/world/2016/08/25/french-burkini-bans-face-legal-challenge-as-tension-mounts.html>.

⁵⁵ Tribunal Administratif [TA] [administrative tribunal] Nice, Aug. 22, 2016, N°s 1603508 & 1603523, <http://nice.tribunal-administratif.fr/content/download/69800/641111/version/1/file/1603508%20et%201603523%20%20r%C3%A9f%C3%A9r%C3%A9%20libert%C3%A9%20plages%20Villeneuve-Loubet.pdf> [hereinafter *Villeneuve-Loubet case*]; see also *The French Council of State found burkini ban illegal*, EUR. CASE-LAW BLOG (Sept. 1, 2016), <http://eurocaselaw.eu/?p=605>.

⁵⁶ Cossalter, *supra* note 51.

⁵⁷ *Villeneuve-Loubet case*, *supra* note 55, at 2.

⁵⁸ *Le port de la tenue vestimentaire dénommée "burkini" sur les plages de Villeneuve-Loubet*, TRIBUNAL ADMINISTRATIF DE NICE (Aug. 24, 2016), <http://nice.tribunal-administratif.fr/A->

bare grounds for the applications by first stating that there was no emergency situation present since there was a long gap of time between when the ban was executed by the Mayor – August 5 – and when the CCIF and the LDH entered their applications – August 16 and 18.⁵⁹ According to the Court, a situation is deemed as an emergency as soon as a serious and illegal infringement to a fundamental freedom is found, which justifies that a judge intervenes within a period of forty-eight hours.⁶⁰ The judges were not swayed by the petitioners’ arguments that they were waiting for physical existence of the order in public, such as the decree being displayed on the beaches or the order being shown in the press. The judges stated the petitioners knew about the ban when it was executed on August 5, which should have been when the “emergency situation” was presented.⁶¹

Next, the administrative court discussed the second requirement: a serious infringement on fundamental freedoms. The petitioners’ argued that there were a number of fundamental freedoms that were being violated by this decree in Villeneuve-Loubet, namely the freedom of dress in the public space, freedom of conscience, freedom to come and go, and the freedom to express religious beliefs.⁶² The court rejected those arguments and stated that there are no serious or illegal infringements of fundamental freedoms from the ban, and that the Mayor of Villeneuve-Loubet had the right under his preventive police power to take such measures in order to “avoid disturbances to public order” and maintain public security.⁶³ The court went further to say that

savoir/Communiqués/Le-port-de-la-tenue-vestimentaire-denommee-burkini-sur-les-plages-de-Villeneuve-Loubet.

⁵⁹ *Villeneuve-Loubet case*, *supra* note 55, at 1.

⁶⁰ *Id.* at 2.

⁶¹ *Id.*

⁶² *Villeneuve-Loubet case*, *supra* note 55, at 2-3.

⁶³ *Id.* at 5.

fundamental freedoms, such as freedom of worship and freedom to express religious beliefs, are not absolute freedoms and must be limited in the context of the appropriate space and time.⁶⁴ The judges believed that the ban was “necessary, appropriate and proportionate” for the protection of the citizens and to prevent public hostility, especially in the wake of the terrorist attack in Nice and an assassination of a Catholic priest in Normandy that took place days before the decree was enacted.⁶⁵ They also feared that a conspicuous display of religious beliefs, such as the ‘burkini’, would be seen by some as “defiance or a provocation exacerbating tensions felt by the population”.⁶⁶ Other reasons that were cited included the decree was only a temporary measure that would last until September 15, and it was being applied equally to everyone of all faiths and beliefs.⁶⁷

C. The Ruling of the Tribunal Court Is Appealed to the Conseil d’État and Overturned

After the requests for a suspension of the law from the CCIF and the LDH were denied, they appealed to the Conseil d’État on August 23 and 25, respectively, in the hopes of trying to repeal the ‘burkini ban’ and the decision of the lower court.⁶⁸ The Conseil d’État is the highest administrative jurisdiction in France. Much like the U.S. Supreme Court, “it is the final arbiter of cases relating to executive power, local authorities, independent public authorities, public

⁶⁴ *Id.* at 4.

⁶⁵ *Id.* at 10.

⁶⁶ *Villeneuve-Loubet case*, *supra* note 55, at 10; *see also French burkini bans face legal challenges as tension mounts*, FOX NEWS (Aug. 25, 2016), <http://www.foxnews.com/world/2016/08/25/french-burkini-bans-face-legal-challenge-as-tension-mounts.html>, and *France’s top court to rule on burkini ban*, ALJAZEERA (Aug. 26, 2016), <http://www.aljazeera.com/news/2016/08/france-top-court-rule-burkini-ban-160826063801212.html>.

⁶⁷ *Villeneuve-Loubet case*, *supra* note 55, at 13.

⁶⁸ Conseil d’État [CE Sect.] [highest administrative court], Aug. 26, 2016, Rec. Lebon 4 (Fr.) [hereinafter *Conseil d’État ruling*].

administration agencies or any other agency invested with public authority.”⁶⁹ However, the Conseil d’État differs from the U.S. Supreme Court because it has a dual function of both judging and directly advising the French Government.⁷⁰

On August 26, the Conseil d’État gave its ruling and overturned the ‘burkini ban’ in Villeneuve-Loubet.⁷¹ The court held that although a mayor does have police power and may institute measures that are deemed necessary to maintain order, safety, security, and public health, those measures still have to take into account guaranteed fundamental liberties; any measures that restrict such freedoms must be “justified by clearly demonstrable risks to peace and good order.”⁷² General policing measures must be adequate, necessary, and proportionate while taking into account time and location, but additional factors may not be added in to the decision-making process of these measures.⁷³ The court also noted that there was no evidence of any threat to the peace and order of the beaches in Villeneuve-Loubet because of the ‘burkinis’, and using the recent terrorist attack and the concerns of the public as justification should not have been factored in at all.⁷⁴ Thus, the Conseil d’État deemed that the ordinance had infringed on fundamental liberties and was illegal, and ordered the decree by the Mayor of Villeneuve-Loubet to be suspended. However, even though the CCIF and the LDH achieved what they set out to do, the decision only

⁶⁹ *Protecting freedom and fundamental rights; Defending the interest of people; Promoting high standards of public governance*, CONSEIL D’ÉTAT (last visited Mar. 20, 2017), <http://english.conseil-etat.fr/>.

⁷⁰ *Id.*; see also *The Conseil d’État: In a Few Words*, CONSEIL D’ÉTAT, http://english.conseil-etat.fr/content/download/32954/285585/version/1/file/CE_EnBrefEnglish.pdf.

⁷¹ *Conseil d’État ruling*, *supra* note 68.

⁷² *Id.*; see also Frank Cranmer, *The Conseil d’État and the “burkini ban”*, L. & RELIGION U.K. BLOG (Aug. 29, 2016), <http://www.lawandreligionuk.com/2016/08/29/the-conseil-detat-and-the-burkini-ban/#more-29887>.

⁷³ *Conseil d’État ruling*, *supra* note 68; Cranmer, *supra* note 72.

⁷⁴ *Conseil d’État ruling*, *supra* note 68; Cranmer, *supra* note 72.

applied to Villeneuve-Loubet. There were at least thirty other municipalities that had already placed or were planning on enacting similar ‘burkini bans’. The decision by the Conseil d’État was expected to set precedent among the other municipalities who had implemented similar decrees,⁷⁵ and the Conseil d’État made an example of Villeneuve-Loubet for any additional legal fights that may stem from other ‘burkini bans’ in other municipalities.

III. Repercussions and France’s ‘Burkini Ban’

Although the ‘burkini ban’ has been officially struck down by the Conseil d’État as unconstitutional in one municipality, there has been some push back on the ruling by others. High level officials, such as Prime Minister Manuel Valls and former President Nicolas Sarkozy have continued to outwardly push for and support the ban, despite the ruling.⁷⁶ As of September 1, 2016, at least two municipalities still had the ‘burkini bans’ in place,⁷⁷ citing security, risk to public order, and the need to preserve France’s brand of secularism as justification.⁷⁸ One lower court judge defied the Conseil by ruling that the ‘burkini ban’ that was instituted in Sisco, France should be upheld.⁷⁹ These forms of legal protest are able to take place in such a manner because, as is the case with the U.S. Supreme Court, any orders handed down by the Conseil are not self-executing. In order for the Conseil’s rulings to be implemented, the other court systems, local governments,

⁷⁵ *Burkini ban overturned in France*, TORONTO SUN (Aug. 26, 2016), <http://www.torontosun.com/2016/08/26/burkini-ban-overturned-in-france>.

⁷⁶ The Associated Press, *France’s burkini ban overturned by highest court*, CBC NEWS (Aug. 26, 2016, 9:21 AM), <http://www.cbc.ca/news/world/burkini-ban-france-overturned-1.3736823>.

⁷⁷ *French resorts lift burkini bans after court ruling*, BBC NEWS (Sept. 1, 2016), <http://www.bbc.com/news/world-europe-37243442>.

⁷⁸ The Associated Press, *supra* note 76.

⁷⁹ Charles Bayliss, *Judge rules burkini ban SHOULD stay in place despite French high-court verdict*, EXPRESS (Sept. 7, 2016, 1:24 AM), <http://www.express.co.uk/news/world/707948/Corsica-judge-burkini-ban-high-court-ruling-sisco-french-high-court-ruling>.

and legal enforcement officers must carry them out. Otherwise, the rulings will be treated as no more than words. Other French cities, however, have abided by the higher court's ruling and lifted their respective bans to avoid any civil litigation against the cities, especially now that all potential 'burkini ban' claims have a stronger foundation in court to win their cases. However, the public sentiments that encouraged the ban to become enforceable still preside in certain areas of the country.⁸⁰

Even in some municipalities that have removed the ban, some citizens still take it upon themselves to enforce the law by asking, and sometimes threatening, women who wear 'burkinis' to leave the beaches.⁸¹ Many people still approve of the ban because of France's firm '*laïcité*' ideologies that religion should not enter the social sphere by any means. The ban itself has also caused an inflammation of Islamophobia, discrimination towards Muslims – Muslim women in particular – and racist or anti-immigrant sentiments among the French population, leaving fear and uncertainty for those that are affected by it firsthand.⁸²

Still, some see this landmark case and the lifting of the 'burkini ban' in some municipalities as a victory that sets the tone and precedent for putting "an end to the onslaught of stigmatizing and Draconian political statements."⁸³ The main concern for the people that have fought – and in

⁸⁰ *France burkini ban: Australian woman forced off Riviera beach*, BBC NEWS (Sept. 19, 2016), <http://www.bbc.com/news/world-australia-37382318>.

⁸¹ Dominique Mosbergen, *Burkini-Wearing Woman Gets Chased Off French Beach*, HUFFINGTON POST (Sept. 19, 2016, 9:48 AM), http://www.huffingtonpost.com/entry/burkini-french-beach_us_57df960be4b04a1497b53f0e.

⁸² *See Reactions as burkini ban is suspended: 'It doesn't change anything' video*, THE GUARDIAN (Aug. 26, 2016), <https://www.theguardian.com/world/video/2016/aug/26/reactions-burkini-ban-suspended-it-doesnt-change-anything-video>.

⁸³ Lizzie Dearden, *Burkini ban suspended: French court declares law forbidding swimwear worn by Muslim women 'clearly illegal'*, INDEPENDENT (Aug. 26, 2016),

some instances are still opposing – the ‘burkini ban’ is that this is not a single-faceted issue. Rather, it encompasses many hot button topics: the rights of women to be treated not only as humans, but as equals; national security issues and how to protect the French citizens from rising terrorist and jihadist threats; the paternalistic view of the French government in feeling obligated to ‘liberate’ Muslim women from being ‘forced’ to wear hijabs and burqas against their will due to familial pressures; the freedom for everyone to practice the religion of their choosing and how to balance the freedom to express those values versus France’s ‘*laïcité*’ roots; and finally, the French citizens’ responses to immigrants and how they treat others in such divisive times. Unfortunately, such issues cannot be solved with just one court decision. It will take time, patience, and more advocating to push back on these issues that the ‘burkini ban’ has resurfaced and brought to the forefront of French society and politics. Discussions on such issues have been taking place in different areas, such as schools,⁸⁴ as more people are realizing that the way to amend such injustices is not to try and hide away or sweep the issues under the rug while pretending it never happened. Some people even draw parallels in their discussion between France’s ban on ‘burkinis’ and burqas, and other countries around the world that have similar laws, including Belgium, Spain, and others.⁸⁵ It is a good way to not only compare the particular events, the social cultures, and the political cultures in each country, but also to ascertain the arguments from all perspectives. As the dust settles and tensions die down in the upcoming months and years, it is quite possible that these

<http://www.independent.co.uk/news/world/europe/burkini-ban-french-france-court-suspends-rule-law-forbidding-swimwear-worn-muslim-women-seriously-a7211396.html>.

⁸⁴ Marie Godin and Giulia Liberatore, *Summer may be long gone, but the debate over the burkini ban is far from over*, INT’L MIGRATION INST. (Nov. 8, 2016), <https://www.imi.ox.ac.uk/blog/summer-may-be-long-gone-but-the-debate-over-the-burkini-ban-is-far-from-over>.

⁸⁵ Reuters, *Troubled Europe debates burqas, niqabs and burkinis*, THE INDIAN EXPRESS (Aug. 25, 2016, 4:09 PM), <http://indianexpress.com/article/world/world-news/europe-burkini-burqa-niqab-2995735/>.

events will be up for a more robust and open forum for discussion other than small group conversations between friends and colleagues. For right now, it seems that the only safe space to hold such discussions are in post-secondary school settings, where ideas and proposals are freely bounced off of others. However, a good way to help solve the issues is to keep the dialogue flowing, discuss everything, and for people to be more open-minded and not give in to blind fear of what they do not know or understand. As long as that line of communication remains open, the conversation about the ‘burkini ban’ and its effects will not disappear with the passage of time.

IV. Implications of the French ‘Burkini Ban’ for the U.S. ‘Muslim Ban’

A. Background of the U.S. ‘Muslim Ban’

On January 27, 2017, President Donald Trump of the U.S. signed Executive Order 13769: “Protecting the Nation From Foreign Terrorist Entry Into the United States”,⁸⁶ which had several effects: 1) suspended the entire U.S. refugee admissions system for 120 days to put stricter vetting laws into place;⁸⁷ 2) suspended the Syrian refugee program indefinitely;⁸⁸ 3) banned entry from seven Muslim-majority countries – Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen – for ninety days;⁸⁹ 4) banned entry of people with dual-citizenship who are from the seven listed countries for ninety days;⁹⁰ 5) prioritized the entrance of refugees from the Middle East who are Christians over Muslims;⁹¹ and 6) lowered the total number of refugees coming into the U.S. from

⁸⁶ Exec. Order No. 13769, 3 C.F.R. § 8977 (2017) [hereinafter Exec. Order 13769].

⁸⁷ Alan Yuhas and Mazin Sidahmed, *Is this a Muslim ban? Trump’s executive order explained*, THE GUARDIAN (Jan. 31, 2017, 14:28 EST), <https://www.theguardian.com/us-news/2017/jan/28/trump-immigration-ban-syria-muslims-reaction-lawsuits>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

any country from 110,000 to 50,000.⁹² The purpose of this Executive Order was to protect U.S. citizens and to prevent potential threats, such as foreign terrorists, from entering the U.S.⁹³ The Order makes no specific mention of any religion or group of people, but there is a strong implication otherwise. The language of the Order and the actions that took place when it was executed raised concerns that the Order was meant to directly affect Muslims and has a religious basis. For instance, the Order states that certain refugees may be prioritized to enter the U.S. if their refugee claim is “on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality.”⁹⁴ All seven of the named countries have a Muslim-majority population.⁹⁵ So, although the Order itself may appear neutral, its application implies that it is religiously motivated.

The results of the Executive Order were instantaneous. There was massive confusion at the airports; over 700 people were denied boarding on to their flights by the following Monday.⁹⁶ U.S. Immigration was nothing more than a raging, unorganized circus; there was confusion on the ground about how local law enforcement was supposed to implement such vague orders.⁹⁷ Students and those with professional jobs – such as doctors, researchers, engineers, and others – that were travelling or given scholarships to attend schools in the U.S. were left worrying whether

⁹² Yuhas & Sidahmed, *supra* note 87.

⁹³ Exec. Order 13769, *supra* note 86.

⁹⁴ Exec. Order 13769, *supra* note 86.

⁹⁵ Mona Chalabi, *Support for Trump travel ban in line with anti-Muslim attitudes in America*, THE GUARDIAN (Feb. 2, 2017), <https://www.theguardian.com/us-news/2017/feb/02/polls-widespread-backing-trump-travel-ban>.

⁹⁶ Ted Soqui and Reuters, *Travel ban on Muslims to include social media ‘vetting’*, ALJAZEERA (Jan. 31, 2017), <http://www.aljazeera.com/news/2017/01/travel-ban-muslims-include-social-media-vetting-170131205425042.html>.

⁹⁷ Chalabi, *supra* note 95.

they would be able to come back to the U.S., or have a job if or when they returned to the U.S.⁹⁸ In addition to that, there were several lawsuits that were filed on the same day that the Executive Order was implemented.⁹⁹ Lawyers who were in some of the airports tried to help in any way possible, even going so far as to write petitions and start the process to file lawsuits on the grounds that the Executive Order was unconstitutional and violated fundamental rights, such as freedom of religion, and the Fifth Amendment right to due process.¹⁰⁰

The Executive Order was officially challenged in court. On January 30, 2017, the state of Washington – later joined by the state of Minnesota – filed suit against the U.S. Government in the U.S. District Court for the Western District of Washington, challenging the constitutionality of the Executive Order.¹⁰¹ Washington also asked the district court to declare a postponement or a temporary stay of the Executive Order, which was granted on February 3, and allowed for the continuation of refugees, green-card holders, and certain religious minorities to safely travel back into the U.S. until the court could “hear and decide the States’ request for a preliminary injunction” at a later time.¹⁰² On February 4, the U.S. Government filed a notice of appeal in the Ninth Circuit Court of Appeals, sought an immediate stay, and an emergency stay of the district court’s decision.¹⁰³ While the immediate stay was denied by the Circuit Court, the “emergency stay of the

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at 1 (W.D. Wash. Feb. 3, 2017) [hereinafter *WA v. Trump* stay].

¹⁰² *Id.* at 2-3. See also *State of Washington vs. Donald J. Trump, et al*, U.S. CTS. (Feb. 3, 2017), <http://www.uscourts.gov/cameras-courts/state-washington-vs-donald-j-trump-et-al>, for a video of the TRO Hearing in the district court and the oral arguments given by the representatives for the State of Washington and the U.S. Government.

¹⁰³ *Washington v. Trump*, 847 F.3d 1151, 1156-1157 (9th Cir. 2017) [hereinafter *WA v. Trump* appeal].

district court's temporary restraining order" was reviewed on February 9 while the U.S. Government's full appeal proceeded through the court system.¹⁰⁴ In its motion for an emergency stay, the U.S. Government argued against the district court's decision and stated that the district court did not have the authority to review a President's decision about immigration policy, especially when it involves actions that deal with national security.¹⁰⁵ On this, the Circuit Court outwardly denied the U.S. Government's argument. The Court stated that although courts provide deference to the Government in respect to immigration and national security issues, the judicial branch still has the authority to "adjudicate constitutional challenges to executive action."¹⁰⁶ In addition, the Court found no evidence to support President Trump's claim that this ban would bolster national security in the U.S., so the Court upheld the temporary stay of the Executive Order.¹⁰⁷

B. Similarities with the U.S. 'Muslim Ban' and the French 'Burkini Ban'

There are many similarities between the France 'burkini ban' and the U.S. 'Muslim travel ban'. First, both policies are being made by secular states. As secular states, there should be a line drawn between church and state, and laws should not be made on the basis of religion regardless of whether the law promotes or discriminates. In addition, being a secular state should mean that laws treat everyone equally, and avoids preferential treatment to certain groups of citizens based on religion. Here, both France and the U.S. are 'Christian based' countries – in other words, both countries were founded on some type of Christian belief. For France, it was predominantly

¹⁰⁴ *Id.* at 1156.

¹⁰⁵ *Id.* at 1156, 1161.

¹⁰⁶ *WA v. Trump* appeal, *supra* note 103, at 1161-1164.

¹⁰⁷ *Id.* at 1168-1169.

Catholicism at the beginning of its history. For the U.S., although some would say that this country was founded on conventional Christian beliefs as well, it is more accurate to say that the Founding Fathers were “theological liberals who approached religion from a rational perspective” – that is to say, they thought about what a higher moral standard would be and strived to be good, reasonable people, but looked for more substance to it other than God.¹⁰⁸

A second similarity is that both France and the U.S. have laws and policies that seem neutral on their face, but in fact may have an unequal impact on the way that they are implemented or enforced. In France, the laws that are known as the ‘burqa ban’ and the ‘burkini ban’ both made no mention of specific religions, nor did they deny individuals the right to practice their religion.

However, the words of the laws themselves implied that unfair treatment against certain groups of people would soon begin – most notably, against those that are Muslim. Under the ‘burqa ban’ – both the original and the extended law that applied to public spaces – people are not allowed to wear ostentatious signs of religious symbols in public spaces, and are not allowed to cover their faces for ‘public safety’ reasons. Although most French citizens are Roman Catholics, 31.5%-39.5% of France’s population are of a different religion that could be highly affected by such laws, with the Muslim community accounting for about 7%-9% of that number.¹⁰⁹ In addition, there are a few religions that require followers to wear traditional religious wear *constantly*, especially headwear. For a law that claims to be neutral, it seems that the French law infringes on the rights of certain groups of people if they do not conform to France’s brand of secularism – more

¹⁰⁸ Mark Edwards, *Was America founded as a Christian nation?*, CNN (July 4, 2015, 10:22 AM), <http://www.cnn.com/2015/07/02/living/america-christian-nation/index.html>.

¹⁰⁹ *The World Factbook: France*, CIA (last updated Sep. 27, 2017), <https://www.cia.gov/library/publications/the-world-factbook/geos/fr.html> [hereinafter *World Factbook France*].

specifically, the blending-in and keep-it-to-yourself mentality of the French populace when it comes to religion can be more stifling to Muslim women and others who practice different faiths than the religions that the French legislature is claiming to try and protect them from.

On the other hand, it can be argued that the U.S. is not nearly as controlling as France. In the U.S., people can wear their religious garb in public spaces. They have the freedom to express themselves as long as they remain under the scope of the laws. However, even in the U.S., laws can be made to look neutral, but in practice it denotes another goal. The Executive Order issued by President Trump made no mention of Muslims at all; it only spoke of foreign terrorists and the Government's wishes to protect the U.S. citizens from harm, but the application and some of the words in the Order triggered warnings. The seven countries that the Executive Order halted travel from were all countries in the Middle East, with a majority population of Muslims.¹¹⁰ In addition, President Trump's Executive Order had an expressed exception in which religious minorities from the designated countries would have priority as refugees for entry into the U.S.; however, the religious minorities coming from those countries would mostly consist of those who practice Christianity.¹¹¹ President Trump has also explicitly stated that he was going to help Christians from those other countries, without going into any details about how he planned on doing so.¹¹² With

¹¹⁰ See generally *The World Factbook*, CIA (last visited Sep. 27, 2017), <https://www.cia.gov/library/publications/the-world-factbook/>, for a look at the populations for the following countries stated in President Trump's Executive Order: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.

¹¹¹ *Id.*

¹¹² Scott Whitlock, *CBS Worries: Trump Refugee Ban Favors Christians*, MRC NEWS BUSTERS (Jan. 30, 2017, 12:39 PM), <http://www.newsbusters.org/blogs/nb/scott-whitlock/2017/01/30/cbs-worries-trump-refugee-ban-favors-christians>.

such a boldly stated intent, it is interesting how the U.S. can remain secular if it is seen as favoring one religion and rejecting another.

One other similarity is that both countries have enacted bans that have been struck down as illegal by the judiciary due to the laws infringing on fundamental human rights of certain groups of people, including freedom of religion. How can this be if both countries are supposed to be secular? Looking at both countries, it is easy to see how the laws transformed into the bans that we see today. With the rising threat of ISIS and terrorist attacks around the world, countries want their citizens to be safe. Both France and the U.S. have been victims of terrorist attacks, so it is only reasonable for each legislature to want to prevent such atrocities from taking place ever again. However, the problem with both countries were their targets and their implementations. For France, the targets for their laws and policies were anything that referred to the Islamic religion, whether it be related to extreme Islamic beliefs or not. France took the approach of hiding the problem away in plain sight, at least to the extent of making their citizens feel safe.

C. Implications from the U.S. ‘Muslim Ban’ and the French ‘Burkini Ban’

By taking such a route, though, the French government then placed an intense pressure on every religious French-Muslim citizen, even if those citizens have absolutely nothing to do with ISIS. The French Government created this aversion and immediate suspicion of anything Islamic – much like their history relating to Catholicism – and this translated to their citizens as well. The French Government normalized Islamophobia in their country with the enactment of the ‘burkini ban’, and this stigmatized and dehumanized their Muslim citizens. By doing so, the French Government was slowly legitimizing the need to shed more and more of the freedoms of

expression and religion under the guise of ‘protecting the citizens and secularism’ that Muslim citizens – especially Muslim women who wear traditional clothes – thought they also had.

The U.S. ran into similar problems as well, but instead of trying to hide any mention of ties toward Muslim or Islamic beliefs, the U.S. Government chose to take a stricter and more forceful route with the basis of ‘protecting the U.S. citizens from foreign terrorist threats’. Again, there is nothing wrong with the government using its power to protect its citizens, as it is charged to do. However, there is clear precedent in the U.S. that in order to limit a person’s fundamental rights, there must be a legitimate reason that trumps those rights. National security is an important interest, but there needs to be strong support indicative of the government’s substantial interest to back up its claim of national security. The French judiciary spoke on this as well: there must be a clearly demonstrable risk as justification for the infringement of rights. As stated by the U.S. District court and U.S. Court of Appeals, the U.S. Government cannot back up its reasoning for denying refugees from predominantly Muslim countries on the basis that banning people would make the national security of the U.S. greater. This reasoning only begs the question. France has also committed this mistake with their ‘burqa ban’ and ‘burkini ban’, because the French government has constantly used the ‘protection of France’s secular society and maintenance of public order’ as the blanket justification for depriving French-Muslim citizens their constitutional rights. It is important for governments to protect their citizens and countries, but it is equally important for those in power to recognize that sowing the seeds of increasing resentment and feelings of otherness in affected populations does not always ensure the enhancement of security.

V. Conclusion

There is a famous saying that is applicable to the events in France: “Those who cannot remember the past are condemned to repeat it.”¹¹³ It seems that France is planning on doing just that by forgetting its own history and how ‘*laïcité*’ was formed. The French have forgotten how the separation of church and state was not an easy or peaceful transition. The French Revolution was a violent period where Catholic nuns were imprisoned or executed if they did not conform with the secular garb ban or claim loyalty to the French Constitution.¹¹⁴ At that time, the public harassed and forced Catholic nuns to disrobe on the streets and heckled them because of their beliefs.¹¹⁵ Similar events are taking place in the France of today. Muslim women are being subjected to similar practices – being forced to take off their hijabs, remove their ‘burkinis’ on public beaches and forcing them to dress down, receiving verbal and physical abuse on the street from random strangers for wearing their headscarves or full-body religious garb, and other instances of discrimination and violence being done against the minority group.¹¹⁶ The ban on headscarves was put in place for similar purposes as the illegality of Catholic religious habits were called for: security, preserving French ideals of society, and to liberate women from their oppression of their religion, religious peers, and families.¹¹⁷ Here, the reasoning is to protect

¹¹³ See generally 1 GEORGE SANTAYANA, *THE LIFE OF REASON: REASON IN COMMON SENSE* 284 (1905).

¹¹⁴ Mangion, *supra* note 5.

¹¹⁵ *Id.*

¹¹⁶ Hélène Irving, *France’s “Burqa Ban” Enforcing Not Solving Inequality*, OPEN SOC’Y FOUND. (Apr. 13, 2012), <https://www.opensocietyfoundations.org/voices/france-s-burqa-ban-enforcing-not-solving-inequality>; see also Intissar Kherigi, *Muslim women are the first to pay the price for Islamophobia in Europe*, MIDDLE EAST EYE (May 30, 2016, 9:45 UTC), <http://www.middleeasteye.net/columns/muslim-women-are-first-pay-price-islamophobia-europe-848269067>.

¹¹⁷ Mangion, *supra* note 5.

women who may have been forced to wear the headscarves, and also because the burqa is a representation of sexism where the male dominates the women.¹¹⁸ Although those are valid concerns to have and the law seems to be made with good intentions, the application seems completely off. If protection of Muslim women is one of the concerns that was behind the law, then it seems counterintuitive to require and force them to not wear it in public. It is even worse when the law tries to hide that very intention by trying to make the law neutral on its face. There were other ways that the French government could have taken to protect both Muslim women and the ‘*laïcité*’ sentiment.

The ‘burkini ban’ itself arguably represented several gigantic steps back into history for France. The ban was made in direct response to terrorist attacks to maintain public order, hygiene, and good morals and secularism.¹¹⁹ However, that reasoning once again does not match up to the application of the ban in the preceding weeks that it was in force in several of the municipalities. Muslim women were forced to remove their ‘burkinis’, kicked off of public beaches, or denied entrance to beaches all together if they did not comply with the authorities.¹²⁰ In addition, the women were slapped with a fine for wearing the ‘burkinis’.¹²¹ If public safety from terrorist attacks was the main concern, then a law or ban that disproportionately targets Muslim women who may or may not be involved or support ISIS or other terrorist groups does not fit with the purpose, and in fact does seem to have ulterior motives for its implementation. The ban also did the opposite of what it was intended to do – keep the public order – and added more oil on the fire of Islamophobia

¹¹⁸ Shaira Nanwani, *The Burqa Ban: An Unreasonable Limitation On Religious Freedom Or A Justifiable Restriction?*, 25 EMORY INT’L L. REV. 1431 (2011), http://law.emory.edu/eilr/_documents/volumes/25/3/comments/nanwani.pdf.

¹¹⁹ Breeden & Blaise, *supra* note 41.

¹²⁰ *Id.*

¹²¹ *Id.*

among the French public. The ban created even more fear of those who practice the Muslim faith, and those that are the targets are fearful for their own safety while they are in public.

The removal of the ‘burkini ban’ was a step in the right direction, but it might take decades, or even longer than that, for the stigma that was created by this ban to be rectified by the people. Activists who are still fighting this ban and its repercussions will have a lot of work ahead of them, but it is time for France – and all nations – to stand up not just for one group’s rights, but for equal rights and treatments for everyone. Stigmatization, discrimination, and racism should not be tolerated, and fear should not be the rule that governs our lives or dictate how we as humans treat one another.

Impunity Watch Essay Contest 2017

By: Andrina Kirst
Nichols School

Impunity Watch Essay Contest

This summer, I attended the Summer Institute for Human Rights and Genocide Studies for the first time. The trip was enlightening, to say the least. While learning about past atrocities and meeting with survivors, I felt a strong sense of hope and realized that I was not fighting alone. I was surrounded by powerful, like-minded people who were either actively mending the world or preparing and laying the groundwork for others to do the same. However, this essay is not entirely about how wonderful the Summer Institute was for me. My essay is mainly to discuss three very important and influential people whose contributions helped to shape the world and society into what it is today. Those people are Raphael Lemkin, Eleanor Roosevelt, and Robert H. Jackson. Researching the challenges that these three individuals had to face allowed me to understand how they became such prominent and influential figures, and the foundations and groundwork that they have created for successive generations of leaders in the fight for equal human rights. What were their sources of inspiration, and do the same lessons and figures resonate today? I sought to learn from these leaders and continue to make a difference as they have, and discover what future activists need as a driving force to... hand give us the vantage point of someone ready to take on the world.

Setting a bar requires enormous strength. The bar is susceptible to falling apart unless it is as strong as the people who had originally set it. It must also endure the challenges of the present and the future. Who were the people that gave Eleanor Roosevelt, Robert H. Jackson, and Raphael Lemkin the strength to make the changes they did as humanitarians?

There is a permanent exhibit in the Robert H. Jackson Center in Jamestown, New York, honors the life of his strongest mentor, his school English teacher, Mary R. Willard. Willard had

a profound impact on Jackson's character and legal mindset. For example, when Jackson took the podium for his final statement in the Nuremberg Trials, he quoted Shakespeare's *Richard III*. Jackson engaged with this particular text while under Willard's guidance, and it seems Willard knew that it would serve Jackson well one day.

Another history altering mentor was Marie Souvestre, whom Eleanor Roosevelt described as one of the greatest influences on her educational and emotional development. Souvestre ran the Allenswood Girl's Academy at Wimbledon Common in London, England. Souvestre had recognized Roosevelt's high potential while she attended the academy. Just as Willard expanded Jackson's education beyond the mandatory curriculum, Souvestre would travel with Roosevelt on school breaks to observe unconventional sights, such as working class and impoverished families going about their daily lives. For young Roosevelt, this was the beginning of a long career of sympathizing with and representing the interests of the less fortunate.

For Raphael Lemkin, his rise to activism was more tragic compared to Roosevelt's or Jackson's upbringing. Lemkin's first exposure to education was in his Eastern Polish household, where he and his two brother were homeschooled by their Jewish parents. After looking through the events in Lemkin's life, it was clear that the actions that he had taken seemed to be derived from lessons of struggle and great loss rather than guidance. He lost close to forty members of his family during the Holocaust, and I believe that his loss drove him to delve wholeheartedly into his life's work as a humanitarian.

In order to appreciate the accomplishments of Jackson, Roosevelt, and Lemkin, it is best to understand the underlying inspiration for these three individuals. To start, Lemkin studied the laws that enabled Nazi occupation after experiencing their effects firsthand. Once removed from

the atrocities of his homeland, Lemkin coined the term ‘genocide’, from the Greek prefix ‘-geno’, meaning ‘race’, and the Latin verb ‘cide’, meaning ‘killing’. His renowned book, *Axis Rule in Occupied Europe*, became the literary and legal standard for identifying crimes against humanity; it was also used as a prosecution tool in the Nuremberg Trials.

Lemkin then became a legal advisor to the Nuremberg prosecutor, Robert H. Jackson. The two first connected when Lemkin sent a copy of his book to Jackson. Following this period in his life, Lemkin lobbied continuously for the adoption of the term ‘genocide’. By the end of Lemkin’s career, he had successfully cemented the importance of labeling and understanding ‘genocide’ with the ratification of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948. Raphael Lemkin continued his activism until his death in 1959. Even years after his passing, his impact on humanitarianism remains alive through his unprecedented work and as an inspiration for future generations.

Next, Jackson is best known for the prosecution of twenty-two Nazis following World War II. President Truman appointed him as Chief U.S. Prosecutor at the International Military Tribunal in order to organize and carry out the Nuremberg Trials. In doing so, Jackson created a procedure for all four Allied nations involved. During this time, he also coined new terms, such as ‘crimes against humanity’ and ‘acts of aggression’. When the Nuremberg Trials concluded, Jackson continued his work in the U.S. Supreme Court and formed the way this nation comprehends issues, such as Civil Rights and Religious Freedom.

Finally, when Eleanor Roosevelt was invited by President Truman to the newly developed United Nations in 1946, she became a significant representative for oppressed individuals all over the world. During her time in the U.N., she used her seat in the Social, Humanitarian, and Culture

Committee to draft the Universal Declaration of Human Rights. This Declaration was a milestone in human rights, because it set the standard in human rights for years to come. In addition, Roosevelt not only helped to draft the Declaration, but she also lobbied for the support of enough countries to endorse it. On December 10, 1948, Eleanor Roosevelt presented the Declaration to the U.N. General Assembly, which was then passed. This event had a huge impact in the international relations community by helping to the establish basic human rights to the less fortunate.

These three extraordinary examples of makers of change in the world have laid foundations for our collective understanding and protection of basic human rights. Personally, I am inspired by the amount of bravery that each of these individuals exemplified during their lives, especially following World War II. The example of these leaders, who took on the responsibilities and burden of fighting against hate, murder, and prejudice is a constant reminder that I should fight from my privileged platform to uphold basic human rights and to push for those rights to be granted to all.

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SELECT ARTICLES FROM IMPUNITY WATCH NEWS

Impunity Watch Reporting Staff

ASIA

Detained Journalists' Lawyers Argue for Case Dismissal

By: Katherine Hewitt

APRIL 11, 2018

YANGON, Myanmar – Court hearings have been taking place since January for two Reuters journalists that were arrested on December 12, 2017. Myanmar officials arrested Wa Lone and Kyaw She Oo for obtaining state secrets from two police officers working in the Rakhine state. The journalists had been working on a story in relation to the mass killings of Rohingya in the Rakhine state.

So far, 17 witnesses gave testimony in court in 13 hearings that have taken place. Lone's and Oo's lawyers say that the witnesses called forth by the prosecution are weak. There are inconsistencies in the testimonies. Additionally, several procedural mistakes were revealed during the court sessions. Testimonies included a witness who burned notes from the time of the arrest, another who wrote the information down on his hand, and one who signed the search form before the section detailing the items seized had been filled in. The defense attorney has called for the dismissal of the case based on this. The judge will decide at the next hearing on 11 April.

The prosecution team responded to the request to dismiss the case by stating that the information that the two journalists had was secret and that the journalist intended

to hurt the country with that information. The defense team presented

that the prosecution could not establish that the information that the journalists obtained

was secret as it had been published by both state and private media outlets.

Wa Lone told journalists after the court hearing, "We only did our work as reporters. I want the people to understand that and want to tell them that I never betrayed the country." She Oo said, "We followed the news and uncovered the Inn Din story. The reason why we did it is to give the vitally important information to the country."

For more information please visit:

Reuters – lawyers for Reuters reporters argue for Myanmar court to dismiss case – 4 April 2018

Democratic Voice of Burma – Court hears arguments on motion to dismiss charges against Reuters duo – 4 April 2018

Washington Post -Lawyers ask Myanmar to dismiss case vs. Reuters journalists – 4 April 2018

Vietnam Jails Six Human Rights Activists

By: Brian Kim

APRIL 10, 2018

HANOI, Vietnam – In Vietnam, six human rights activists were sentenced to between 7 and 15 years in jail. The activists were charged for "attempting to overthrow the state" on Thursday, April 5th, 2018. The sentence imposed on the activists is the harshest sentence in years in Vietnam. All of them will face up to five years under house arrest when they are released from prison.

The six activists were connected to the Brotherhood for Democracy group. They were

accused of pushing multi-party democracy and receiving money from overseas. Blogger Pham Van Troi, priest Nguyen Trung Ton, journalist Truong Minh Duc, entrepreneur Nguyen Bac Truyen, and human rights worker Le Thu Ha were all sentenced on Thursday.

The Hanoi People's Court gave Nguyen Van Dai, a human rights lawyer, the longest sentence for "trying to overthrow the people's administration." He was sentenced to 15 years in prison. Ms Vu Minh Khanh, Dai's wife, expressed her disappointment with the trial. She claims that "he is innocent and he pleaded innocent at the trial."

Since the end of the Vietnam War in 1975, the Communist Party of Vietnam has ruled the country. Although the country has been reforming its economy and its social policies, the government retains a tight grip on media censorship.

Amnesty International believes that there are around 97 prisoners being held in jail for their human rights work in the country.

On the recent actions taken by the Vietnamese government, the United States State Department stated that "the United States is deeply concerned by the Vietnamese government's efforts to restrict these rights, through a disturbing trend of increased arrests, convictions, and harsh sentences of peaceful activists." Moreover, the spokesperson went further by stating that "individuals have the

right to the fundamental freedoms of expression, association, and peaceful assembly, both online and offline."

For more information please visit:

CNN – Six activists jailed in Vietnam amid crackdown on dissent – 5 April, 2018

The Guardian – Vietnam jails six activists for up to 15 years for trying to 'overthrow state' – 5 April, 2018

The Straits Times – Vietnam jails human rights lawyer, five other activists – 6 April, 2018

EUROPE

Thousands Again Protest 'Stop Abortion' Bill in Poland

By: Jenilyn Brhel

APRIL 16, 2018

WARSAW, Poland – On March 23rd, thousands of protesters across Poland marched in response to plans to fortify the country's already strict abortion laws.

A new bill in parliament intends to ban abortions that are performed as a result of fetal abnormalities, one of the few instances in which an abortion is currently allowed in the country.

The "Black Friday" protests were conducted across the country as a result of the proposal.

Abortion is currently banned for the most part in Poland. Currently, abortions are allowed in cases of rape, incest, when there is serious threat to the mother's health or if the fetus has been found to have severe, irreversible damage.

However, illegal abortions are rampant in Poland. For every 1,000 to 2,000 legal abortions there are an estimated 10,000 to 15,000 illegal ones.

A letter from over 200 groups stressed that "This bill would further hinder women, particularly those from low-income and rural communities, from accessing safe abortion care....and place women's health

and lives at risk and violate Poland's international human rights obligations."

Europe's human rights watchdog, The Council of Europe, is urging lawmakers to reject the bill,

stressing that it violates Poland's human rights commitments.

Proponents of the bill say that 96% of abortions performed in 2016 were on fetuses diagnosed with Down Syndrome.

Poland's president, Andrzej Duda, supports the bill and has promised to sign it if it is approved by parliament.

A bill drafted in 2016 proposed to ban all abortions, even those where it was essentially guaranteed that the fetus would die. The bill also would have limited access to prenatal care as well as contraception. This proposal was rejected after it initiated nationwide demonstrations, with more than 150,000 Polish citizens mobilizing across the country to oppose it.

The same women's groups that protested in 2016 came back out in force to oppose the latest legislation which is entitled "Stop Abortion."

Droves of people took to the streets with signs reading "Girl Power" and "My body, my choice."

Critics of the bill fear that if already strict abortion laws are made even more stringent, women will travel to other countries to obtain abortions or resort to unsafe methods, putting their lives at risk.

Draginja Nadazdin, director of Amnesty International, spoke on the matter, saying "Women in Poland are strong and determined and we will defeat this threat. But we should not have to fight our own members of parliament to get our basic rights."

For more information, please see:

BBC News – Poland Abortion: Protests Against Bill Imposing new Limits – 26 March 2018

CNN – Poles March Against Abortion ban, Again. – 23 March 2018

Newsweek – Black Friday Protests Against ‘Stop Abortion’ Bill Planned in Poland – 23 March 2018

New York Times – Polish Women Protest Proposed Abortion Ban (Again) – 23 March 2018

NORTH AMERICA

Oakland Mayor Warned Bay Area Residents of Impending ICE Raid

By: Karina Johnson

MARCH 30, 2018

OAKLAND, California — On Saturday, February 24, Oakland Mayor Libby Schaaf issued a news release warning local residents that US Immigration and Customs Enforcement (ICE) would be conducting operations in the Bay Area during the next 24 hours. This warning was posted on Facebook and shared on Twitter.

Mayor Schaaf’s February 24 news release detailed her rationale for disclosing her knowledge of the pending raids: “As Mayor of Oakland, I am sharing this information publicly not to panic our residents but to protect them. My priority is for the well-being and safety of all residents — particularly our most vulnerable — and I know that Oakland is safer when we share

information, encourage community awareness, and care for our neighbors.”

In a statement made on February 27, ICE Deputy Director Thomas D. Homan said, “The Oakland mayor’s decision to publicize her suspicions about ICE operations further increased that risk for my officers and alerted criminal aliens — making clear that this reckless decision was based on her political agenda with

the very federal laws that ICE is sworn to uphold.” The statement

further asserted that “ICE does not conduct sweeps or raids that target aliens indiscriminately, and the agency prioritizes public and national security threats, immigration fugitives and illegal

reentrants.” ICE arrested over 150 suspected undocumented immigrants, half of which do not have criminal records. Mayor Schaaf defended her decision two days later on Twitter: “I do not regret sharing this information. It is Oakland’s legal right to be a sanctuary city and we have not broken any laws. We believe our community is safer when families stay together.”

During the weeks following the operation, ICE’s San Francisco spokesman James Schwab resigned, frustrated by repeated misleading statements made by officials, including Attorney General Sessions, alleging that roughly 800 undocumented immigrants escaped arrest due to Mayor Schaaf’s public warning. In an interview with the San Francisco Chronicle, he condemned the misleading statements: “To say that 100 percent are dangerous criminals on the street, or that those people weren’t picked up because of the misguided actions of the mayor, is just wrong.”

Across the United States, places like San Francisco, Chicago, Seattle, New York, and

Philadelphia have challenged the constitutionality of President Trump's January 2017 Executive Order 13768 that says cities and counties would lose federal funding if local law enforcement did not cooperate with immigration agents. All courts (except for Seattle, which is still pending) have granted preliminary injunctions halting the enforcement of the order. On March 6, the Department of Justice filed suit against the state of California. The complaint alleges that three recently enacted "state sanctuary laws" are unconstitutional as they are preempted by federal law and seeks to block their enforcement.

Liam Brennan, a former federal prosecutor and head of Connecticut's Public Corruption Task Force, described his own experiences as a federal prosecutor, sanctuary cities such as Los Angeles and New York City prioritized fighting crime instead of enforcing civil immigration violations, because "Solving a crime was clearly more important than deporting immigrants who came here looking for economic opportunity." The federal government (through U.S. Citizenship and Immigration Services) may offer U-visas and T-visas to individuals who have been victims of a crime in the US and who choose to cooperate with law enforcement in certain criminal prosecutions.

For more information, please see:

Just Security – Reclaiming the Public Safety Mantle for Sanctuary Cities – 27 March 2018

Just Security – Does the Oakland Mayor Face Legal Liability for Warning About ICE Raids? – 15 March 2018

San Francisco Chronicle – San Francisco's ICE spokesman quits, disputes agency's claim that 800 eluded arrest – 12 March 2018

The Washington Post – Justice Dept. sues California over 'sanctuary' laws that aid those in U.S. illegally – 6 March 2018

The Washington Post – Oakland Mayor Libby Schaaf tipped off immigrants about ICE raid and she isn't sorry she did – 28 February 2018

U.S. Immigration and Customs Enforcement – ICE statement on immigration enforcement activities in northern California – 27 February 2018

SF Gate – Oakland mayor's warning puts immigrants, advocates on high alert – 25 February 2018

The Los Angeles Times – California becomes 'sanctuary state' in rebuke of Trump immigration policy – 5 October 2018

SOUTH AMERICA

Chilean students and teachers march against Pinera administration

By: Emily Green

APRIL 27, 2018

SANTIAGO, Chile – On Thursday, thousands of students and teachers held a massive demonstration in Chile. They gathered to denounce profit-making in higher education under President Sebastian Pinera's administration.

Organizers estimated around 120,000 participants in the demonstration along central Alameda Avenue in Santiago. Similar protests took place in other main cities of Chile such as Coquimbo, Valparaiso, and Temuco. The march was called by the National Confederation of Students of Chile (Confech) and was the first major protest under the month-old administration of conservative President Pinera. They demanded an end of profit-making, student debts, and sexism in higher education.

This protest follows a recent decision by the country's constitutional court to overturn a law that prohibited for-profit companies from controlling universities. While profit-making from higher education is illegal, critics have long claimed that some companies that operate universities have found ways to exploit loopholes in the law. These companies find ways to turn a profit without re-investing the money in reduced tuition or improved education.

Young people consider higher education a business that is putting them and their families in debt. One spokeswoman for the students, Sandra Beltrami, said "the demands of the student movement are still valid and remain the same. We want to be in the classrooms, we want to have classes, we want to study a career

in order to be someone in life and have a profession like many people in this country, and we cannot do it because there is still profit in Chile."

Students and teachers marched through downtown Santiago and made their point by banging drums, toting banners, and sometimes throwing rocks and blocking traffic. There were small confrontations with police who occasionally used tear gas to disperse protesters.

President Pinera is a conservative billionaire who served a term as president from 2010 and 2014. His first term was marred by massive student protests seeking an education overhaul. Earlier in the week, President Pinera sent a bill to Chile's Congress to increase public financing for technical colleges. In a move that many thought was intended to defuse tension with students, he promised that access to free education was "here to stay."

Higher education was free in the country until 1981 when Augusto Pinochet's military dictatorship paved the way for the development of private universities with no constraints on tuition fees. Now, the Organization for Economic Cooperation and Development reports that Chile has the fourth-most-expensive university system in the world.

For more information, please see:

Sputnik – Chilean Students March Against Unfair Education – 20 April 2018

FMT News – Chile's students launch first protest under Pinera administration – 20 April 2018

The Santiago Times – Pinera administration
faces first student march in Chile – 19 April
2018

Democracy Now – Chile: Massive Student
Mobilization Protests Privatization of Education
– 20 April 2018

Telesur – Over 120,000 Chilean Students March
Against Profits and Sexism – 19 April 2018

SELECT PUBLICATIONS FROM
LAW-899: Atrocity Law and Policy

**“Making A Monster” Exploring the Development of Perpetrators, Bystanders, and
Rescuers**

By: William Hodge

“MAKING A MONSTER”**EXPLORING THE DEVELOPMENT OF PERPETRATORS, BYSTANDERS, AND RESCUERS****BY: WILLIAM HODGE, FALL 2017**

INTRODUCTION

“Shoot her.”

Bleeding and lying on the ground in tears, the officer turns to Private Heinrich and orders the woman be shot on-site. This elderly woman, having worked as an architect earlier in life, had just offered a suggestion for laying the foundation of a new shower chamber on the campgrounds. Having built over ten homes in her native country of Yugoslavia, Uryla knew that the laborers were laying bricks too far apart. In response, the commanding officer, none too pleased with this intellectual assertion, had just picked up a nearby brick and struck Uryla without saying a word. Having witnessed what had just transpired, Heinrich, unlatches his P38 9mm pistol and shoots Uryla in the head without hesitation. Both the commanding officer and Heinrich exchange affirmative nods and carry about their business.

While unfathomable, something in Heinrich’s life had led to his impassive, undaunted reaction to the order to take an innocent, elderly woman’s life. Some may argue that it is the nature of his duty, the conformity that comes with serving in the Fuhrer’s army. Others may attribute this heinous act to a number of other surrounding factors in a volatile culture all culminating into one. But perhaps it is something more, something outside the scope of reasoning surrounding the situation. What factors may have led to the identity formation of certain individuals that may support these atrocities and those that oppose them?

Manipulative leaders will always exist, but they cannot succeed without the support of a following.¹ Many researchers and scholars have weighed-in on the top-down approach to genocide where elites have harvested subdued hatred from their followers to orchestrate genocides. Therefore, this paper will look at

¹ Baum, Steven K. (2008) *The Psychology of Genocide*. Cambridge University Press, 7.

the issue from a bottom-up perspective and will explore the psyche of those followers that either carry out these egregious orders, those that recognize the evil and seek to stop them from happening, and those that sit idly by and let the egregious acts transpire. Specifically, this paper will compare and contrast whether it is the individual's internal development, cultural upbringing or both that leads to an individual's membership in one of three groups: perpetrators, bystanders, and rescuers. Rather than seeking to find a cure for perpetrators or motivation for the bystanders, we will analyze the overarching question of why to get a better understanding of the unfathomable.

BACKGROUND

Albert Einstein said, "It is easier to denature plutonium than to denature the evil spirit of man." Though many have tried, there is no one way to psychoanalyze a person's behavior to understand why or how. As E.O. Wilson stated in his book *Consilience*, "People know more about their automobiles than they do their minds."²

Over time, psychologists and sociologists have tested various methods to develop their theories, but the truth is, many factors may be involved in the development of an individual especially during the tumultuous time of war.

Perpetrators

Generally, perpetrators are those who obey authority and act in an aggressive manner towards others.³ Many researchers have used the term "anti-Semitic persons" when defining perpetrators meaning their thinking tends to be rigid, fearful, and closed to new experiences.⁴ When studying the characteristics of the perpetrators during the Holocaust, sociologist Theodor Adorno described the perpetrators' characteristics as blind submission, aggression, anti-intraception, superstition and stereotypy, power and

² E.O. Wilson (1998) *Consilience*. New York: Knopf.

³ T.W. Adorno, E. Frenkel-Brunswick, D.J. Levinson & R.N. Sanford (1950/1964) *The authoritarian personality*. New York: Wiley, 40.

⁴ R. Rosenbaum (1998) *Explaining Hitler*. New York: Random House.

toughness, destruction and cynicism, projectivity, and sex.⁵ Psychologist Bob Altemeyer later narrowed Adorno's list down to three factors related to authoritarianism: conventionalism, authoritarian submission, and authoritarian aggression.⁶ Regardless of classification, researchers of all types agreed that perpetrators all have one trait in common – the ability to kill with little to no remorse for the life of the victim or their respective families.⁷

The development of the perpetrator mindset is unsubstantiated and varied. In the FBI report following the massacres at Columbine High School, it was revealed that the shooters were cult members that believed doomsday was imminent while sharing their desire to kill “almost all [Denver's] residents.”⁸ The perpetrators were not operating under the instructions of another but rather their own fostered hatred for other human beings. While having a prior history of breaking into cars and making unsubstantiated threats, the shooters carried on normal lives to where people around them never foresaw the impending threat.⁹ Similarly, workplace perpetrators no longer concern themselves with the opinions of others. The Chrysler shooting in 2005 was a product of nothing more than lack of recognition and developing a mindset to make others listen and pay attention.

Bystanders

In contrast to taking action like a perpetrator or rescuer, a bystander is one that is present but refrains from any type of involvement.¹⁰ In some cases, the inaction of a bystander can be more infuriating than the action of a perpetrator. For example, consider the murder of Catherine Genovese. On the night of her murder, it was determined that approximately thirty-eight people ignored Genovese's cries for help as her

⁵ Conventionalism: the philosophical attitude that fundamental principles of a certain kind are grounded on (explicit or implicit) agreements in society, rather than on external reality; Anti-intraception: subjective or imaginative tendencies; Cynicism: an inclination to believe that people are motivated purely by self-interest; Projectivity: way of revealing hidden motives or underlying personality structure of an individual by use of unstructured test materials; see Adorno at 40.

⁶ <http://www.panojohnson.com/automatons/rwa-scale.xhtml>

⁷ Baum, at 119.

⁸ Baum, at 121.

⁹ *Id.*

¹⁰ Baum, at 153.

killer proceeded to brutally murder the twenty-eight-year-old woman for over a span of roughly thirty to forty-five minutes.¹¹ When interviewed by the police, most of the thirty-eight witnesses said something to the extent of, “I didn’t want to get involved.”¹² It was later revealed that had one of the witnesses called the police, they would have been on the scene in ten minutes thus preventing the death of Catherine Genovese.¹³

Constituting the majority of the three groups¹⁴, a bystander has various traits all tailored to making that person feel the same or normal under their current circumstances.¹⁵ Their dispositions typically include instability, uncertainty, tolerance, fear of threat and loss, and poor self-esteem to name a few.¹⁶ However, it is difficult to ascertain a bystander’s traits or dispositions due to their ability to sometimes perpetrate or at times rescue.¹⁷

Rescuers

With perpetrators and bystanders seemingly everywhere, it begs the question – where are the rescuers – those that recognize the evils of our world and seek to help others? Is the act of rescuing where a bystander temporarily crosses the proverbial threshold to save someone in dire circumstances?

Most research says the act of rescuing is not mere happenstance. There does not appear to be a distinctive gene or type of training that sparks the initiative of a rescuer. It is a behavior so permanent in nature that similar behavior has been observed even in primates.

Recall the 1996 story of Binti Jua, a gorilla at Chicago’s Brookfield Zoo, that cradled and cared for a three-year-old boy after he had fallen eighteen feet into the gorilla’s exhibit.¹⁸ Generally perceived to be

¹¹ <https://www.nytimes.com/2016/04/05/nyregion/winston-moseley-81-killer-of-kitty-genovese-dies-in-prison.html>.

¹² *Id.*

¹³ *Id.*

¹⁴ Baum, at 153.

¹⁵ J. Block & J. Block (2006) Venturing a 30-year longitudinal study. *American Psychologist*, 61, 315-27.

¹⁶ *Id.*

¹⁷ Baum, at 153.

¹⁸ <http://abcnews.go.com/US/gorilla-carries-year-boy-safety-fell-enclosure-1996/story?id=39479586>.

an aggressive species, this particular individual displayed one of the most sincere, empathic traits rarely seen in humans.¹⁹

While perpetrators concern themselves with their selfish desires or the opinions of authority and bystanders ask what others would think, rescuers have an internal motivation to do or say what they feel is right.²⁰ Displaying traits such as autonomy, resistance, tolerance and honesty, rescuers maintain an innate empathy-based morality.²¹

So back to the question of why and how? Why do individuals find themselves classified as a perpetrator, bystander, or rescuer and how does it happen? Many have asserted these people are a result of a culture while just as many have insisted that it is an individual's development that has led to their respective choices.

Similar to the plutonic question posed by Albert Einstein – how do we denature the spirit of man?

ANALYSIS

One of the biggest misconceptions of the Nazi regime was that there had to be something wrong with them mentally. People believe that the only way the unfathomable could have happened was they all suffered some sort of mental defect that made it impossible for all those involved to perceive the consequences of their actions. This theory assumes that all those not involved were mentally healthy when, in fact, that is not the case at all.

During the Nuremberg trials, American psychiatrist Dr. Leon Goldensohn attempted to analyze and identify the psychopathology of the Nazis on trial.²² Goldensohn's results were surprising, finding that most of the Nazis were mere opportunists that were "all too normal" and anything but mentally ill.²³

¹⁹ *Id.*

²⁰ Baum, at 182.

²¹ *Id.*

²² L. Goldensohn, (2005) *The Nuremberg Interviews*. New York: Vintage.

²³ *Id.*

Veritably, these men were found to come from well-educated families with families of their own in which they were perceived as “good family men.”²⁴ These same men would eventually return to their respective families, having sequestered their extreme hate and prejudice towards Jews, whom had families of their own, and carried on normal lives.

Prejudice that exists in many may decrease with education and income but what about those that are highly-educated and wealthy but still harbor hate for certain classes of people? All research inevitably tells us that ordinary people can commit demonic acts.

One prevailing theory to explain this phenomenon is the one of social conformity or, as defined by psychologist Muzafer Sherif, “complying with the collective.”²⁵ This power to influence others became more prevalent and distinguished through Solomon Asch’s conformity study where he asked students to estimate line lengths.²⁶ Specifically, Asch placed two equal lines in two separate boxes but had an outside contingent inform the subjects of the study that the lines were not equal.²⁷

To Asch’s surprise, 37/50 (74%) conformed to the incorrect opinion of the outside group and those that did not conform felt “conspicuous and crazy” for going against the majority.²⁸

As a result of this study, Asch theorized that even in societies of reasonably intelligent and well-intentioned adults, conformity can influence those individuals to agree with the majority.²⁹ In other words, when individuals become uncertain of their words or actions in a tumultuous society, they seek direction from others, which some perceive as permission.³⁰

²⁴ *Id.*

²⁵ http://www.intropsych.com/ch15_social/sherif_1936_group_norms_and_conformity.html.

²⁶ S.E. Asch (1956) Studies of independence and conformity. A minority of one against a unanimous majority. *Psychological Monographs*, 70.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Baum, at 86.

In the early 1960s, Yale University researcher Stanley Milgram conducted a study similar to Asch's.³¹ Milgram's study tested administrators' responses to conformity by placing a phony electrical shock apparatus in front of the administrators and instructed them to shock an unsuspecting subject when that subject gave a wrong answer to a test question.³² The experimenter assured the administrators that, while painful, none of the shocks would cause any permanent damage to the subjects.³³

Despite fake cries of pain and other reactions from the supposed subjects, around 65% of the administrators complied obediently with the experimenter's instructions.³⁴

This same experiment was conducted over numerous years and in various regions all with similar average obedience rates causing Milgram to conclude that "[w]e do not observe compliance to authority merely because it is a transient cultural or historical phenomenon, but because it flows from the logical necessities of social organization."³⁵

Elaborating on Milgram's conclusion as a result of his own prison experiment, lead experimenter Philip G. Zimbardo concluded that the majority of normal, average, intelligent individuals will conform to commit immoral, illegal, irrational, aggressive acts when placed under certain situational conditions.³⁶ Zimbardo maintained the notion that "bad systems create bad situations, create bad apples, create bad behaviors, even in good people."³⁷ In conjunction with this study, Milgram's conclusion seems to align most with that of a perpetrator culture where there is an instilled sense of superiority to those they deem inferior due to their narrow focus of what is right and what is wrong.³⁸

³¹ S. Milgram (1974) *Obedience to authority*. New York: HarperPerennial.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ P. Zimbardo (2007) *The lucifer effect*. New York: Random House, 461.

³⁷ *Id.* at 445.

³⁸ I.W. Charny (2006) *Facism and democracy in the human mind*. Lincoln: University of Nebraska Press, 3.

Perpetrator Culture

Some smiling. Some smirking. Some standing next to dozens of bodies next to a picket fence as if the victims were prized game shot on a Saturday morning hunt. In photos from the Holocaust, soldiers had just shot innocent men, women, and children, sometimes unprovoked and mostly under the guise of permission from someone the soldiers viewed as a superior elite. The soldiers' faces and stature indicate no signs of pain, remorse, or grief for the lives lost. Rather, the unfathomable was commonplace to these soldiers of genocide. As previously mentioned and vindicated by numerous theories, all of these men in these pictures share one thing in common: the ability to kill without remorse.

In a perpetrator culture, there is punishment for not obeying regardless of the orders. Each perpetrator in that culture fosters an instilled sense of superiority toward all those they consider inferior because those inferiors do not observe a certain belief or an established standard of arbitrary norms.³⁹ That sense of superiority typically stems from a profound religious belief backed by an elite.⁴⁰ Other perpetrator cultures grow out of greed. Whether it be land or money, the elites of the culture give orders based on their own personal gain under the guise of some "moral" reasoning for their sins.⁴¹ The Fascist mind compels the person, couple or family to conform and obey the totalistic dictates of its ideology.⁴² Any deviation from these dictates is treated as deserving of retaliatory punishment by unforgiving symptoms in the functioning of the self or of the interpersonal system established by that respective culture.⁴³

Some see the perpetrator culture as a hotbed of populism, fostering intolerance of the weak and containing a number of factors all cultivating into a culture of hatred and cruelty.⁴⁴ Under the Third Reich

³⁹ Umberto Eco's *Eternal fascism: Fourteen ways of looking at a blackshirt*, originally in *New York Review of Books*, 6/22/95, www.themodernword.com/eco/eco_blackshirt.html.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Baum, at 131.

⁴⁴ Eco, www.themodernword.com/eco/eco_blackshirt.html.

of Hitler, racism was a part of racial pride. All responsibility rested with the victim who was biologically inferior and brought trouble upon himself by mixing with the master race, or so the thinking went.⁴⁵

In honor cultures, shame is everywhere to be corrected by the honor-based gesture where violence is glorified and passed on via shared public norms.⁴⁶ In such cultures, restoring one's honor is culturally linked; there is no sense of an individual self.⁴⁷ The social norm is to glorify violence, and the restoration of one's honor is only attainable via cultural standards.⁴⁸ Individual anger never subsides because, like bullies waiting for a pretext to rage, everything that threatens, everything that they cannot control, everything that is not conducted in their way is to be punished.⁴⁹ In other words, these cultures do not recognize the sense of individual self but rather a collective whole that transposes every social, religious, or political contention into a personal attack thus triggering a release of rage and emotion on those that do not conform.⁵⁰ The perpetrator culture makes it impossible for the individual to develop emotionally and morally.

Conformity, or “complying with the collective,” seems to be prevalent in all of these perpetrator cultures.⁵¹ Asch said that the tendency to conform in these perpetrator societies is so strong that reasonably intelligent and well-meaning people “are willing to call white black.”⁵² They are unable to deviate from the cultural pressures and thus unable to develop an opinion of their own.

Bystander Culture

Oftentimes, it appears as if perpetrators and bystanders coexist in the same type of culture, but in reality, bystanders will go along with the social norms whether they be perpetrating or rescuing. A

⁴⁵ J. Waller (2002) *Becoming evil*. New York: Oxford University Press.

⁴⁶ R.E. Nisbett & D. Cohen (1996) *Culture of honor*. Boulder: Westview Press.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Baum, at 133.

⁵⁰ *Id.*

⁵¹ http://www.intropsych.com/ch15_social/sherif_1936_group_norms_and_conformity.html.

⁵² Baum, at 85.

“bystander culture” does not exist because bystanders tend to blend in with the majority, acting in whatever way is considered the cultural norm.

While perpetrators tend to come from perpetrator families, the same cannot be said for bystanders as they tend to come from various backgrounds.⁵³ It appears as if bystanders are loyal to no one but themselves, only acting under the rarest of circumstances and sometimes if the act benefits them personally. In the midst of peril, bystanders typically lead normal lives and maintain that presence of normality regardless of the calamity surrounding them.⁵⁴ Predominantly described as ambient, bystanders are socially full of whatever culture they are in but emotionally empty with no consistent mind of their own.⁵⁵ Like perpetrators, bystanders conform to the collective, trapped in a culture that prohibits self-development.

Rescuer Culture

It is important to note that in all three of the aforementioned conformity studies (Milgram, Asch, and Zimbardo), there were a substantial number of subjects that did not conform. In Asch’s experiment, there was a point in the study where two-thirds of the subjects did not conform to the majority group’s opinion that the lines were different.⁵⁶ Similarly, Milgram’s experiment resulted in one-third of the administrators defying the experimenter’s orders to shock the test subjects.⁵⁷ So in this controlled, system or situation, how is it these individuals defied the experimenter’s commands?

In some instances, a fascist culture can serve as an incubator for the rescuer persona.⁵⁸ Rescuers see the culture as a platform to protest against the culture itself.⁵⁹ Approximately 76% of rescuers take action because of the needy condition of the victim, regardless of the culture, but some enjoy the idea of

⁵³ Baum, at 154.

⁵⁴ *Id.*

⁵⁵ E.A. Zillmer, M. Harrower, B.A. Ritzler & R.P. Archer (1995) *The quest for the Nazi personality*. Hillsdale, NJ: Lawrence Erlbaum.

⁵⁶ Asch, at 70.

⁵⁷ Milgram, *Obedience to authority*.

⁵⁸ Baum, at 192.

⁵⁹ *Id.*

being above the law that they see as flawed.⁶⁰ There is the story of Marion Pritchard who once shot a policeman when he arrived at Pritchard's home at 2:00am searching for three Jewish children that Pritchard was hiding.⁶¹ Marion had never shot a pistol, but when confronted by the law, she saw the decision as him or the kids.⁶² Later accounting the events of that night, Marion stated that she was excited when she did it because she had saved the children from what Marion knew was wrong despite it being the law.⁶³ However, according to Baum, the remaining 24% are less opportunistic and take advantage of cultural opportunities to display good deeds and empathetic gestures such as visiting local hospitals and caring for the poor.⁶⁴

Converse to religion serving as a justification for perpetrator actions, very few rescue for religious reasons.⁶⁵ During the Nazi regime, it was revealed that those who classified themselves as "irreligious" rescued more than those that identified as a Christian or some other religion.⁶⁶ Instead, the majority was found to have taken a more empathetic approach, operating under the theory that they were doing what any other human would have done under those circumstances.⁶⁷ It was later revealed that many of the rescuers in the Nazi regime were professionals such as social workers, teachers, counselors, and nurses. This led some to conclude they rescued merely because helping others was part of their jobs.⁶⁸ While that may be true, others were not as cynical citing that these rescuers knew what was right and acted in the interest of others because of their own personal emotional development.

Based on these findings, it is reasonable to suggest that those that are not as vulnerable to social forces tend to be more emotionally developed.

⁶⁰ *Id.* at 194.

⁶¹ <https://www.nytimes.com/2016/12/23/world/europe/marion-pritchard-rescuer-of-jews.html>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Baum, at 192.

⁶⁵ B. Duriez (2004) Are religious people nicer people? Taking a closer look at the religion-empathy relationship. *Mental Health, Religion and Culture*, 7, 249-54.

⁶⁶ *Id.*

⁶⁷ Johtje Vos, cited in E. Fogelman (1995) *Courage and conscience*. New York: Anchor.

⁶⁸ Taney, personal communication. Also see K.R. Monroe (2004) *The hand of compassion*. Princeton: Princeton University Press, 204.

Individual Development

Classified by Milgram as “defiants,” these administrators were later tested by developmentalist Lawrence Kohlberg.⁶⁹ When compared with those that obeyed the experimenter’s commands, the defiants scored at the highest levels of moral development.⁷⁰ When compared with the parallel study of nonconformity in psychology, Kohlberg’s defiance study was found to be fairly consistent. Predominately, nonconformity tends to be a sign of resistance to cultural norms and those that follow merely for the acceptance of others.

Nonconformity typically coincides with traits such as honesty, generosity, higher levels of self-esteem and elevated levels of achievement and leadership.⁷¹ Those that resist conformity also resist the need for others’ approval and decline to partake in cultural mindsets such as authoritarianism and conservatism.⁷² Some refer to the concept of nonconformity as dissent or defiance, but the pattern remains all the same – those who do not follow orders do not socially identify with the culture they are in and maintain a higher level of autonomy. In other words, these defiants typically parallel the traits of rescuers in the context of genocidewhile those susceptible to social forces parallel those in genocide that become perpetrators. To better understand these differences, a developmental perspective should be explored.

Perpetrator Individual Development

While it may seem harsh, many researchers have suggested that the least morally developed people were the ones who were most likely to adhere to social standards and traditions. These perpetrators have been found to be more susceptible to cultural norms and thus more compliant with orders. All that is

⁶⁹ L. Kohlberg & L. Candee (1984) The relationship of moral judgment to moral action.

⁷⁰ *Id.*

⁷¹ J. Arndt, J. Schimel, J. Greenberg & T. Pyszczynski (2002) *Personality and Social Psychology Bulletin*, 28, 671-83.

⁷² L.E. Petersen & J. Dietz (2000) Social discrimination in a personnel selection context: The effects of an authority’s instruction to discriminate and followers’ authoritarianism. *Journal of Applied Social Psychology*, 30, 206-20.

required for these under-developed individuals is an authority to deem their acts legitimate via the perception of permission.⁷³ There is an underdevelopment of personal identity and overdevelopment of social identity.

Ego development is correlated with traits of less mature people. These individuals are found to be more sociopathic in that they have lower levels of development and are, therefore, incapable of feeling remorse. The perpetrator ego develops with the culture that determines the “right” ways to act and how to treat others. A perpetrator always believes their actions are right and justified and that there is no other way to act outside of the cultural norms. Simplistic thinking has been statistically linked to having more prejudices simply because the victims or “outsiders” do not fall within a specific, culturally-determined criterion. Genocide scholar Israel Charny identified the mindset as fascistic, based on childish forms of thinking of right and wrong, and categorization of falsehoods.⁷⁴ The perpetrator mindset needs logic and consistency.⁷⁵ It is a mindset based on the need to be confirmed by social consensus and the need to be right even if that means taking a position that contrasts their own senses and logic.⁷⁶

“Killing is easier than farming,” said one of Jean Hatzfeld’s subjects who was a member of the Rwandan Kibundo gang that had killed an estimated 50,000 of their Tutsi neighbors.⁷⁷ Many of the gang members said they had killed numerous cordial acquaintances with machetes and that it was second nature after the first couple of murders.⁷⁸ The gang had been operating under the perception that they were the elite and that anyone inferior was wasting the gang’s land and resources.⁷⁹ They enjoyed lives of good

⁷³ Baum, at 5.

⁷⁴ I.W. Charny (2006) *Fascism and democracy in the human mind*. Lincoln, NE: University of Nebraska Press, 6. Also see Jessica Stern (2003) *Terror in the Name of God*. New York: Ecco, who found Arab perpetrators often misperceived persecution and trust, seeing everything as an attack.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ J. Hatzfeld (2005) *Machete Season*. New York: Farrar, Straus, and Giroux, 198.

⁷⁸ *Id.*

⁷⁹ *Id.*

fortune, never questioning their self-examination and should they ever be required to seek forgiveness, it must come from another that has the authority to grant forgiveness upon request.⁸⁰

The lack of remorse all stems from the inability to self-identify and the inability to develop emotionally. That lack of development leads to a mindset that perceives the world as a prism, taking instructions from an authoritative figure and categorizing all of life's complexity into right or wrong. Identity, feelings, and needs must be laid out in basic terms because anything other than black-and-white specifications lead to anxiety in those with a lack of coping skills.⁸¹ For example, when studying the psychological makeup of the Ku Klux Klan, there was a predominant fear of diversity and new experiences instead of Blacks and Jews per se.⁸² This proclivity towards social stigmatism typically translates to a fear and loathing of outsiders and a maintained list of enemies.

Irrespective of culture and surrounding circumstances, there are open- and closed-minded people that are unable to tolerate change, and that simplistic thinking has been statistically linked to that person having more prejudices.⁸³ Such polarized thinking, devoid of complex choices, helps simplify the thought processes of perpetrators. Without complexity of choices and an automated classification of persons and moral decisions, there can be no emotional development and thus no self-identification or self-actualization.

Bystander Individual Development

Compared to perpetrators, bystanders are more developed on multiple measures but less developed emotionally when compared to rescuers. Bystanders tend to find themselves on the midpoint of the emotional development scale. Bystanders experience middle levels of development and are comprised of

⁸⁰ *Id.*

⁸¹ Baum, at 124.

⁸² D. Green, R. Abelson & M. Garnett (1999) The distinctive political views of hate-crime perpetrators and White supremacists. In D.A. Prentice & D.T. Miller (eds.) *Cultural divides*. New York: Russell Sage.

⁸³ M. Kossowska & A. Van Hiel (1999) Personality and current political beliefs: A comparative sample of Polish and Belgian samples. *Polish Psychological Bulletin*, 30, 115-28.

some identity exploration, though with no real commitment or vocational commitment.⁸⁴ There are rudiments of personal identity but that identity remains underdeveloped, subject to the overpowering of the social identity.⁸⁵ In the fluid development of bystanders, insight is a key component in making developmental shifts between temporary rescuer and temporary perpetrator.⁸⁶ Insight is an understanding of the origin, nature, and mechanisms of beliefs, feelings, attitudes and opinions of oneself and others.⁸⁷ Consider those in the Nazi regime that were found to be shallow-thinkers without deep feelings or emotional attachments. They had poor coping skills, were highly vulnerable to stress, had lower self-esteem, were cognitively simple, racist, and rigid, and, like perpetrators, often saw themselves as victims. These thought processes, or lack thereof, is known as an “abstinence from thinking.”⁸⁸

Passivity tends to be a common thread amongst bystanders. Ervin Staub theorized that passivity changes bystanders. They seek justification for their passivity, guilt, or lack of empathy by distancing themselves from the victims so bystanders do not know or cannot act on the victim’s suffering.⁸⁹ This distancing contributes to a devaluing of the victims and increases the likelihood that the bystander will remain passive because they are not having to interact with the conflict they seek to avoid.⁹⁰ The lack of interaction with the very thing that makes them uncomfortable makes it impossible for bystanders to develop beyond that passive mindset. Consequently, this leads some bystanders to join perpetrators.⁹¹ For instance, those who collaborate may be considered temporary perpetrators, and those that show some resistance would fall under the temporary rescuer category. In the midst of genocide, bystanders divest themselves emotionally where they can.

⁸⁴ S. Lewis (1935) *It can’t happen here*. <http://gutenberg.net.au/ebooks03/0301001h.html>.

⁸⁵ *Id.*

⁸⁶ Baum, at 175.

⁸⁷ *Id.*

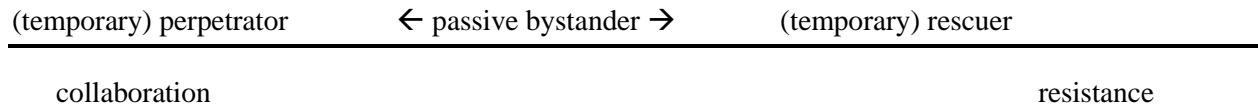
⁸⁸ B.F. McFarland-Icke (1999) *Nurses in Nazi Germany*. Princeton, NJ: Princeton University Press; also see M. Dudley & F. Gale (2002) Psychiatrists as a moral community?: Psychiatry under the Nazis and its contemporary relevance. *Australian & New Zealand Journal of Psychiatry*, 36, 585-94.

⁸⁹ E. Staub (2001) Individual and group identities in genocide and mass killing. In R.D. Ashmore, L. Jussim & D. Wilder (eds.) *Social identity, intergroup conflict, and conflict reduction*. New York: Oxford University Press, 173.

⁹⁰ *Id.*

⁹¹ *Id.*

Different Types of Bystanders (a continuum)



Another prevalent theme in bystanders during genocide is numbness. Numbness is predominately the inability to empathically project one's self into others that share a common humanity.⁹² Numbness not only speaks to a form of self-protective dissociation but also a highly self-conscious narrative about the collective construction of moral availability, if not empathy.⁹³ It makes sense that numbness is a trait associated with bystanders as they are unable to absorb the magnitude of a mass genocide.⁹⁴ Their under-developed ability to conceptualize the peril of common humanity can be directly correlated to their inaction and constraint of humanist aspirations.⁹⁵

Like perpetrators, bystanders are more self-centered and more emotionally constricted than others. While catastrophe, pain, and genocide takes place all around them, the non-actors demonstrate a numbness to other common humanity. However, there is no doubt that these individuals maintain the ability to do good but threats from others, anxiety, and stress cause an increased need for structure for these individuals to know how to act. While the identity of a perpetrator is all social with little to no personal development, a bystander exhibits a culmination of the two identities.

Compared to rescuers, bystanders tend to be less emotionally developed yet maintain the "great potential power do to do."⁹⁶ Many have attributed this occasional resistance to a bystander's higher functioning background and the development of an identity.⁹⁷ However, this identity remains theoretical

⁹² C.J. Dean (2004) *The fragility of empathy*. Ithaca: Cornell University, 5.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ E. Staub (1995) How people learn to care. In P. Schervish, V.A. Hodgkinson, M. Gates & Associates (eds.) *Care and community in modern society*. San Francisco: Independent Sector/Jossey-Bass, 4.

⁹⁷ *Id.*

until influenced by some situation making it difficult to fully understand the shift in the behavioral paradigm.⁹⁸ Recall the Milgram study. Would the administrator defy the experimenter's orders to shock the student in a less controlled environment? It is not unreasonable to assume that the results may have been different had the administrators been observed under normal, daily circumstances.

Rescuer Individual Development

While not determinative, education in empathy can be a start to developing higher levels of development within a culture.⁹⁹ The idea behind that education is to perceive others individually and personally rather than socially.¹⁰⁰ Rescuers tend to demonstrate a wisdom on how life is to be lived above the fray and beyond cultural boundaries.¹⁰¹ Their core of universal morality is human welfare rather than religious exhortations, systems of moral rules, or adherence to abstract ethical concepts such as fairness or justice.¹⁰² Some have theorized that rescuers maintain a non-materialistic mindset. When one is no longer dominated by their own needs – physiologically, socially, and personally – they are able to self-actualize or achieve the highest levels of emotional development.¹⁰³ They exemplify a democratic mindset, able to change ideas as new information comes available giving them the ability to strive for more information and thus more equality should they be elevated to a leadership role.¹⁰⁴

The rescuing behavior is one that is neither self-congratulatory or self-serving.¹⁰⁵ Most rescues begin spontaneously, on an unplanned basis. These acts are responses to requests for help where, like the perpetrator mindset, the thought process is simple: "I had no choice but to rescue."¹⁰⁶ However, some have

⁹⁸ *Id.*

⁹⁹ Baum, at 175.

¹⁰⁰ J.W. Sherman, St J. Stroessner, F.R. Conrey & O.A. Azam (2005) Prejudice and stereotype maintenance processes: Attention, attribution, and individuation. *Journal of Personality and Social Psychology*, 89, 607-22.

¹⁰¹ Baum, at 187-88.

¹⁰² K.R. Monroe (2004) *The hand of compassion*. Princeton: Princeton University Press, 204.

¹⁰³ www.maslow.com/.

¹⁰⁴ Charny, at 3.

¹⁰⁵ David Hume, at 182.

¹⁰⁶ Johtje Vos, cited in E. Fogelman (1995) *Courage and conscience*. New York: Anchor.

argued that rescuing is not purely unselfish and that the act of rescuing helps the person feel less guilty or aids their own self-esteem. London School of Economics lecturer Matt Mulford would further that assertion in finding that a universal mindset was linked to heroism and a propensity to judge others.¹⁰⁷ Even so, it is rescuing all the same regardless of the person's motivation. As stated by Charny, rescuers have a democratic mindset that "rejoices in one's existence and claims the inherent right to self-defense against dangers and extremes... [but is] committed to deep respect for the right of others to live and to rejoice in the quality of their lives."¹⁰⁸

Charny's theory would lend itself to another theory that says that the exuberance one experiences when helping another serves as a primary motivation for rescuers.¹⁰⁹ During their studies, Oliner and Oliner found that the best predictor of current helping was past helping.¹¹⁰ During the Nazi Regime, fifteen-year-old Marcel Marceau altered French youths' identity cards to indicate that they were too young for labor camps.¹¹¹ Masquerading as a Boy Scout leading his troupe on a hike, he would later save hundreds of children's lives by smuggling them through the Alps into Switzerland.¹¹² Like most, Marcel would dismiss his heroic acts saying he did nothing compared to others, including those that died in their quest to help others.¹¹³

Converse to ordinary perceptions of perpetrators and bystanders, rescuers are anything but ordinary. They maintain high levels of altruism, courage and independent mindedness. Marion Pritchard attributed her heroic acts against the Nazi police to her emotionally healthy upbringing where her curiosity

¹⁰⁷ Robyn Dawes (2001) *Everyday irrationality*. Boulder: Westview, 153.

¹⁰⁸ Charny, at 3.

¹⁰⁹ *Id.*

¹¹⁰ Supported earlier work by Midlarsky & Oliner which found the best predictor is altruistic motivation: see E. Midlarsky & S.P. Oliner (1985) The aged Samaritan: Heroes of the Holocaust forty years later. Paper presented at the 93rd Annual Convention of the American Psychological Association, Los Angeles.

¹¹¹ <http://www.openculture.com/2015/12/how-marcel-marceau-started-miming-to-save-children-from-the-holocaust.html>.

¹¹² *Id.*

¹¹³ *Id.*

was never met with punitive treatment but rather a furtherance of understanding and encouragement to think on her own.¹¹⁴

Because of their evolved emotional development, rescuers know what is right, good, and just. This thinking that incorporates not only individual needs but also social constraints is what most psychologists refer to as moral development that enables rescuers to take the proverbial high road.¹¹⁵ But is moral development consistent across the board?

Princeton postdoctoral fellow Joshua Greene wanted to distinguish varying levels of moral development by presenting various moral dilemmas to subjects such as whether or not to consider killing their child to save a group of non-related people or diverting a trolley to kill one person versus the five it would have killed on its present path.¹¹⁶ Greene found his results to be equally divided in both scenarios, but his studies consistently showed the subjects participating in abstract reasoning and a strong interplay between more complex moral questions.¹¹⁷ These findings subsequently led Greene and other moral developmentalists to determine that there are varied levels of maturation based on consideration for both the personal (emotional reaction, reasoning) and social (empathy, norms) consequences.¹¹⁸ Naturally, those less susceptible to cultural conformity found themselves in the third, highest tier of classification.¹¹⁹

In a world where some are too scared to act or are perpetrating themselves, rescuers stand alone displaying courage that can be defined as the bold need to help beyond reason.¹²⁰ Their courageous acts often do not get recognized in society, and no public glory comes with their deeds. No parades or accolades. In some instances, they are shunned from their own social group and called a lover of the inferior. Most do not boast about helping others but rather go along with their lives, waiting for the next opportunity to

¹¹⁴ Baum, at 195.

¹¹⁵ *Id.* at 196.

¹¹⁶ Greene US News & World Report, February 28, 2005, p.60. Also see the work of J. Haidt (2006) *The happiness hypothesis*. New York: Basic, and his website www.yourmorals.org.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Baum, at 194.

rescue. They have achieved the highest level of morality, relating to others via their universal needs and human rights. Their motivation? Helping where and when they can.

CONCLUSION

Overall, it appears as if the more individually developed a person is, the less susceptible that person will be to social norms and conformity within tumultuous cultures. A person's emotional, moral, and ego development has been found to be directly correlated with which of the three groups they belong. Conversely, a culture that inhibits one's ability to self-identify can hinder the moral development of rescuers and thus enhance the conformity of perpetrators and bystanders. As previously mentioned, the most prevalent genocides in our world's history have occurred in well-established honor cultures that meet nonconformance with violence and punishment. Any independent mindedness is met with cruelty and backlash that effectively subdues contention to those cultural norms. So long as people are unable to distinguish between personal and social identities, ethnocentrism¹²¹ and xenophobia¹²² will persist in those cultures.

So how do we undo hate? Education in defiance, maturation, tolerance and empathy may be one way.¹²³ The perpetrators and fluid bystanders hate because they are ignorant. They hate out of pain. They hate because they are mentally unbalanced and immature. Non-rescuers need development and education may be the only way to achieve that goal.

Techniques that encourage and stimulate independent-mindedness and nonconformity may prove successful. Maturation can grow out of an acknowledgement of the others' humanity and harnessing a vision based on the emotional development of one's personal identity. Naturally, once non-rescuers attain

¹²¹ Ethnocentrism: evaluation of other cultures according to preconceptions originating in the standards and customs of one's own culture.

¹²² Xenophobia: intense or irrational dislike or fear of people from other countries.

¹²³ Baum, at 223-25

a certain level of emotional development, traits such as tolerance and empathy will follow suit. Both traits lead to a better understanding of diversity to help individuals get over their superficial fears and stereotypes.

Another purposed method is one of community involvement to break down stereotypes and correct societal wrongs. Diane Bock once experimented with this theory through a family matchmaking program in order to promote personal contact among people of different groups.¹²⁴ Although agencies such as the United Way turned her proposal down, Bock persisted by creating her own program that paired up ethnically different families and now has over 300 families participating in monthly connections.¹²⁵

Dr. Martin Luther King proposed legislation as a means to restrain the heartless. Legal action may not change people's hearts but can protect the minorities and suppress hate. Finding their roots in the Nuremberg Trials, international tribunals across the world have played a key legal and emotional role in the lives of victims. Those associated commissions and prosecutors have since brought about a force of reconciliation and accountability powerful enough to take down the most corrupt, but their role does not come into play until after the unfathomable has occurred and victims have been identified.¹²⁶ However, legislation and legal action can aide in suppressing speech that inspires hateful acts and hate towards another race of human beings.

New enemies will be invented and old ones revisited. The unfathomable such as the Holocaust and 9/11 will continue to occur in different forms until the world learns to rise above the social perceptions that have driven out reality.

“Evil can be frustrated by people you might think are weaklings.”¹²⁷ Those “weaklings” are the bystanders and rescuers. Hate does nothing good for anyone. Thus, it is up to the non-perpetrators to find

¹²⁴ Diane Bock, see www.cuzz.org/oprah.php.

¹²⁵ *Id.*

¹²⁶ B. Hamber (1998) The burdens of truth. *American Imago*, 9-28, 55.

¹²⁷ P. Rusesabagina (2006) *An ordinary man*. New York: Viking, 203.

a new way of understanding how to develop people's minds to extract that hate and foster consistent growth both emotionally and morally.

**The Unchecked Aggression of a Mass-Murderer: How the United Nations
Failed Eastern Europe
By: Christopher Briggs**

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Introduction

An atrocity committed by a nation is not unique to the past hundred years of human history. However, it is unique that during that time, the international community has taken to dealing with these atrocities through the court system. The largest supporter of these tribunals has been the United Nations,¹ an international peacekeeping organization that formed in the wake of World War II to handle the aftermath of this event.² This conflict left Europe in ruin, and China was almost conquered by Japanese invaders as it faced an ongoing civil war. At the time, the United States was a beacon of hope due to the necessary aid that it provided to Great Britain to prevent total domination of Europe by Nazi Germany. Joseph Stalin was a tyrant and mass murderer years before Adolf Hitler had come to power in 1933.³ When the war ended in late 1945, the question arose as to what steps the leaders of the ‘winning’ countries would take. Winston Churchill, the Prime Minister of Great Britain for most of the war, had warned of the Soviet Union’s growing influence in the ravaged lands of Eastern Europe. During the famous “Iron Curtain” speech, Churchill made it clear that he did not trust Stalin’s regime in the outlook of Europe.⁴

Churchill was right to doubt the Soviet Union. Throughout 1945 to 1949, Stalin had already maneuvered the Soviet Union (USSR) into power by creating Communist states throughout Eastern Europe that would serve as puppets loyal to the USSR.⁵ He used fear, terror

¹ *Uphold International Law*, UNITED NATIONS, <http://www.un.org/en/sections/what-we-do/uphold-international-law/index.html> (last visited Dec. 3, 2017).

² *History of the United Nations*, UNITED NATIONS, <http://www.un.org/en/sections/history/history-united-nations/index.html> (last visited Dec. 3, 2017).

³ NORMAN M. NAIMARK, *STALIN’S GENOCIDES* 5 (2010).

⁴ FRASER J. HARBUTT, *THE IRON CURTAIN: CHURCHILL, AMERICA, AND THE ORIGINS OF THE COLD WAR 183-185* (1988).

⁵ *Id.* at 184-185, 210.

and murder to maintain his rule over these Communist states. Unfortunately, the United Nations chose to not to step in or interfere at the time. Instead of taking some form of action, the United Nations was complicit and did nothing for those suffering under Stalin's rule. Lack of knowledge did not apply as a reason for the United Nation's lack of response. The American Federation of Labor had collected eye witness accounts of over a dozen survivors of Stalin's reign of terror before, during, and after World War II, and had presented this to the United Nations in 1949 as evidence.⁶ Eventually, the individuals who took part of the genocide of the Holocaust and the collaborators to Nazi Germany were punished and shamed for their actions. However, nowhere in the former-USSR will you find a monument to memorialize those who died in the terror of the Soviet cleansings.⁷

This time of peace and hope during this period was merely a façade. Citizens from other parts of the world who were not physically present in Germany or had not personally witnessed the horrors of the Holocaust were still privy to the stories, rumors, pictures, and propaganda of the events that were taking place in Germany.⁸ Although the Soviets attempted to keep some of their acts of terror hidden for decades, a large portion of the world was already aware of the dreaded gulags that served as the main motivation for Soviet citizens not to garner negative

⁶ AM. FED'N OF LAB., SLAVE LABOR IN RUSSIA: THE CASE PRESENTED BY THE AMERICAN FEDERATION OF LABOR TO THE UNITED NATIONS 11-12 (1949) (the AFL was making their claim to the United Nations that the Soviet labor camps were a direct violation of the Geneva Convention and went against everything gained in the Nuremberg verdict against forced labor).

⁷ DAVID SATTER, IT WAS A LONG TIME AGO, AND IT NEVER HAPPENED ANYWAY: RUSSIA AND THE COMMUNIST PAST 2-3 (2012).

⁸ AM. FED'N OF LAB., *supra* note 6, at 27-30 (the AFL had collected evidence showing that this forced labor affected not only Soviet citizens, but all citizens in the Soviet-occupied regions of Eastern Europe).

attention from the Kremlin.⁹ Despite all of the warning signs, evidence, and outspoken concerns from leaders of other countries, the United Nations still gave Stalin and the Soviet Union a seat on the Security Council with veto power.¹⁰ The United Nations, an organization supposedly built around the idea of international peace, had essentially given the fox the key to the henhouse.

1. Birth of a Killer

Joseph Stalin was born as Ioseb Jughashvili in Gori, Georgia on December 6, 1878.¹¹ He grew up in an impoverished household, where he was neglected and beaten by his alcoholic father.¹² These formative years would play a large role in Stalin's life, which helped to turn him into a bitter and ruthless young man who held deep-seeded violent tendencies and a lack of trust in others. By the time Stalin was a teenager, he had already aligned with several leftist groups that pushed for the end of the Czar's reign in Russia.¹³ He was simultaneously enrolled in a seminary school where he excelled as a student; however his growing political leanings led to his expulsion from school as it was illegal to own political pamphlets that were derogatory to the Czar.¹⁴

A. Stalin's Political Rise

When Stalin was kicked out of school, he became involved in the early movement of the Bolsheviks in 1905. During the years leading up to the Bolshevik Revolution, Stalin was arrested

⁹ AM. FED'N OF LAB., *supra* note 6, at 31-34 (the AFL was discussing how the point of this hearing was to make sure the powers that had recently toppled the totalitarian regime in Nazi Germany were living up to their own standards).

¹⁰ DAVID L. BOSCO, FIVE TO RULE THEM ALL: THE UN SECURITY COUNCIL AND THE MAKING OF THE MODERN WORLD 16-19 (2009).

¹¹ OLEG V. KHLEVNIUK, STALIN: NEW BIOGRAPHY OF A DICTATOR 11 (Nora Seligman Favorov trans., Yale Univ. Press 2015).

¹² *Id.* at 12.

¹³ *Id.* at 18-19.

¹⁴ *Id.* at 20-21.

repeatedly for his political affiliations to revolutionary groups.¹⁵ Stalin's final arrest under the Czarist regime took place in 1913, when he was sentenced to four years in exile in Siberia.¹⁶ Upon the end of his exile, he returned to the Bolsheviks with renewed vigor and malice towards the Russian Empire. Vladimir Lenin, a man not so dissimilar from Stalin, successfully led an uprising against the Czar,¹⁷ and Stalin had managed to join and climb the ranks within Lenin's revolution. Lenin died shortly after the successful revolution in 1924, and in December of 1927, Stalin had crushed all political opposition within the former Bolshevik movement and succeeded Lenin and take over as the singular leader of the Soviet Union due to careful political maneuvering.¹⁸

B. Stalin's War on the Peasant Class

Stalin had achieved power, but it would be how he exercised his power that would earn him the reputation as one of the world's greatest mass-murderers. In 1928, Stalin began his first Five-Year Plan.¹⁹ This was a radical attempt to change the agrarian peasant-based society that was keeping the former Russian Empire close to a century behind other European nations technologically. The idea was that farmland would become collective farms owned by the government, instead of small, family-run plots. However, not all farmers wanted to sell their land to the government. At first, the more affluent farmers, known as "kulaks", resisted this plan.²⁰ Stalin had little tolerance for civil disobedience in his new regime. From 1929 to 1932, over ten million Soviet citizens were either exiled to Siberia, displaced from their land, or killed by

¹⁵ KHLEVNIUK, *supra* note 11, at 21-28.

¹⁶ *Id.* at 29.

¹⁷ MARTIN MCCAULEY, *STALIN AND STALINISM* 24-25 (Pearson Educ. Ltd., 3rd ed. 2003).

¹⁸ *Id.* at 26; KHLEVNIUK, *supra* note 11, at 91.

¹⁹ NAIMARK, *supra* note 3, at 53.

²⁰ PETER JULICHER, "ENEMIES OF THE PEOPLE" UNDER THE SOVIETS: A HISTORY OF REPRESSION AND ITS CONSEQUENCES 96-98 (2015).

Stalin's task forces.²¹ The term "kulak" soon became a word used not just for affluent farmers, but a general term for political dissenters who opposed collectivization and to communism.²² Anyone who was deemed a "kulak" starting in 1931 were either sent to the gulags or executed. Stalin used the idea of "kulaks" as a source of fear for the general public, a scapegoat to deemed to be the true enemy of the poorest classes.²³ He could use the alleged greed of the "kulaks" to explain grain shortages and began a campaign of "trials" to give the poorest citizens a sense of justice for those who had betrayed them.²⁴ By the end of the first Five-Year Plan, over five million Soviet citizens had died because of Stalin's attempt to destroy the peasant class.²⁵

The number of civilians killed and exiled in the Soviet Union jumped exponentially following the ratification of Order 00447 in July of 1937.²⁶ This Order gave Stalin's task forces the ability to seek out and remove "anti-social elements" of society, which targeted "kulaks", political activists, and religious leaders. Each year, hundreds of thousands of Soviet citizens were rounded up for either mass execution or exile. It is estimated that under Order 00447, over two million Soviets were sent to Siberian gulags, where many succumbed to the horrible conditions throughout the course of the 1930s.²⁷

Despite Stalin's ruthless tactics, he still faced opposition amongst the citizenry when it came to collectivization. Between the late 1920s into the early 1930s, the Ukrainian populace adamantly resisted Stalin's idea of progress that led to many acts of violence committed against

²¹ NAIMARK, *supra* note 3, at 54-57.

²² *Id.* at 56-57.

²³ JULICHER, *supra* note 20, at 100-01.

²⁴ *Id.* at 101.

²⁵ *Id.* at 118.

²⁶ NAIMARK, *supra* note 3, at 67-69.

²⁷ *Id.* at 69.

the Ukrainian citizens.²⁸ The constant debate to keep grain central to the region proved to be costlier than Stalin cared for. He decided if the Ukrainian people did not wish to work for the government, they did not deserve to eat.²⁹ From 1932 until 1933, Ukraine was cut off from the rest of the Soviet Union.³⁰ People were not allowed to travel through the region, and supplies were prohibited from going to Ukrainian citizens. However, grain was still harvested in Ukraine and was siphoned to the Soviet Union; it was only a matter of time until famine struck the people. It is estimated that during this period – known as the Holodomor which roughly translates to extermination by hunger – about three to five million people died of starvation or other food-related causes in the Ukraine.³¹ The ban against Ukraine was lifted in 1933 when Stalin was certain that his enemies had been defeated and their spirits crushed.

2. Soviet War Crimes Committed During World War II

In August of 1939, Stalin and the Soviet Union turned to one of its few allies when Stalin signed a treaty with Hitler and Nazi Germany.³² The Nazi-Soviet Pact was a non-aggression treaty that would assure Adolf Hitler would not have to worry about Soviet interference as he moved into western Poland to continue expanding Germany's territory.³³ This treaty between two unlikely allies would prove beneficial in the eyes of both tyrants until 1941.

A. Soviet Aggression in Eastern Europe

The Soviets had largely dealt with internal strife until this moment, but Stalin saw an opportunity to expand his own borders. The Soviet Union annexed the Romanian province of

²⁸ NAIMARK, *supra* note 3, at 70-74.

²⁹ *Id.* at 72-73.

³⁰ *Id.* at 72-74.

³¹ *Id.* at 70.

³² *Id.* at 88.

³³ NAIMARK, *supra* note 3, at 88.

Bessarabia, as well as the Baltic states of Latvia, Lithuania and Estonia, and invaded eastern Poland.³⁴ All the land seized was incorporated into the Soviet Union. During the Soviet occupation of the Baltic states from 1940 to 1941, tens of thousands of citizens were displaced from their homes and sent to Siberian gulags.³⁵ Thousands of Polish prisoners of war were massacred at the hands of the Red Army, although Stalin's general policy was to use them for forced labor.³⁶ In November of 1939, shortly after the Soviet Union and Germany had completed the conquest of Poland, the Soviets gave Germany over forty thousand Polish prisoners, including many Jews.³⁷ These were not only prisoners of war, but also refugees fleeing from the Nazis. For the most part, the Jewish citizens of the new Soviet lands welcomed them as liberators and oftentimes created special task forces to help carry out orders for the Red Army.³⁸ However, not all Jews were so eager to accept Soviet citizenship. Thousands of refugees from western Poland, many of whom were Jewish, were sent to gulags from which many never returned for their failure to fall in line.³⁹ Stalin did not care about the Jewish people. He was only concerned with the obedience of his subjects.

B. Germany's Betrayal and Stalin's Reaction

The war would take a strange turn in June of 1941 for Stalin and the Soviet Union. Poland and France had fallen, and Great Britain was on the verge of collapse. The pact with Nazi Germany had seemingly paid off for Stalin. However, when his top military officials came to

³⁴ NAIMARK, *supra* note 3, at 88-89.

³⁵ *Id.*

³⁶ JÖRG BABEROWSKI, SCORCHED EARTH: STALIN'S REIGN OF TERROR, 322-23 (Yale Univ. 2016) (2012).

³⁷ *Id.* at 324.

³⁸ *Id.* at 325-27.

³⁹ AM. FED'N OF LAB., *supra* note 6, at 37-43 (based upon the eyewitness account of Julius Margolin, who was a Jewish Pole held in a Soviet concentration camp).

him in May of 1941 to relay information of an imminent betrayal by Hitler, Stalin was the only person who would not hear it.⁴⁰ Stalin threatened to punish anyone who made such claims, even as the Nazi invasion of Soviet-held territory was already underway. Stalin came to the edge of breaking, fleeing to his home with no intent of returning to Moscow on June 27, 1941.⁴¹ A few days later, members of the Politburo, which was the principal policymaking committee of a Communist Party, pleaded for Stalin to return to his post. Stalin was inspired by the belief in his leadership and returned on July 3 to address the Soviet citizens that Russia must be defended against the Nazi invasion.⁴² Despite Stalin's sudden public stance as the charismatic leader who would lead the Soviet people to a victory over the Nazi invaders, the soldiers on the front had a far different understanding. There were two options for a soldier in the Red Army: die at the hands of the Germans or die in a gulag.⁴³ One of his closest generals, Andrei Vlasov, was declared a traitor by Stalin's regime because he was defeated and captured by Nazi forces in 1942 when trying to end the siege of Leningrad.⁴⁴ Despite his allegiance to the Soviet Union, his mark as an enemy of the state led Vlasov to defect to the Germans soon after his capture.⁴⁵ By the end of the war, nearly a million soldiers within the Red Army had been court-martialed by Stalin's secret police, and over a hundred thousand of those court-martialed ended up facing execution as punishment for showing cowardice in the face of the enemy of the state.⁴⁶

Despite the initial success of the German invasion of the Soviet Union, the Red Army had pushed the Nazis back into their own territory. Nine million Soviet soldiers had died in combat

⁴⁰ BABEROWSKI, *supra* note 36, at 339-41.

⁴¹ MCCAULEY, *supra* note 17, at 64-65.

⁴² *Id.*

⁴³ BABEROWSKI, *supra* note 36, at 371.

⁴⁴ JULICHER, *supra* note 20, at 166-67.

⁴⁵ *Id.* at 168.

⁴⁶ BABEROWSKI, *supra* note 36, at 371.

by the time the Red Army reached the borders of Germany,⁴⁷ and it was not afraid to show its animosity towards the German populace. Male civilians were beaten and shot, and females were raped and either killed or left for dead.⁴⁸ All the while, the Nazis continued to put up a vicious defense as over a million Soviet soldiers died in combat during the final six months of the war. When Germany surrendered, part of Stalin's overarching goal had been achieved. However, Stalin's plans for Germany were far from over.

3. An Era of Hope

The year 1945 saw the downfall of Nazi Germany and the Japanese Empire, and the end of World War II. It had been a brutal conflict that left many nations broken and bankrupt and saw millions of people lose their lives.⁴⁹ The now-deceased United States President Franklin D. Roosevelt had already thought well in advance of how things would play out in the aftermath of the war. The initial blueprints for an international organization first appeared in April of 1943 and came with many questions.⁵⁰ Two of the main questions were: what was to be done with the leaders of the Axis Powers, and how would the world heal from this terrible conflict.

A. The International Trials

Roosevelt's cabinet was torn between holding actual trials or exacting revenge by death sentences.⁵¹ Roosevelt eventually chose the former process in order to show the world that future international acts of aggression would be punishable by the international community.⁵² Despite pleas from members of his own cabinet and Winston Churchill, Roosevelt stood firm to avoid a

⁴⁷ BABEROWSKI, *supra* note 36, at 373.

⁴⁸ *Id.* at 374.

⁴⁹ MCCAULEY, *supra* note 17, at 71, 75.

⁵⁰ SUSAN BUTLER, ROOSEVELT AND STALIN: PORTRAIT OF A PARTNERSHIP 254 (2015).

⁵¹ FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL LAW 4-5 (Phillipe Sands ed., 2003).

⁵² BUTLER, *supra* note 50, at 258-259.

draconian post-war punishment on Germany as a nation but instead to focus on the Nazi leaders.⁵³ Despite Stalin's bitter feelings towards the Nazis, he was aligned with Roosevelt's ideas for post-war justice.⁵⁴ This was due to Stalin having different priorities in post-war Europe. Stalin was more interested in using the chaos of World War II to further thrust the Soviet Union into a position of power.⁵⁵ He had managed to change the Soviet Union from a backwards, agrarian society, to an industrial world power in a little more than a decade. It was at this point that Stalin felt he was the right man to save Europe economically and politically. He had become more aware that peace in Europe would be more beneficial to the Soviet Union's long-term goals than an extended fight with the United States and Great Britain once Germany surrendered.⁵⁶

Roosevelt died mere months before the end of the war, putting the burden on Harry Truman to decide how to go forward with Roosevelt's plan. Truman, a former small-town judge, was in favor of a trial over summary execution.⁵⁷ He became the leading force of setting Roosevelt's initial idea into motion during the San Francisco meeting between the big three major powers – the United States, Great Britain, and the Soviet Union – and in May of 1945.⁵⁸ The Nuremberg Trials and Tokyo Trials came to be the basis of what is now a permanent feature in our present day international justice system.⁵⁹ It was the first time national leaders were put on trial for war crimes or crimes against humanity in an international setting. This gave the international community a sense of justice served. War criminals had to face a justice system that was not going to stoop to their level to achieve results. Ironically, one of the countries that had

⁵³ BUTLER, *supra* note 50, at 259.

⁵⁴ *Id.*

⁵⁵ *Id.* at 260-61.

⁵⁶ *Id.* at 262.

⁵⁷ FROM NUREMBERG TO THE HAGUE, *supra* note 51, at 5.

⁵⁸ *Id.* at 5-6.

⁵⁹ *Id.* at 2.

helped to achieve this goal was the Soviet Union, a country that committed horrible atrocities before, during, and after World War II, which continued under the reign of Joseph Stalin.

B. The Birth of the United Nations

Stalin had a unique perspective when it came to the post-war peacekeeping ideas of Roosevelt, as the two shared a unique bond that almost resembled friendship.⁶⁰ Roosevelt, much like Churchill, did not fully trust Stalin, but the President had a post-war vision that would require the Soviet Union.⁶¹ Roosevelt wanted to create an international alliance, much like the League of Nations after World War I, but this time he wanted to give it authority so that nations who got out of line would be punished before anything could escalate, similar to Nazi Germany. This was the early foundation of the United Nations. The plan was to have an international peacekeeping organization, known as the Security Council, with the four strongest nations at the helm: United States, Great Britain, the Soviet Union, and China.⁶² Roosevelt had two key reasons that he wanted to include China as the fourth head of this international organization. The first for including China was Roosevelt sympathized with the Chinese who were then fighting a bloody war with Japan, who served as the main antagonist for the American populace during World War II.⁶³ The second reason for including China was far more tactical: China was a massive nation on the border of the Soviet Union that were trying to resist a Communist threat. Roosevelt saw China as the ideal barrier to prevent Stalin from going rogue after the war.⁶⁴

⁶⁰ MCCAULEY, *supra* note 17, at 74-75.

⁶¹ BUTLER, *supra* note 50, at 254-55.

⁶² *Id.* at 255.

⁶³ *Id.* at 256.

⁶⁴ *Id.* at 257.

Many American politicians were not enthused by the idea of Chiang's China being a contender among the top four powers of the world after the war.⁶⁵ The consensus among Americans was that Chiang's hold over China was too compromised since he relied heavily on American funds to keep himself in power against Japan and Mao's Communists. The French and British saw China's inclusion in the four nations as Roosevelt tactically including a nation that would be a ready ally that could not afford to stray from the favor of the United States.⁶⁶ Great Britain was more favorable towards the idea of France being included as the fourth nation among the Security Council.⁶⁷ Stalin was neutral towards China so as not to draw negative attention from France and Great Britain,⁶⁸ though Stalin held the French in low esteem because of the Nazi occupation. The adamant arguing of Winston Churchill and Charles De Gaulle eventually wore on both the United States and the Soviet Union, and France replaced China in Roosevelt's plans as the fourth member of the Security Council. Stalin's surprising flexibility on powers and policies of the Security Council paid enormous dividends, because he was able to successfully argue that any member of the Security Council could veto a substantial matter within the United Nations.⁶⁹ Stalin wished for peace with his Western allies, but constantly feared they would turn on him once the war had ended. Assuring the Soviet Union would gain access to veto rights within this international peacekeeping entity gave Stalin a sense of security. Ironically, many Americans were delighted and viewed Stalin's approval as a major concession by the Soviet Union.⁷⁰

⁶⁵ BOSCO, *supra* note 10, at 24-25.

⁶⁶ *Id.* at 25.

⁶⁷ *Id.* at 26.

⁶⁸ *Id.* at 25-26.

⁶⁹ *Id.* at 30-31.

⁷⁰ BOSCO, *supra* note 10, at 31.

Stalin had helped engineer the United Nations, supported Roosevelt's theory of international peace, and had given his approval that the Soviet Union would become a part of the solution to international acts of violence. Unfortunately, Stalin did not plan to practice what he preached. Entering the United Nations was nothing more than a gesture. He wanted to give comfort to his allies in the United States and Great Britain that the Soviet Union was their friend.⁷¹ For many in the Western World, the international trials in Germany and Japan and the formation of the United Nations were the beginning of an era of hope. For Stalin and the Soviet Union, it was an era of opportunity by any means necessary.

4. Rising Tensions

It did not take long for Stalin's gestures to fall short of impressing his Western Allies.⁷² Winston Churchill's "Iron Curtain" speech was an embodiment of how many western European nations feared the expansionist ambitions of the Soviet Union. Once the threat of Nazi aggression had quelled, it was obvious that the Soviet Union had little in common with its Western Allies. The Soviet re-occupation of the Baltic States towards the end of World War II made it clear that Stalin's ideas for Europe were very different than those of the United States, Great Britain, and France.⁷³ Soviet forces still occupied most of Eastern Europe, and it became clear that Stalin had no plans to remove them.

A. The Berlin Blockade

Tensions arose in 1946 when the former Allied Powers began to discuss what to do with post-war Germany. The United States, Great Britain, and France controlled the western half of

⁷¹ KHLEVNIUK, *supra* note 11, at 261-62.

⁷² *Id.* at 261.

⁷³ Aldis Purs, *Soviet in Form, Local in Content: Elite Repression and Mass Terror in the Baltic States, 1940-1953*, in *STALINIST TERROR IN EASTERN EUROPE: ELITE PURGES AND MASS REPRESSION* 29 (Kevin McDermott & Matthew Stibbe eds., 2010).

Germany, while the eastern half was controlled by the Soviet Union. The German capital of Berlin was in the eastern half, but cut into zones that were split between the Soviet Union and its Western Allies.⁷⁴ The Western Allies wanted to demilitarize, democratize, and unify Germany back into its former state, which was currently occupied by the four members of the Security Council.⁷⁵ On the other hand, Stalin had developed plans for turning Germany into a Communist state very early on;⁷⁶ however, the actions of the Red Army during the war had not won the German Communist leaders any favor amongst the German populace. Stalin could not push a Communist agenda in all of Germany without starting a full-on war with the West, so he instead decided to experiment with the Soviet-controlled zone in Berlin.⁷⁷ The Soviet Union began the Berlin Blockade on June of 1948 to cut off the Western powers from Berlin in order to unify the city under a Soviet banner.⁷⁸ The move ended up being unsuccessful when the Western powers within the United Nations Security Council united to declare the Berlin Blockade a crisis.⁷⁹ The United States, France, and Great Britain began a massive airlift campaign to bring food to the Western-occupied zones of Berlin for nearly a year. The blockade ended in the spring of 1949 when Stalin realized that his experiment failed.⁸⁰

⁷⁴ MCCAULEY, *supra* note 17, at 85.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 86.

⁷⁸ BOSCO, *supra* note 10, at 51.

⁷⁹ *Id.* at 52.

⁸⁰ *Id.* at 53.

B. The Creation of NATO

The Berlin Blockade was a driving force in the formation of the North Atlantic Treaty Organization (NATO) in 1949.⁸¹ NATO constituted as a defensive alliance between western Europe and North America and formed in the wake of the growing threat presented by the Soviet Union. The democratic power established by Great Britain in Czechoslovakia after World War II had already been ousted by a Communist-led, Soviet-backed coup in 1948,⁸² and the Communist Party was a growing threat in post-war Italy. President Truman, who had agreed to follow through on Roosevelt's plans for peace and post-war justice, signed the document with the sinking feeling that the last thing the Soviet Union wanted was peace in Europe. Truman wanted to take a stand against the spreading threat that the Soviet Union posed, and halt Stalin's ambitions.⁸³

Truman had already made a grave mistake by assessing that it was Communism that should be at fault and not the ambitions of a tyrant. His speeches to Congress, later known as the Truman Doctrine,⁸⁴ would play a vital role in American foreign policy long after the death of Stalin. This extreme stance on Communism would unfortunately put the United State in several positions of questionable morality, whereby the United States government would act more like Stalin than protecting the world from his oppression.

⁸¹ See generally *10 things you need to know about NATO*, N. ATL. TREATY ORG., <https://www.nato.int/cps/en/natohq/126169.htm> (last updated Feb. 27, 2018), for an introduction to the purpose of NATO and its efforts on crisis management.

⁸² Kevin McDermott, *Stalinist Terror in Czechoslovakia: Origins, Processes, and Responses*, in *STALINIST TERROR IN EASTERN EUROPE: ELITE PURGES AND MASS REPRESSION* 98-99 (Kevin McDermott & Matthew Stibbe eds., 2010).

⁸³ BOSCO, *supra* note 10, at 52-53.

⁸⁴ MCCAULEY, *supra* note 17, at 87.

5. Stalin's Post-World War II Atrocities

Joseph Stalin's actions in foreign affairs should come as a surprise to none, especially those who had the power to keep him from gaining veto power within the United Nations. However, what was revealed to the United Nations, and eventually to the world at large, would be the extent to which Stalin's malicious actions went. He came to many Eastern European nations as a savior. The Soviets had freed many countries from their Nazi oppressors, but Stalin could only hide his ruthless ambition for so long. These nations had simply traded one oppressive tyrant for another.

A. Post-War Prisoners of War

Stalin had shown during World War II that he was not particularly interested in the Rules of Engagement or the Geneva Convention. This was very apparent in February of 1945, when Stalin demanded the repatriation of all Soviet nationals at the Yalta Conference.⁸⁵ Roosevelt and Churchill were hesitant to give in to such a demand knowing they both had over fifty thousand soldiers in territories held by the Soviet Union.⁸⁶ In order to placate Stalin, the United States and Great Britain gave approximately two million freed Soviet prisoners of war back to the Soviet government when Germany fell. These soldiers were immediately put on trial as enemies of the state and most of them were executed.⁸⁷ Among those who were repatriated and executed were an 86-year-old man named Piotr Krasnov, a former general of the Czar who had fled to Germany after the Communists came to power, as well as Stalin's former friend Andrei Vlasov, who had turned against the Nazis by the end of the war.⁸⁸

⁸⁵ JULICHER, *supra* note 20, at 173.

⁸⁶ *Id.* at 173-74.

⁸⁷ *Id.* at 174.

⁸⁸ *Id.* at 170-74.

Soviet prisoners of war were not the only group who felt Stalin's wrath in the wake of World War II. Many German soldiers who had only served in the military and had not been tried at Nuremberg were either captured during the war by the Soviet Union or handed to the Soviets after the war by their allies and sent to gulags.⁸⁹ There were many Germans who had purposefully surrendered to the Americans or British, only to later be handed over to the Soviets.⁹⁰ The conditions of the gulags were bleak, to put it best. Prisoners' uniforms were often what little clothing they could keep, rations were short, and the hours of forced labor were long and arduous.⁹¹ Any resistance to the camp guards was met with death or punishment,⁹² and the sentences were usually for life imprisonment. It was not until Nikita Khrushchev took power in 1955 that German and Russian prisoners of war would start to see leniency in their prison sentences.⁹³

Stalin had rounded up both his own soldiers and enemy combatants, however he did not stop there. Even Allied soldiers who found themselves in Soviet territory were often shipped to gulags under suspicion of espionage.⁹⁴ Soon after World War II ended, the State Department learned that there were many American prisoners being held in the Soviet Union. When the Pentagon was approached about reaching out to Stalin about releasing the prisoners, the idea of negotiations were quickly dismissed as too sensitive to the fragile alliance between the Western

⁸⁹ GOTTLOB HERBERT BIDERMAN, IN DEADLY COMBAT: A GERMAN SOLDIER'S MEMOIR OF THE EASTERN FRONT 295 (Derek S. Zumbro ed. & trans., 2000).

⁹⁰ SIEGFRIED KNAPPE & TED BRUSAW, SOLDAT: REFLECTIONS OF A GERMAN SOLDIER, 1936-1949, 334 (Dell Publishing Co. 1993) (1970).

⁹¹ *Id.* at 336-37.

⁹² BIDERMAN, *supra* note 89, at 307-09.

⁹³ JULICHER, *supra* note 20, at 175.

⁹⁴ JAMES D. SANDERS, MARK A. SAUTER & R. CORT KIRKWOOD, SOLDIERS OF MISFORTUNE: WASHINGTON'S SECRET BETRAYAL OF AMERICAN POWS IN THE SOVIET UNION 109 (1992).

Allies and the Soviet Union.⁹⁵ The Pentagon and various United States intelligence agencies were tasked with keeping the true nature of the American prisoners in the Soviet Union quiet by removing names from the government's recorded list of prisoners of war.⁹⁶ Due to the tampering of records, only a rough estimate of the loss of life has been gathered using eye witness accounts and circumstantial evidence. It is believed somewhere around twenty thousand American soldiers who served in World War II would later die in a Soviet gulag.⁹⁷ These were allied combatants who had been freed by the Red Army, and one only has to look at how poorly Stalin treated his own soldiers who were captured in battle to see how little he empathized with their plight.

B. Stalin's Persecution of the Jews

In 1928, around the start of the first Five Year Plan, the Soviet Union openly advertised itself as a haven for Judaism to encourage a new work force to immigrate to its borders.⁹⁸ The region of Birobidzhan became a new safe zone for the people of Jewish faith to run a nearly autonomous settlement.

Post-World War II Soviet Union saw a rise in xenophobia, as Stalin's image as the great military leader of the people reached nearly cult-like proportions.⁹⁹ After the Holocaust, which had displaced many Soviet Jews living in Birobidzhan, there became a renewed interest in re-establishing the region as a pseudo-homeland for the Jews.¹⁰⁰ This vision was cut short with the formation of Israel in 1948, a move that Stalin quickly approved of to appease his Western

⁹⁵ SANDERS ET AL., *supra* note 94, at 106.

⁹⁶ *Id.* at 107.

⁹⁷ *Id.* at 104.

⁹⁸ JULICHER, *supra* note 20, at 194-95.

⁹⁹ MCCAULEY, *supra* note 17, at 76.

¹⁰⁰ JULICHER, *supra* note 20, at 195.

allies.¹⁰¹ Behind closed doors, Stalin became wary of the many Soviet Jews who openly applauded the creation of a foreign state.¹⁰² While a rational individual would look at this situation and see the Jews as a people who were on the brink of extinction in Europe only a few years ago getting excited for a bright future for Judaism, Stalin saw only the potential for spies and internal strife.¹⁰³

Stalin did not have a rabid hatred for the Jewish people, but his general distrust for anyone who even seemingly posed a threat would lead to an era for Soviet Jews where life would become extremely difficult, even after Stalin died.¹⁰⁴ The downfall began with a campaign where Stalin painted Jews as loyal to Trotsky and the enemy of the people.¹⁰⁵ Propaganda began circulating that it was Jewish miscalculation of grain and misappropriation of funds that was causing the famine in certain areas of the Soviet Union. Jewish artists and journalists were blacklisted within the Soviet Union, and in extreme cases, tried for treason and executed.¹⁰⁶

This behavior was par for the course when looking at Stalin's reign. First, it was the evil of the kulaks. Next came the terror of Nazi Germany. Stalin needed a boogeyman to help explain why the people of the Soviet Union were suffering so horribly and provided his own scapegoat by using anti-Semitism.

C. The Taming of Eastern Europe

Stalin's usage of violence began to extend outside of his own borders after the end of World War II. He was high on victory, and the Soviet population saw him as their savior.¹⁰⁷ The

¹⁰¹ JULICHER, *supra* note 20, at 194.

¹⁰² BABEROWSKI, *supra* note 36, at 405.

¹⁰³ *Id.*

¹⁰⁴ JULICHER, *supra* note 20, at 194.

¹⁰⁵ *Id.* at 95.

¹⁰⁶ *Id.*

¹⁰⁷ MCCAULEY, *supra* note 17, at 76.

Soviet Union had control over most of Central and Southeastern Europe and had also re-occupied the Baltic States by the end of the war.¹⁰⁸ The people of this region initially saw the Soviets as a better alternative than being ruled by the Nazis; however, the desire for independence would prove a hurdle for Stalin. To make matters worse, Stalin was not the type of leader who chose to speak with the civilian populace often about matters involving the country, thus leaving much of the people under his rule in the dark.

The Germans were the perfect Soviet antagonist during the war. Stalin inspired his nation to fight back against the tyranny of the fascist regime as he implemented his own tyrannical schemes.¹⁰⁹ To Stalin, fighting the Germans was also a personal matter. The Germans had killed millions of Soviet nationals, and Stalin was determined to hit back just as hard. Thousands of East German civilians were arrested for conspiring with the Nazis and sentenced to work in forced labor camps in the Soviet Union.¹¹⁰ The loss of Soviet lives had created a gap in Stalin's recruiting, so he found a new source of labor. In 1948, just before the Berlin Blockade, the Soviet Union began a purge within East Germany of all non-Soviet-backed political parties.¹¹¹ The purges largely targeted parties who were former allies to the Nazis, but even Communist parties in East Germany that were deemed "fake socialists" were removed.¹¹² This was Stalin's way of controlling the East German polling process and establishing the Germany he had dreamed of towards the end of World War II.

¹⁰⁸ MCCAULEY, *supra* note 17, at 96-97.

¹⁰⁹ BABEROWSKI, *supra* note 36, at 343.

¹¹⁰ See generally AM. FED'N OF LAB., *supra* note 6, at 88-93 (describing how many of the deportees from Germany were intellectuals, legal minors, and women).

¹¹¹ Matthew Stibbe, *East Germany, 1945-1953: Stalinist Repression and Internal Party Purges*, in *STALINIST TERROR IN EASTERN EUROPE: ELITE PURGES AND MASS REPRESSION* 59 (Kevin McDermott & Matthew Stibbe eds., 2010).

¹¹² *Id.* at 61-62.

The Baltic States of Latvia, Lithuania, and Estonia had already felt the wrath of the Soviet Union. These annexed nations were conquered by the Nazis in late 1941 but reunited with the Soviets when the Red Army reclaimed the regions in 1944.¹¹³ After the war, mass deportation of persons living in the Baltic States began again. However, unlike the previous purge in the Baltic States, the only people who were targeted were those of German ancestry.¹¹⁴ This was unique because Stalin had never gone after a single nationality when instituting his internal policies. This quickly changed in 1946, when many rebel groups formed in the Baltic States in a doomed attempt to free their homelands from the grasp of Soviet rule.¹¹⁵ These groups were labeled as former Nazi bandits who were trying to undermine the prosperity that the Soviet Union would bring to the Baltic States. Anyone who was even remotely or rumored to be related or affiliated with the rebel groups was at risk of deportation. By the end of 1949, nearly ninety thousand people from Latvia, Lithuania, and Estonia had been arrested and deported to gulags since the end of World War II.¹¹⁶

Poland was another nation that was familiar with Soviet rule that fell back under the reign of Stalin after the war. By the end of 1944, the Soviet Union had taken all of Poland from the Germans.¹¹⁷ After the war, it was negotiated in a prison cell in Moscow how the Poles would establish their new government. Under duress, the Poles who had been fighting against the Nazi occupation gave in to a new Communist regime, and the United States and Great Britain

¹¹³ Purs, *supra* note 73, at 29.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 30-31.

¹¹⁶ *Id.* at 35.

¹¹⁷ Łukasz Kaminski, *Stalinism in Poland, 1944-1956*, in *STALINIST TERROR IN EASTERN EUROPE: ELITE PURGES AND MASS REPRESSION* 81 (Kevin McDermott & Matthew Stibbe eds., 2010).

hesitantly recognized this as the governing body of Poland.¹¹⁸ Many Polish nationals were not overly enthusiastic with their new government being a puppet state of the Soviet Union. Polish displeasure produced a political movement, which became an opposition party focused on defying the Soviet hegemony. Stalin swiftly crushed this movement and within two years, over a hundred thousand Poles had been arrested and deported for crimes against the state.¹¹⁹

In 1948, the nation of Czechoslovakia went through a shift in power when a coup overthrew the democratic government the Western allies had put in place after the war.¹²⁰ Thousands of Czechoslovakians who opposed the new Stalin-backed regime were blacklisted from work, and thousands more were deported to the Soviet gulags.¹²¹ Hungary saw a similar regime as Poland, which led to over a half-million political arrests from 1945 to 1949.¹²² The Soviet Union freed the Balkans in late 1944 from Nazi occupation, and soon thereafter began to force political unity amongst the divided ethnic groups.¹²³ By 1945, the Soviet-backed regime in Yugoslavia had been given a green light to “cleanse” the region of any political or national discontents.¹²⁴ From 1945 to 1947, over one hundred thousand Yugoslavian people, mostly Croats, were executed in mass killings or were put into forced labor camps.¹²⁵

¹¹⁸ Kaminski, *supra* note 117, at 82-83.

¹¹⁹ *Id.* at 87.

¹²⁰ McDermott, *supra* note 82, at 98.

¹²¹ *Id.* at 99-100.

¹²² László Borhi, *Stalinist terror in Hungary, 1945-1956*, in *STALINIST TERROR IN EASTERN EUROPE: ELITE PURGES AND MASS REPRESSION* 121-22 (Kevin McDermott & Matthew Stibbe eds., 2010).

¹²³ Jerca Vodušek Starič, *Stalinist and anti-Stalinist repression in Yugoslavia, 1944-1953*, in *STALINIST TERROR IN EASTERN EUROPE: ELITE PURGES AND MASS REPRESSION* 167 (Kevin McDermott & Matthew Stibbe eds., 2010).

¹²⁴ *Id.* at 168.

¹²⁵ *Id.* at 168-169.

Stalin had a pattern of terror and bloodshed that he used to forge his vision of a Communist Europe. Political resistance was met with oppressive violence and repressive laws that prohibited speaking out against the local government. The irony of these policies is that Joseph Stalin spent much of his young life in and out of prison for this exact same behavior. These events raise an important question: where were the United Nations when these atrocities were taking place? Absent and complacent seem the likeliest of answers. The three Western powers on the Security Council were aware about the gulags and Stalin's control over the nations of Eastern Europe. It would not take much thought for these politicians and diplomats to realize what was going to happen to the newly "liberated" nations after a half-decade of warfare and a Communist ruler at the helm.

Conclusion

The years from 1945 to 1949 can be described as disappointing. The opportunity to make change in the international community was at an all-time high, and certainly some great feats were accomplished, including the Nuremberg Trials, the Tokyo Trials, and the idea behind the United Nations. However, this era is tainted by the West compromising and being complicit with a tyrant. Is this to say that the West should have demanded that Joseph Stalin retreat from the lands he held in Eastern Europe in the aftermath of World War II? Sadly, the likely outcome of such a scenario would have been another major war. It is more disappointing because the United Nations, the international peacekeeper, was founded to contain men like Stalin from spreading their influence. In turn, Joseph Stalin used the veto power that he had negotiated for to oppress the lands he had obtained through warfare. The United Nations was hamstrung as far as military maneuvers and failed to try any form of economic sanctions to deter Stalin's behavior. It is a great moment when considering the success of the Berlin Airlift but disheartening when shown

how often the United Nations did nothing when questions arose from Stalin's actions. If people wonder why the United Nations is now in a questionable state of power, they need look no further than its formative years. In the modern era, all nations within the Security Council would make the obligatory claim that they do not negotiate with terrorists, but what was a monster like Stalin, if not a terrorist on the grandest of scales.