PAX ROMANA JOURNAL

2022

Special Edition

Pax Romana Jurists Commission

About the Journal

The Pax Romana Journal

The Pax Romana Journal is an interdisciplinary annual publication for literature reviews, research and opinion pieces on specific contemporary social issues. Key themes, include but are not limited to: Human rights; Democracy, good governance and global governance; Themes on the United Nations agenda; Faith, church reform, synodality, and lay participation; Youth participation and advocacy; Climate change and ecological justice; Intercultural/interreligious dialogue.

Each of these themes is approached from the perspective of Catholic Social Teaching with the goal of promoting peace, justice and mercy, in service of the common good of the poor and the Earth.

La Revista Pax Romana

La Revista Pax Romana es una publicación anual interdisciplinaria revisada por pares del movimiento para revisiones de literatura, investigaciones y artículos de opinión sobre temas sociales contemporáneos específicos. Entre los temas claves a trabajar se encuentran (no de forma excluyente) los siguientes: Derechos humanos; Democracia, buen gobierno y gobernanza global; Temas en la agenda de Naciones Unidas; Reforma de la iglesia, sinodalidad y participación laica; Participación e incidencia juvenil; Cambio climático y justicia ecológica; Diálogo intercultural/interreligioso.

ada uno de estos temas abordados desde la perspectiva de la Doctrina Social de la Iglesia, con el objetivo de promover la paz, la justicia y la misericordia, al servicio del bien común de los pobres y de la Tierra.

La Revue Pax Romana

La revue Pax Romana est une publication annuelle interdisciplinaire avec un contrôle collégial du mouvement, qui propose des publications, des recherches et des articles d'opinion sur des questions sociales contemporaines particulières. Les principaux thèmes clés comprennent, sans s'y limiter: droits de l'homme; démocratie, bonne gouvernance et gouvernance mondiale; thèmes à l'ordre du jour des Nations Unies; réforme de l'église, synodalité et participation des laïcs; participation et plaidoyer des jeunes; changement climatique et justice écologique; dialogue interculturel / interreligieux.

Chacun de ces thèmes est abordé sous l'angle de l'enseignement social catholique dans le but de promouvoir la paix, la justice et la miséricorde, au service du bien commun des pauvres et de la Terre.

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In the front page: Henri Matisse,"La Danse", 1910.

Introduction

The “Pax Romana Journal” is an interdisciplinary annual publication for literature reviews, research and opinion pieces on specific contemporary social issues. Key themes, include but are not limited to: Human rights; Democracy, good governance and global governance; Themes on the United Nations agenda; Faith, church reform, synodality, and lay participation; Youth participation and advocacy; Climate change and ecological justice; Intercultural/interreligious dialogue.

Each of these themes is approached from the perspective of Catholic Social Teaching with the goal of promoting peace, justice and mercy, in service of the common good of the poor and the Earth. The systematic violation of human rights which is happening worldwide calls international catholic organisations to develop a structured thought on the ways the Catholic Social Teaching could be actualised with the purpose of developing a “human rights culture”.

In 2022 the special edition of the Journal was edited by Pax Romana Jurists' Commission (PRJC). The theme of the Journal, "Human Rights for Peace and Justice", was chosen in light of the concurrent relevance and more than a century long peace and justice experiences of global catholic tertiary students.

The articles published in this special number, in the vein of the interdisciplinary layout of the journal, vary from the analysis of some juridical issues arising from some legal orders concerning developments in Human Rights Protection, as well as the need of the developing a solid Human Rights Education, by enhancing the cooperation between high profile cultural institutions and the public sphere.

The role of catholic jurists is fundamental in reaffirming the need of a human rights based approach in the contemporary legal thought by recognising the crucial importance of the centrality of human dignity and its corollaries in today's global processes, regarding, among others, Environmental Protection, Gender Equality, Human Dignity and the Importance of Life, the Freedom of Religion or Belief, The Right to Education.

The work Pax Romana Jurists' Commission is aimed at stimulating, through legal research and representation in International Institutions, critical perspectives in juridical thought by harmonising Social Catholic teachings with the ongoing theoretical reflection on the Law. The publication of the special edition 2022 of Pax Romana Journal is one of the steps taken to lead and to express the expected future direction of Pax Romana Jurists' Commission.

FROM PAX ROMANA ARCHIVES:

1. Entrevista con Gustavo Gutiérrez

Peru

Carlos: América Latina es un continente marcado por la muerte temprano e injusta del pobre, un continente donde se niega el salario para vivir dignamente al trabajador; se le niega la tierra al campesino y en donde, en muchos lugares, se persigue a quienes buscan la justicia. En ese contexto de injusticia y de dolor ¿cómo ser testigos de la resurrección?

P. Gustavo: Yo creo que ese es el gran desafío hoy día a los cristianos y al conjunto de la Iglesia de América Latina. El corazón del mensaje cristiano es precisamente el Reino, una voluntad, entonces, de vida; afirmarla en un continente tan fuertemente marcado por la muerte nos da como resultado un enorme contraste. La gran línea aquí yo diría, es la de un compromiso en defensa de la vida bajo todas sus formas. La ética del reino, lo que se desprende de la aceptación del don del reino, es precisamente dar vida. El compromiso es con diferentes formas de vida, me refiero a la vida física, material el pan, la salud, la educación, la libertad, la democracia, la evangelización, la oración. Todo eso son expresiones de vida. No se trata por cierto de ponerlas todas en un mismo plano, indiferenciadas, cada una tiene su función propia e insustituible. Hoy día, el gran eje del testimonio cristiano es el de defensa de la vida. Acá hay algo que suena un poco a paradoja y es que el camino más rápido hoy en América Latina para que maten a alguien es que se comprometa en esa línea. El que defiende la vida, habla de los pobres y de las causas estructurales de la pobreza hoy día, arriesga su vida. El caso de Mons. Romero no es sino el ejemplo más claro, más preciso de lo que ha sucedido con muchos otros cristianos que han intentado decir que, en América Latina existe una muerte temprana e injusta; esto ha puesto en riesgo su libertad, la permanencia física en su patria y su propia vida. Dije que era una paradoja, pero tal vez no lo es. Jesús mismo defiende la vida dando la suya, como dice un verso de Vallejo no "poseo para comunicar mi vida sino mi muerte". De alguna manera morir por solidaridad con los pobres y oprimidos es actualmente un precio a pagar. No estoy diciendo que todo el mundo tiene que hacerlo y sobretodo buscarlo; pero, en fin, me parece que hay ahí algo importante y además es la experiencia, la penosa experiencia, de muchos cristianos en el continente.

Carlos: ¿Por qué llamar a Jesús el Dios de la Vida?

P. Gustavo: Bueno, en primer lugar porque así es llamado en la Biblia. En los Hechos de los Apóstoles, en un discurso a San Pedro -es decir la primera predicación de comunidad cristiana- se dice: “Uds. han matado al autor de la vida". Además, en toda la Biblia Dios es llamado el Dios vivo, el Dios de la vida. La misma fórmula tan clásica del Exodo que se expresa con la palabra Yahvé, yo soy el que soy, quiere decir yo soy la vida, yo doy la vida. El propio Jesús dice "yo soy el camino, la verdad, la vida". Entonces hablar de Dios como el Dios de la vida, de Jesús como el autor de la vida y como la vida misma tiene una profunda raíz Bíblica.

De otro lado, el Jesús en quien creemos es el Jesús Resucitado o sea, el que tiene la vida plena. La Resurrección, es de alguna manera, la muerte de la muerte. Es la vida definitiva. Lo que nos convoca en comunidad, en iglesia, es la Resurrección del Señor. Podría tomar todavía otras entradas para decir por qué se le llama a Jesús el Dios de la vida.

En verdad su testimonio de amor y de preferencia por los más cercanos a la muerte o sea los pobres, los enfermos, los despreciados, Son expresiones del aspecto que estamos destacando. El Dios de la vida se acerca precisamente a quienes están viviendo una situación humana, física, social o espiritual cercana a la muerte por eso son los preferidos del Señor. Son entonces un conjunto de temas, no marginales sino centrales a nuestra comprensión de Jesús, lo que nos lleva a hablar del Dios de la vida en la Biblia y de Jesús mismo como la vida o como el autor de la vida.

Carlos: Dentro de este tema de defensa de la vida está el tema de la defensa de los pobres. La opción preferencial por los pobres es fuertemente subrayada por Medellín y Puebla. ¿Qué contenido tiene hoy para los cristianos de América Latina y nuestra Iglesia?

P. Gustavo: Bueno, hay un dato central en la revelación bíblica y es que el reino de Dios se dirige a toda persona humana: “vayan por el mundo y hagan discípulos a todas las naciones". Son varias las expresiones de esta universalidad. Dios ama a todos y por lo tanto no es posible mutilar el mensaje del Señor y decidir no amar a una parte de la humanidad. Ahora, al mismo tiempo, y tan neta como esta afirmación de la universalidad, se encuentra la afirmacion de la preferencia por los últimos, por los más pobres, por el insignificante, por el débil. La exigencia del cristiano ha sido siempre, lo es también hoy para nosotros, saber vivir al mismo tiempo universalidad y preferencia, lo que no es fácil, pero es claro que la una no excluye a la otra. La universalidad sin la perspectiva de la preferencia corre el peligro de ser una universalidad abstracta de aquel que pretende que ama a todo el mundo y no ama a nadie en concreto. Y creo que la preferencia sin universalidad corre el peligro de ser una perspectiva sectaria. Ahora bien, ¿cuál es para nosotros hoy día, en este país, en este continente, la manera de vivir simultáneamente universalidad y preferencia? Ese es el desafío para el cristiano y me parece que, en la Conferencia episcopal de Medellín, la Iglesia latinoamericana tomó una posición muy clara al respecto. De allí su insistencia en el anuncio del mensaje evangélico a todo el continente, pero, al mismo tiempo, reforzando lo que significaba la solidaridad, la cercanía, el compartir los intereses, las esperanzas, las luchas, los sufrimientos de los pobres y optimados. Esta perspectiva, lanzada claramente en Medellín y asumida por muchos cristianos del continente, retomada también en reflexiones de orden teológico, es lo que constituye hoy día lo más vivo de la Iglesia latinoamericana. Yo diría también lo irreversible en el proceso de Iglesia latinoamericana en estos últimos 20 años. Precisamente en este año celebraremos el vigésimo aniversario de Medellín.

Susana: Una opción que no es acogida de igual manera por todos…

Así es. Hay círculos cristianos que no se sienten cómodos con la preferencia por el pobre. Me parece que hay aquí una falta de lectura de la Biblia, pero eso ocurre. Hay muchas imágenes falsas frente a lo que llamamos opción preferencial por el pobre y se la quiere incluso cambiar con una serie de expresiones pretendidamente equivalentes, pero que le hacen perder la punta a esta perspectiva que nunca se presentó además como exclusividad en el sentido de eliminar del anuncio del mensaje evangélico, a quienes no eran pobres.

Pero hay también dificultad para aceptar esta perspectiva, porque indudablemente preferir al pobre es preferir a aquel que es despojado y marginado por un orden social que tiene responsables y beneficiarios. Entonces si se prefiere al pobre se entra en conflicto, en problemas con intereses y con personas pero no porque uno busque hacerlo. Ocurre que si alguien se pone a reclamar los derechos de los pobres, (es una expresión usada en Medellín) quienes hoy día gozan privilegios en la sociedad actual sienten cuestionadas sus prerrogativas y por lo tanto se producen circunstancias difíciles. Muchos en América Latina han dado su vida por esta opción por el pobre sin la cual no somos auténticos discípulos del Señor. Juan Pablo II ha sido el Papa que ha hablado frecuentemente de la opción preferencial por el pobre la ha repetido numerosas veces, en diferentes lugares (creo que, cronológicamente la última vez fue en el viaje a Francia en mayo del 87).

Carlos: Habla incluso Juan Pablo II en Laborem Excercens sobre la Iglesia de los pobres.

P. Gustavo: Así es, y es también el primer Papa que después de Juan XXIIl toma la expresión. Además, en la misma encíclica precisa lo que quiere decir por pobres. Es importante, porque desgraciadamente el término pobre se ha vuelto en algunos sectores eclesiales una palabra antigua, jugando con perspectivas espiritualistas (no digo espirituales, tengo mucho respeto por la expresión espiritual). El pobre espiritual en los evangelios es el discípulo del pobre y oprimido, con su vida, con sus intereses, con sus sufrimientos, con sus luchas es una exigencia fundamental para el discípulo de Cristo, compromiso cristiano. Esto va variar según las situaciones concretas y las posibilidades de cada persona. Pero esa es la gran línea para poder anunciar el evangelio a todos. Yo creo que la vía de la preferencia es la que nos permite proclamar realmente el amor de Dios por todos.

Carlos: Los obispos chilenos dicen que se dan tres aspectos complementarios en esta opción preferencial, en sus opciones pastorales. Una es vivir con el estilo de Jesús, en segundo lugar, servir a los pobres y en tercer lugar mirar la vida desde la perspectiva del pobre.

P. Gustavo: Creo que es una excelente precisión, son esos los caminos concretos para hacerlo. Ahora, mirar la vida desde la perspectiva de los pobres -el último aspecto que señalas- es mucho más fácil de decir que de hacer. Porque, en efecto, el pobre tiene una manera de ver la vida, la historia su propia situación, etc. que quienes no llevan una vida de pobre porque no es esa su situación social, corren el peligro de olvidar. Me parece que asumir la perspectiva de los pobres, eso es lo que en América Latina se está intentando incluso para estudiar la Biblia. Los resultados son muy fecundos.

Susana: Es sobre parte de tu respuesta a la pregunta acerca de la opción por los pobres. En los últimos años en la Iglesia de América Latina hemos vivido un proceso tenso y difícil, tú dices, optar por el pobre es optar desde su situación concreta, desde su vida y es optar en medio del conflicto que supone la vida del pobre. Conflicto que, además, él sufre en primer lugar. Esa carga conflictiva de la opción por el pobre es difícil de asumir y me parece importante lo que has planteado ya y que quisiera que desarrolles más. Asumir al pobre con esa carga de conflicto sin vaciarlo. La pregunta es ¿cómo vivir esa opción por el pobre en una situación de conflicto objetiva y real en nuestra sociedad?

P. Gustavo: Bueno, es que ahí tenemos que entendernos sobre algo que yo creo que se falsea mucho. En primer lugar, la situación de confrontación de intereses, y por lo tanto de conflicto social, a nadie le gusta, pero existe. Entonces, me parece un error poner esos hechos entre paréntesis y decir: "al cristiano no le gusta el conflicto", lo que es cierto; a mí tampoco me agrada. Pero por eso mismo quiero ver el conflicto social cara a cara para intentar suprimirlo, justamente porque no me gusta. La perspectiva del cristiano es esa. Se habla de una teología de la reconciliación y me parece bien, pero precisamente, si hablamos de reconciliación es porque tenemos que volver a conciliar algo que estuvo separado, dividido, tal vez en conflicto. En la realidad humana, histórica, social se presentan de hecho situaciones de enfrentamiento. ¿Cómo entender al pobre de América Latina sin darnos cuenta que hay causas de la pobreza? La gran novedad de Medellín para algunos fue precisamente hablar de esas causas. A mí me parece que un cristiano, un ser humano, tiene que tomar en cuenta las situaciones de conflicto no para promoverlas, sino para eliminar sus causas. Porque ¿cómo acabar con una enfermedad si no voy a las causas de ella? Teológicamente decimos que el Señor asumió los pecados de la humanidad no porque eran algo bueno sino porque había que borrarlos. Asumir el conflicto no significa hacerlo con gusto y alegría, es asumir una realidad negativa desde el punto de vista de la justicia, fraternidad, etc. para ver las formas, justamente de que cese esa situación. Eso es lo que realmente importa. Hoy día no hay modo de comprometerse con el pobre y no ser lúcido sobre las razones de la pobreza en América Latina y en el mundo entero.

Por otra parte, ¿qué otra cosa están diciendo los obispos y Papa durante estos últimos años? Cuando el Papa afirmaba en México, texto repetido varias veces en Puebla: la riqueza de unos pocos esta en base a la pobreza de muchos, está señalando las causas de la pobreza y eso, ciertamente. Es tocar una situación de conflicto pero no para complacerse en ella, sino, justamente, para poder de algún modo- encontrar los caminos de solución y terminar con esas situaciones. A ese análisis de causas estructurales hay que añadir las historias concretas de pueblos y naciones, ellas pondrán en mayor relieve las responsabilidades personales.

Carlos: Tú estás trabajando ahora Bartolomé de Las Casas. ¿Cuál es la propuesta teológica que se recoge de él para estos momentos?

P. Gustavo: Bueno, cuando uno se refiere a un personaje de esta envergadura hay que ponerlo cuidadosamente en contexto histórico. Bartolomé de Las Casas es un testigo del Evangelio y de Cristo que nos sigue diciendo algo a nosotros a partir de un contexto histórico y con una expresión teológica distinta a la nuestra. Las casas tuvo la enorme penetración de ver en lo que sucedía en las Indias en el siglo XVI una situación de explotación, de guerras injustas, y sobre todo, de desprecio al habitante de estas tierras. Supo ver en el indio al pobre según el Evangelio, por ello su vida es un testimonio de preferencia por el pobre, fundamentalmente por el indio pero también -pese a las calumnias que hay al respecto- de defensa del negro incluso de los españoles pobres. Porque en el proceso, en la evolución espiritual y teológica de Las Casas a partir de la realidad masiva del indio como explotado y marginado, se va produciendo una abertura a otras situaciones de pobreza:

la de los negros (que no percibió al comienzo, como nadie en su tiempo lo hizo), y la de españoles. Esa es la clave de su teología, y además llega incluso en esta intuición a apoyarse en ese texto clásico y tan significativo de Mateo 25: me diste de comer, de beber, "a mí me lo diste", Las Casas se basa en ese texto para decir que en los indios Cristo mismo es explotado, flagelado, despreciado y asesinado. Esa es la gran intuición de Las Casas.

A partir de esa visión luchó en defensa de la vida de los indios. Los millones y millones de indios muertos en el continente eran para Las Casas el hecho más escandaloso e increíble que podía imaginar. Aún hoy se dice que Las Casas exageraba las cifras. Pero los estudios más que sus cálculos que hay que reconocer eran a "ojo de buen cubero" son bastante correctos. Las Casas declaraba hacia 1540 que hubo 20 millones de indios muertos; hoy día se calculan de 35 a 40 millones de muertos para los setenta primeros años de la presencia europea en este continente. Es difícil hacer esos cálculos pero, en fin estoy dando cifras medianas. La vida de Las Casas estuvo consagrada a la defensa de la vida del indio en ese tiempo incluso su vida física, material. De ahí que él hiciera una afirmación, que personalmente he citado muchas veces en los últimos años: que más valía indio vivo aunque fuera infiel que indio cristiano pero muerto. Eso está expresando hasta donde llega su preocupación, afirma también Las Casas que los indios están "muriendo antes de tiempo". Bueno, toda su vida, su teología, su acción, sus propuestas son una defensa de estos míseros, de estos opresos indios, como él decía.

Carlos: Quiere decir esto que la práctica de la propuesta de nuestra Iglesia, de compromiso con el pobre y de defensa de la vida no es un hecho nuevo sino que se basa en el Evangelio, en la historia de la Iglesia que tiene expresiones como esta de Bartolomé de Las Casas.

P. Gustavo: Así es. Es algo demasiado importante además para que lo hallamos descubierto recién en el siglo XX ¿no es cierto? Como todas las cosas fundamentales del cristianismo, el compromiso con el pobre tiene una larga tradición que a veces se oscurece pero que remonta lejos y en este caso, por ejemplo, al testimonio del siglo XVI. Por eso creo que la acción de Las Casas es enteramente vigente. Las formas concretas hoy no serán las de él, pero lo esencial de su testimonio, sigue siendo el mismo.

Susana: En relación a lo que es la defensa de la vida del pobre. Yo creo que eres una de las personas que más ha trabajado la complejidad de la vida del pobre. No se trata sólo de luchar en función de las aspiraciones a vivienda, a salud, a una serie de necesidades fisicas, materiales del pobre que son fundamentales. Hay una aspiración a vivir una serie de dimensiones de la vida: cultura, sexualidad, etc. Háblanos un poco más alrededor de esa complejidad de la defensa de la vida.

P. Gustavo: Yo creo que eso en realidad es muy importante y constituye para mí una de las experiencias más impresionantes de estos años. Porque una tendencia, explicable en fin, es la de estar exclusivamente atento a los aspectos, digamos, sociales de la situación del pobre en el continente lo cual indudablemente es fundamental.

Pero pobre es el insignificante, ese es me parece uno de los mejores acercamientos de la noción del pobre, cuya vida, sufrimientos y proyectos no son relevantes en la sociedad actual. El componente económico y social es fundamental, pero no único. En un continente como el nuestro ser pobre es tener color, es el indio, es el negro. Es también el asiático, que muchas veces, incluso, puede tener dinero y sin embargo constituyen un sector marginado de la sociedad. Una de las grandes mentiras de América Latina es que aquí no hay racismo. Lo que no hay son leyes racistas, pero eso se comprende porque las leyes en este continente no son muy observadas. ¿Para qué va haber ley?, las costumbres son más importantes. Prueba del racismo es que hay instituciones en este país. por ejemplo, donde es necesario tener un color claro para ser aceptado. Por supuesto que no hay nada en el reglamento de esas instituciones que diga que el color de la piel es un impedimento para entrar en ellas. Eso es racismo. Sin duda es también un aspecto ligado a lo económico y social.

A esto hay que agregar la situación de la mujer, no únicamente en América Latina sino, desgraciadamente, también a nivel universal. Como se dice en Puebla -y antes en escritos de teología de la liberación- la mujer de los medios pobres, es doblemente marginada y oprimida. Es una situación inaceptable y hay que tenerla en cuenta al hablar del pobre. No basta hablar de una situación económica y social, ni de la marginación por razones raciales. Creo que este aspecto de desprecio de la mujer también hay que tenerlo en cuenta. Lo curioso es que muchas veces resulta nuevo y sorprendente (sino chocante) incluso en ambientes populares, que están un sufriendo marginación de orden social o racial. Esta conciencia de la complejidad de la situación del pobre me parece que no ha entrado todavía suficientemente.

Añadiría algo más: ser pobre es también una manera de ser humano. Carlos mencionaba esa expresión de los obispos chilenos: mirar como los pobres. En realidad, ellos tienen una manera de ver Ias cosas. No pretendo que tengan una cultura radicalmente distinta a la del conjunto del país; pero hay una manera diferente de ser, hay una noción distinta del tiempo; el tiempo para el pobre no es lo mismo que para otros sectores sociales; además, les sobra el tiempo...

Hay todo un mundo del pobre: una manera de orar, de hacer amigos, de razonar. Esto no es independiente de los factores mencionados anteriormente, todo forma un conjunto. El mundo del pobre es de una complejidad muy grande. No basta decir que uno está comprometido con el pobre cuando lo está con sus intereses sociales, políticos o raciales o por la dignidad de la mujer. Estar en el mundo del pobre es de alguna manera estar en la complejidad de este mundo. No hay manera de estar comprometido con los pobres sin amistad con ellos, de otro modo estamos comprometidos con una abstracción, con una clase social, con una raza, con la mujer y no con los pobres concretos. El mundo del pobre es un algo muy complejo en el que no se entra sino muy lentamente. Consciente de los valores que uno encuentra y también consciente de las enormes limitaciones y fallas, pues el universo del pobre es humano y por tanto es un mundo de gracia y de pecado al mismo tiempo. La idealización de ese mundo me parece una gran ingenuidad. Es esta percepción de la complejidad del mundo del pobre lo que más me ha marcado en los últimos diez años, percepción que me parece que no teníamos un tiempo atrás.

Susana: y la lejanía del mundo del pobre.

P. Gustavo: La lejanía del mundo del pobre, se debe a su complejidad. Cuando uno cree que una cosa es más chica, uno se siente más cerca del fin. Cuando se da cuenta que es tan grande hay una sensación de lejanía y no es porque uno esté menos dentro, sino viene paradójicamente porque ese está más dentro y se tiene una mejor visión. Antes creía que estaba a la mano bueno, -no exageremos- pero en fin, más cercano.

En América Latina somos cada vez más conscientes de la inmensidad del mundo del pobre. Nos parecía mucho más chico al comienzo. Y ahora parece tan enorme que nos sentimos siempre lejos del pobre. Se requiere una humildad muy grande para estar en el mundo del pobre o, con la expresión evangélica: se requiere una gran dosis de "infancia espiritual" para estar comprometidos con la pobreza real de nuestro continente. Más todavía: creo que tenemos, como Iglesia, una ubicación social y cultural que no es la del pobre. La Iglesia en su conjunto, no vive en el mundo del pobre; el mundo del pobre es más un lugar de trabajo que un lugar de vivienda, si me permiten esta imagen.

El mundo del pobre pone tensa a la Iglesia. De esto, tal vez, vienen muchos de los problemas de todos estos años. Es que el mundo del pobre -cuando se está realmente presente en él- crea tensiones porque está lleno de problemas tan apabullantes que uno no sabe qué hacer frente a ellos; lleno de conflictos también.

Creo que hay que ir a habitar el mundo del pobre, no sólo a trabajar allí, sino a vivir en ese lugar. Desde ese mundo salir a anunciar el evangelio a toda persona humana. Evangélicamente hablando, la residencia histórica de la comunidad cristiana es el mundo del pobre.

Creo que a veces entramos al mundo del pobre impositivamente. La comunicación de las grandes nociones evangélicas, los grandes conceptos, es importante. Pero es necesaria también una etapa de silencio.

Un hermoso texto del profeta Isaías (25, 8) dice que en el día del juicio final el Señor enjugará las lágrimas de nuestros rostros y ¡ay de aquellos a los que el Señor encuentre con los rostros secos! ¡Ay de aquellos, entonces, que no hayan sabido comulgar con los sufrimientos de los pobres! No hay manera de entrar en su mundo sin estar en comunión con su sufrimiento concreto, y por cierto con sus esperanzas. Este mundo del pobre es nuestra Galilea. Así como el Señor salió de su tierra despreciada y oprimida, nosotros debemos partir del mundo del pobre. Anunciar el evangelio desde Galilea es hacerlo en el mundo del pobre y desde el mundo del pobre.

ALUMNI REFLECTIONS

VALORI, REALISMO E APPRENDIMENTO

Stefano Ceccanti, Phd - Italia

Accolgo con gioia l'invito di Pax Romana a riprendere una riflessione collettiva di tipo giuridico sul tema dei diritti umani per la giustizia e per la pace.

Mi concentro su tre punti.

Il primo è che la fase attuale, riproponendo in Europa un conflitto drammatico, colpendo la pace, mette in discussione una visione ottimistica, lineare, dello sviluppo dei diritti, ma questo non ci deve portare a rinunciare a una preziosissima spinta valoriale verso l'unificazione politica del mondo nel senso dei diritti e della dignità della persona.

Teniamo moltissimo alla Dichiarazione Universale dei Diritti dell'Uomo del 1948 e alla Convenzione europea del 1950 anche perché esse nascono, per così dire, dentro l'ispirazione comune dei nostri movimenti. Se solo si pensa alla Dichiarazione dei diritti promossa da Emmanuel Mounier nel 1944, tesa a superare la sovranità assoluta degli Stati, e all'azione concreta di Jacques Maritain per giungere alla Dichiarazione Onu, parliamo di una spinta propulsiva che ha dato molto al mondo e anche alla Chiesa. Quest'ultima ha gradualmente superato le sue riserve iniziali accettando il metodo di trovare un consenso per intersezione tra le diverse visioni del mondo, un'intesa pratica che non poteva riguardare i diversi fondamenti.

Eppure questo grande patrimonio, che sembrava destinato a generalizzarsi con la Terza Ondata Democratica dal 1974 in Portogallo fino alle rivoluzioni non violente nell'Est Europeo, oggi segna il passo. La Russia putiniana è stata inevitabilmente espulsa dal Consiglio d'Europa, rompendo il legame con la Convenzione europea, e anche altre esperienze, come quella dell'Iran di fine anni '70, sembrano aver rifiutato in modo sempre più deciso una prospettiva di evoluzione, negando in radice l'universalità dei diritti, in particolare della donna, anche a costo di usare la violenza contro larga parte del proprio popolo. In Polonia e in Ungheria Governi nazionalisti negano in sostanza che una giustizia costituzionale indipendente e i Paesi con cui si condivide l'Unione Europea possano porre limiti a chi ha vinto le elezioni statali, rivendicando esplicitamente un'idea di "democrazia illiberale", intrisa di legami strumentali con l'esperienza religiosa, trasformata in fattore di chiusura.
Per questa ragione, oggi più che mai, è necessario un lavoro internazionale come quello di Pax Romana, teso a riaffermare, al netto di legittimi adattamenti ai diversi contesti, legittimi in quanto proporzionati e ragionevoli, il carattere universale dei diritti, senza i quali ritornano le sovranità assolute degli Stati che creano guerre e si riafferma il legame regressivo anziché liberante delle esperienze religiose. È il progetto di cambiamento che Maritain, negli anni della maturità, aveva chiamato "umanesimo eroico", basato su un credo democratico e pluralista. A questo proposito, credo siano da rileggere in particolare le brevi Riflessioni sull'America di Maritain, la cui riedizione ho avuto l'occasione di curare per Morcelliana.

Il secondo punto è complementare e si richiama al realismo cristiano, al dovere di fare i conti coi conflitti quali essi concretamente sono e non quali vorremmo che fossero. Qui ci aiuta in particolare Emmanuel Mounier, con le sue riflessioni contro la volontà di potenza hitleriana successive all'accordo di Monaco e di poco precedenti la Seconda Guerra Mondiale, pubblicate in Italia col titolo *I cristiani e la pace* e riedite da Castelvecchi in occasione dell'inizio della Guerra in Ucraina. Ho avuto l'onore di curare anche questa riedizione e devo dire che sono rimasto colpito dal nucleo centrale dell'idea di legittima difesa in Mounier. Indubbiamente il cristianesimo ci spinge a un impegno politico esigente che tende alla riduzione della violenza nella storia e ad allontanarci dalla facile aggettivazione della guerra come 'giusta', ma occorre evitare di trasformare questa consapevolezza in un massimalismo etico. Per evitare la guerra, scrive Mounier, non si può escludere a priori il rischio di guerra: «il rischio è ovunque, salvo nell'avvilimento o nel suicidio deliberato. […] Deve essere corso, facendo al contempo uno sforzo tanto più eroico per scongiurarlo». Per questa ragione, non possiamo oggi negare ogni forma di sostegno, anche militare, all'Ucraina aggredita, non possiamo evitare la scelta di mezzi imperfetti in nome di un percorso pur giusto di lungo periodo di purificazione dei mezzi stessi.

Il terzo punto che voglio sottolineare è l'apprendimento. Siamo in una fase sinodale della vita della Chiesa, una comunità che non ha solo da proporre ad altri, ma che ha anche molto da imparare in termini di valorizzazione della dignità della persona dentro di sé. Non possiamo mai dimenticare che, anzi la Chiesa è tanto più credibile nel messaggio ad extra quanto più è coerente ad intra con i valori che afferma. Al di là delle sue indubbie particolarità interne che ne fanno uno strumento sui generis rispetto a tante altre realtà umane, il tema dei diritti, della dignità va affrontato anche all'interno, prendendolo sul serio. Del resto qualcosa si è già fatto. Il recente testo vaticano del 2021, il Decreto generale *Le associazioni di fedeli*, ricorda che "l'autorità viene attribuita dalla libera volontà degli associati a norma degli statuti" e che "il ricambio generazionale degli organi di governo mediante la rotazione delle responsabilità direttive apporta grandi benefici alla vitalità dell'associazione", ponendo quindi dei chiari limiti temporali per gli incarichi di vertice. Per realtà come quelle di Pax Romana, abituate a dinamiche democratiche, aliene dal rischio di delega a fondatori carismatici, niente di nuovo, ma certo non si può dire lo stesso per tante altre realtà ecclesiali.

In questo modo sono appunto valorizzate le esperienze che si sono rivelate più feconde e sono sanzionate quelle che hanno dato luogo a fenomeni di devozione di tipo personalistico o autoritario. Peraltro, le prime sono state anche palestra di apprendimento per l'impegno politico e istituzionale. Molti di coloro che sono impegnati politicamente oggi hanno imparato *prima* in queste associazioni le tecniche (e dietro le tecniche i valori) che hanno sperimentato *dopo* nell'impegno civile e politico. Forse, sia pure senza determinismi, non è un caso se alcune forme degenerative nella vita interna e nella vita politica e civile siano invece maturate nelle esperienze ecclesiali più movimentiste, meno abituate ai limiti ai mandati, all'utilizzo del voto segreto, alla netta separazione tra i beni degli aderenti e quelli della realtà associata, a forme di ampia trasparenza delle decisioni. Il tema dei diritti, a cominciare dalla valorizzazione della dignità della donna, quindi parla anche alla vita interna della Chiesa, è uno degli aspetti chiave del ripensamento sinodale di una realtà che non è fine a sé stessa, ma che è ricondotta dal Concilio alle categorie più umili di "segno e strumento".

PAPA BENEDICTO XV

Eugenio Gay Montalvo, Phd - Catalonia

En primer lugar, deseo felicitar muy sinceramente al grupo de jóvenes juristas que están poniendo en marcha esta publicación, a la que deseo una larga y fructífera andadura. En segundo lugar, mi agradecimiento al ofrecerme esta ocasión para escribir unas líneas en su primer número.

Quisiera que las mismas empezaran por un reconocimiento al Papa Benedicto XV (cardenal, Giacomo della Chiesa) gran jurista, a quien le tocó vivir la tragedia de la Gran Guerra de 1914, que intentó evitar por todos los medios y durante la que mantuvo una absoluta imparcialidad no tomando partido por ninguno de los contendientes, mientras hacía, no sin sufrimiento, esfuerzos enormes para conseguir la paz; baste para ello recurrir a su biografía. Es precisamente a su iniciativa a quien debemos la promoción de un movimiento de universitarios, más tarde también intelectuales, católicos bajo el nombre Pax Romana, que es nuestro origen y nuestra razón de ser. Los horrores de la guerra y sus trágicas consecuencias nos ponen de manifiesto cuán necesario resulta que los católicos apostemos, sin fisuras, por la paz.

Bien pronto, dentro del grupo de intelectuales, nacería un movimiento específico de juristas que tuvieron un papel esencial en la promoción de los valores nacidos de la dignidad de la persona, sobre la que debe fundamentarse el derecho. Su papel fue esencial en las postrimerías de la Segunda Guerra Mundial y contribuyeron, en no poca medida, a la construcción jurídica de un nuevo orden que sienta sus bases sobre la dignidad, de cuyo imperativo categórico nacería la Declaración Universal de Derechos Humanos, de 10 de diciembre de 1948. Podemos afirmar que a partir de ese momento la democracia cobra sentido porque las reglas del derecho se justifican y obtienen su razón de ser en la proclamación de los derechos fundamentales de la persona. Si bien es verdad que, como acuñaron los romanos, no hay sociedad sin derecho, ni derecho sin sociedad, afirmando que *ubi societas ibi ius*, también es verdad que la historia de la Humanidad tiene una de sus páginas más bellas en la cruenta y larga lucha de los hombres por conquistar su dignidad; es decir, la dignidad de cada cual, como afirmó el gran jurista español Juan Iglesias, en su libro “El arte del Derecho”.

A partir de ese momento, las constituciones de los países democráticos fundamentarán su parte dogmática en el reconocimiento de los derechos fundamentales y su estructura política sujeta al respeto de los mismos. Ello fue así gracias, también, a la influencia que intelectuales y juristas católicos ejercieron en esos momentos en consonancia con la doctrina social de la iglesia, que a partir de la encíclica del Papa León XIII, de *Rerum Novarum*, fue manteniendo a lo largo de los años. Sin embargo, una nueva encíclica vendrá a consagrar una lectura inequívoca de los Derechos Humanos desde la fe, como fue la *Pacem in terris*, verdadero testamento del gran Papa que fue San Juan XXIII, publicada pocos días antes de su fallecimiento. De ella es importante destacar aquello que dice respecto al orden moral “*cuyo fundamento objetivo es el verdadero Dios*” y continua así “*el*

orden que rige en la convivencia entre los seres humanos es de naturaleza moral. Efectivamente se trata de un orden que se cimenta sobre la verdad, debe ser practicado según la justicia y exige ser vivificado y completado por el amor mutuo y, finalmente, debe ser orientado a lograr una igualdad cada día más razonable, dejando a salvo la libertad". Ello exigirá, como más adelante indica, "una ordenación jurídica en armonía con el orden moral y que responda al grado de madurez de la Comunidad política, constituye, no hay duda, un elemento fundamental para la actuación del bien común".

Más adelante nos dirá El Santo Padre al resaltar la importancia de la Declaración Universal de los Derechos Humanos, que "esta Declaración se ha de considerar como un primer paso e introducción hacia la organización jurídico-política de la Comunidad mundial" y, por fin, ya en las postrimerías de su encíclica nos dice "porque todos cuantos creen en Cristo, deben ser en esta nuestra sociedad humana, como una antorcha de luz, un fuego de amor, un fermento que vivifique toda la masa; y tanto mejor lo serán cuanto más unidos estén con Dios […]. La Paz ha de estar fundada sobre la verdad, construida sobre las normas de la Justicia, vivificada e integrada por la caridad y realizada, en fin, con la libertad".

Pax Romana, tanto en el movimiento de intelectuales, como el de juristas y el de estudiantes, ha intentado, desde el principio, mantenerse fiel a estas enseñanzas y orientaciones de la Iglesia y se confió al movimiento de juristas la representación en Naciones Unidas de la propia Pax Romana, como organismo consultivo. De manera que, cada año asistía con voz a la Comisión de Derechos Humanos con sede en Ginebra, donde participaba de manera inequívoca intentando que el mensaje de paz, de justicia, de libertad y de igualdad y fraternidad, entre todos los seres humanos y los pueblos, se hiciera realidad en consonancia con las exigencias de los derechos fundamentales de las personas.

Tuve el privilegio, durante bastantes años, en la década de los 80 del pasado siglo de representar y coordinar a ese grupo de juristas, como Secretario que fui del movimiento que entonces presidía Louis Edmont Pettiti, que fue decano del Colegio de Abogados de París y Magistrado del Tribunal de Derechos Humanos de Estrasburgo, en el que realizó, con otros Magistrados de ese Tribunal también miembros de Pax Romana, una labor extraordinaria. Muchas fueron las misiones que se organizaron en coordinación con Naciones Unidas, con otras organizaciones, o por cuenta propia, en lugares donde se conculcaban los Derechos Humanos y en los que las injusticias clamaban al cielo, dando cuenta de ello en la Comisión de Naciones Unidas.

Lamentablemente, resulta imposible en un artículo como este realizar una crónica de todo lo que a lo largo de los años se efectuó, pero puedo asegurar que los esfuerzos y las misiones efectuadas fueron muy numerosas. Algunas de ellas en lugares que estaban en guerra, otras intermediando para que se pusiera en libertad en Irán a unos aviadores ahí retenidos y secuestrados, otras, por ejemplo, para conseguir la salida del país en el caso de la URSS de un significado escritor de nacionalidad rusa, así como misiones en países donde las dictaduras ejercían poder absoluto, como en Uruguay, Argentina, Chile, Brasil, Paraguay, por citar unos ejemplos; como también en el rescate de detenidos o refugiad-

-os en campos de concentración durante la terrible guerra de Ruanda; o en Colombia, después del asalto con tanques de la sede del Palacio de Justicia y del Consejo de Estado de Bogotá donde asesinaron, entre otros, a un Magistrado representante de Pax Romana en Colombia, país en el cual el narcotráfico capitaneado por Pablo Escobar hacía estragos en la sociedad.

Quisiera, sin embargo, destacar un tema especialmente duro para Pax Romana, que fue cuando después de haber puesto de manifiesto los viajes de los helicópteros del ejército de la Armada Argentina descargaban en el mar a muchos de los detenidos donde morían ahogados, Argentina solicitó la expulsión de Pax Romana de Naciones Unidas por mentir abiertamente y acusar indebidamente a su país. A esta petición se sumaron países como Estados Unidos, la URSS y todos los países de la Europa Oriental, así como Cuba y, por supuesto, los países dictatoriales del Cono Sur de América. La situación fue enormemente tensa para Pax Romana y también para el Vaticano. En aquellos momentos, era Secretario General de Naciones Unidas Kurt Waldheim, que posteriormente fue Presidente de la República Austriaca y que había pertenecido a Pax Romana, quien, con sus dotes diplomáticas, consiguió evitar la expulsión.

Hoy vivimos momentos muy convulsos en los que las guerras, el hambre, la injusticia, la falta de respeto a la dignidad de la persona humana siguen martilleando la convivencia e impidiendo una comunidad internacional fraterna y en paz. La voz de los juristas católicos debe ser fiel a las enseñanzas evangélicas y al legado que de ellas mantiene vivo la Iglesia hasta nuestros días.

4

HUMAN RIGHTS, JUSTICE AND PEACE IN AFRICA

Pihewa Karoue, Phd - Togo

Human rights, justice and peace, are fundamentally interlinked, not only by semantics but also by their social consequences: there is as much peace as human rights are respected and fulfilled and vice versa. Despite not being an ultimate end, justice is an essential modern peace and human rights tool. Human rights, even though not the finality, can't be avoided if all the transformational agendas target a "dignifying life for every human being".

Justice is related to establishing equality between human beings and is fundamentally linked to human rights principles and standards. The Universal Declaration for Human Rights (UDHR) provides a more straightforward definition in the first article. "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (UDHR, art. 1).

At the international level, the two world wars' experiences have triggered deeper consciousness around the notion of dignity. The outrageous attacks on freedoms and vital human needs, which have forced the establishment of prevention apparatuses such as the United Nations, enabled meaningful reflections around values and norms of global validity. One could read in the preamble of its charter that the UN's role is to

"… take effective collective measures for the prevention and removal of threats to the peace, and the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace…." (UN charter.)

The International community affirmed its "faith in Dignity and Human Rights" in the UN charter. This statement testifies that the UN considers the two notions as having a status of supreme guiding values or principles. The question is around the rationale on how the two notions could summarise the role the UN has to play and the result in people's lives, for the idea of Dignity and Human Rights to be at the centre of the action. Some definition, such as the one of Jack Donnelly, gives a direct answer. For him, human rights are "the minimum set of goods, services, opportunities, and protections that are widely recognised today as an essential prerequisite for a life of dignity, and a particular set of practices to realise those goods, services, opportunities, and protections…." (Donnelly, 2013: 17). Reinforcing this idea of an intrinsic link between human dignity and human rights, Roberto Andorno states the following:

"According to international law, the relationship between human dignity and human rights is between a foundational principle of equal respect for every human being and the concrete norms needed to flesh out that principle in social life. Human dignity is the foundation of human rights; rights derive from human dignity. Human dignity is not a kind of super-right or a collective term to refer to rights, but rather the ultimate source of all rights. The notion of human dignity attempts to respond to the question, "why do human beings have rights? And the answer is that they are entitled to rights precisely because they possess intrinsic worth" (Andorno, 2014: 49)

Ultimately, Human rights and Human Dignity refers to the worth of the person, even if the first has a legal value, whereas the second has a moral value. In the contemporary world, a reference to the notion of dignity without human rights remains incomplete. The centrality of the concept of dignity is not limited to the vita-

vitalisation of the idea of Human rights. Human dignity is taken as a principle and is the ultimate benchmark measured through human rights indicators, which, once achieved, will amount to a situation of peace. The UN system has created regional and international human rights protection mechanisms that increasingly meet national adhesion from states worldwide. For 18 international human rights treaties (including optional/additional protocols), 57 states have ratified between 15 to 18; 85 States have approved 10 to 14; 50 have confirmed five to nine. And only five States have ratified less than 5[1]. This data on the State's ratification of human rights treaties indicates high enthusiasm for International human rights mechanisms for the promotion, protection and fulfilment of human rights. As a consequence, there is an implicit expectation: entering increasingly in an era where human rights and human dignity becomes the alpha and omega of whatever government authorities undertake to do.

However, data shows an ongoing, if not increasing, trend of human rights abuse and violation, in all corners of the world, especially in Africa. Several countries on the continent are burning under the fires of different type of long-lasting conflicts, which drives the mass and severe abuse of fundamental rights.

The Global peace paradigm

In this reflection, we will be using the concept of the Global Peace Paradigm to describe the international human-rights-based apparatus developed by world leaders to promote peace and justice in the world.

We agreed. The World Wars are the most outrageous conflicts humanity has tragically faced in the last century. The damages are known to have deeply affected and diminished the value of a human person and triggered deep reflection on the specificity and intrinsic endowments of human beings and people.

To provide durable answers, build sustainable peace, and ensure the equal treatment of all people and all nations, the international community has chosen an institutional apparatus anchored in democratic principles, International Human Rights Law (IHRL), and International Humanitarian Law (IHL). The global peace paradigm created has the form of an international governance system with two faces. The first one is an open and accessible space of adhesion to international principles of IHRL and IHL. The second is a framework with regulations and standards used for countries' self-evaluation and evaluation by their peers and people.

One of the Global Peace paradigm's most significant achievements has been establishing standards. Human Rights Standards result from an intentional process to define objectively the indicators through which dignity could be understood, measured, evaluated and guaranteed. This process has also set the values by which States, first responsible for human rights protection and fulfilments, are seen on scales of good governance[2].

The Universal Declaration of Human rights (UDHR, 1948), which is part of the voluntary effort of the UN system to move forward the human rights apparatus, was voted by the General in 1948 as a guiding document made of internationally recognised and accepted principles and guarantees. World leaders have set these principles to guide actions and prevent the omission of duty-bearers and rights-holders.

However, using the argument of cultural relativism, some State actors have justified severe human rights abuses. The UDHR has provided principles of universal validity, which have given a weak resonance to the cultural relativism argument. This change occurred because the international community has seen human rights principles as the product of a universal and joint decision to choose values that should guide the decisions and actions of duty-bearers and rights-holders. It explains why the GA voted for the UDHR as a "common standard of achievement for all people and all nations" (UDHR preamble).

The UN system, with its six (6) main organs, is settled to be the warrant of this international system, even though its capacity of delivery continues to lay on the use made of its treaties, recommendations, guidance, and requests by States parties. The Global Peace Paradigm considered a fit-for-purpose apparatus is as effective as the willingness of the States parties to fulfil their international obligations. Likewise, respecting international human rights principles in social, economic, cultural, and political dynamics is as effective as the value objectively entrusted to dignity by duty-bearers.

The reflection on the global peace paradigm raises questions about its substantial effect on current trends, social dynamics, and human lives. These reflections could look at the system as an instrument; they could also look at actors with responsibilities to make principles and standards a reality or (geo) political dynamics that influence them. In one way or another, there is a need to have a consolidated view incorporating all the dimensions and interactions that lead to more profound questions on the paradigm.

What isn't working?

The current political and social situation across the African continent is disproportional to the desired sophistication of the global peace paradigm. The crisis underway in many corners of the world could seem to not have an equivalent solution because of the weakness of the provision of the international system vis-à-vis those issues. What is regulation without a firm commitment from key stakeholders to implement the regulation's requirements? The analysis of the main gaps in the current global peace paradigm shows a few discrepancies in a few facts:

1. The quantities of treaties ratified and the pace at which they are by some countries don't always lead to the betterment of human rights situations and peaceful coexistence in those countries;
2. The effectiveness and efficiencies of provisions of international human rights instruments lay exclusively on the will of the State parties to implement them;
3. The States have the sovereign power to reject, refuse or delay the implementation of the recommendations of the international human rights mechanisms.

These facts show how this paradigm's weaknesses lie widely in this apparatus's inability to enforce treaties and conventions even though mechanisms are put in place to encourage the implementation. A wide range of assumptions could be explored, including the possibility of imposing the enforcement and the provision to promote the enforcement.

Instrumentalising instruments

The international community has set human rights principles and values that should guide the relations between States and their citizens.

The institutionalisation of the global tenets through the UN, the UDHR and subsequent conventions and treaties have also set expectations from States actors and citizens. These principles have also been beneficial in developing indicators of good governance and social responsibility in business and production systems.

This development of international instruments has created increasing global appreciation marked by numerous steps of States in ratifying international human rights treaties. By doing so, states accepted obligations under these treaties that set social, economic, cultural, political and civil rights standards. We have assumed that ratifying treaties, signing international conventions, and taking active roles in specific regulations were indicators of increasing consciousness of the raison-d'être of those agreements, which is a dignifying life for every human being without any discrimination.

However, the persistence of human rights abuse and violations across countries demands to take into account two main factors that seem to dictate State actors' steps around the global dynamic:

· The setting of International Human Rights Mechanisms[1] also opened an era of political action of global validity: The human rights principles were not only legal tools. They have also created a political culture which has led to a set of accepted or condemned practices across countries. Human rights are also a language that resonates in all corners of the world. Accepting human rights and humanitarian standards is also a commitment to global validity's political action, which means an engagement for dignity, peace, and justice through human rights and humanitarian standards.

Therefore, the choice for treaties' ratification also corresponds to the expectations of UN entities from States parties to comply with international human rights standards and have a seat at the table of exemplarity. Ratification equates seamless access to the great global family with symbolic recognitions that follow it. Such recognition is essential in international politics because it temporarily sets the grid through which countries, institutions and citizens will interact over issues of common interest. Moreover, every country wishes others to cite her as applying exemplary leadership and scoring good marks in all domains. The competition of States over these symbolic statuses has been part of human history and could be an explanatory factor in the dynamic of treaty ratifications.

The State have interests: The ratification of human rights treaties by States is not necessarily a deep attachment of political leaders/State actors to values of dignity by which they would be determined to lead. The ratifications as an act of accepting the principles and standards were necessary to be considered fully partaking of the international system. To promote their interests that involve international institutions and other countries, States are to subscribe to rules in play, even if it means violating them later.

The democratic principles are anchored in human rights. Human rights are an essential indicator of good governance and profoundly impact the economic dynamics at the national level either through the conditionality of investors before establishment in countries or in evaluating the already established businesses. In this context, it is evident that human rights are a cross-cutting issue which plays a role in assessing the credibility of institutions in which human beings are involved. In the international system, States are primarily responsible for protecting and fulfilling human rights and are expected to respect this aspect of their leadership as it contributes to their credibility vis-à-vis key players in international dynamics.

Conclusion: A way out

As already stated before. The success of international systems has always lain on the will, commitment, and strategic engagement of political leaders leading State parties to it. Implementing the Global Peace Paradigm might require the endowment of State leaders with fundamental human values. At the core of the Global Peace Paradigm is the belief in the worth of every human being for respect and dignity. As the State actors are primarily responsible for implementing this paradigm, the Global Peace Paradigm requires them to respect each human being's rights deeply. In his book titled politics and society, Pope Francis stated the following: "Paul VI and Pius XI said that politics, grand politics, is one of the highest forms of charity. Why ? because it is oriented towards the common good of all" (Pope Francis, 2017:40).

As we question the humanity of political actors in power, we may also need to examine the popularity of human values in society because the leaders are always accompanied by collaborators and elected by a sample of people. The support system of political leaders is beyond the country's borders and motivated by economic interests, which are also the main reason for biased internal support from people. Therefore, questioning the functionality of the Global Peace Paradigm challenges the political actors in power and international economic systems, vulnerabilities, and dominant systems of values promoted through education and public discourses at national levels.

It wouldn't have been the same analysis we would have done if the international system was a supranational entity which could dictate conduct to national political leaders based on principles and standards agreed upon by key actors. The current situation leaves the power to political leaders to ensure the implementation of the paradigm. The inability of the international human rights systems to impose conducts, strategies or deadlines leaves her with little leverage because, vis-à-vis of international structures, the State have an obligation to report and not an obligation to accept all the recommendations

The comprehensive analysis of peace, justice and human rights situation leads to broader reflections of two main categories. The first one questions how close the contemporary systems of values promoted in Africa are to fundamental human rights. The second concern is the possibility of readjusting the current international approach to fit the need for leaders to operate by principles and standards jointly defined.

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Notes

[1] Data available on the Website of the Office of the High Commissioner for Human Rights (OHCHR). - OHCHR Dashboard (consulted on the 15 November 2022)
[2] Through human rights principles, the indicators of good governance are backed by the quality-of-life people have access to and the level at which their worth is translated in their daily lives.
[3] Human rights mechanisms refer to two key components of international human rights system: the treaty bodies (nine committees of independent experts that monitor implementation of the core international human rights treaties) and the Human Rights Council (which has key process it oversee such as the UPR process and special procedures)

ESSAYS

5

DEVELOPMENTS OF ENVIRONMENTAL PROTECTION IN ITALY

"In the interest of future generations: a step forward in the European legal context"

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Abstract

Abstract: The work delves into the constitutional issues arising from the entry into force of Constitutional law n. 1/2022 which provided the Constitution with principles of environmental protection. After an analysis of the doctrinal reaction towards the reform, particular attention is the devoted to the intergenerational solidarity principle as enshrined in the novella *of article 9 of the Constitution. Due to the lack of jurisprudential sources the present contribution seeks to assess the heuristic value of the sentence of the German Federal Constitutional Tribunal of 2021 in theme of environmental protection for the understanding of the possible outcomes that the reform could lead to.*

1. Introduction.

The present contribution intends to delve into the possible "constitutional climate litigation" outcomes of the reform purported to the Italian Constitution by Constitutional Law n. 1/2022.
With Constitutional law[2] of February the 11th 2022 no. 1/2022[3] considerable changes were brought to the Constitution insofar as it revised articles no. 9 and 41 with the finality of providing environmental issues with a express constitutional stabilization[4], although being critiqued as an non useful reform.[5] The Constitutional Revision Law was approved with the qualified majority necessary to the immediate possibility of entry into force of the Reform[6], which was evocative of a substantial coherence in the intention of the parliamentary political forces.

Article 9 of the Constitution is in the Fundamental Principles[7]. Originally devoted to the development of culture, scientific research, technique, the landscape, and the historical and artistic heritage of the Nation[8], it now shows the following textual formulation: "The Republic shall promote the development of culture and scientific and technical research; It protects the landscape and historical and artistic heritage of the Nation. It protects the environment, biodiversity, and ecosystems, also in the interests of future generations. The law of the state shall regulate the ways and forms of animal protection"[9]. Along with the revision of article 9, article 41 was revised as well, resulting the original formulation in following prospect[10]: "*Private economic initiative is free*

free. It may not be carried out in conflict with social utility or in such a way to damage security, liberty, human dignity, health, and the environment. The law determines the programs and appropriate controls so that public and private economic initiative may be directed and coordinated for social and environmental purposes[11]. The constitutional reform is rooted in the evolutive tendence of global constitutionalism since 1990s consisting in the progressive acknowledgement of the principle of the protection of the environment in the Constitutions[12].

The Constitutional revision was longly awaited in the Italian legal system, in the direction of aligning the Constitutional provision with the international standards as well as with the comparative context[13]. Before getting more deeply into the analysis of the reform it must be remembered that the obligation of the Republic to pursue with international standards is therefore laid down in article 117, first comma of the Constitution, and, coherently with the general spirit of the reform, involve all the levels of exercise of public power[14]. This logic was then poured in the revised constitutional provisions, with the finality of involving all the governance levels in doing so.

The Constitutional process which led to the drafting of the new article thus aligns itself with the objectives laid down in the Paris Agreements of 2015[15] as well with the obligation on which Italy is bonded through the ratification the European Treaties. With reference to the environment, the country's duties could be derived articles 13, 191-193 TFEU and 3 TEU[16]. Among others, the obligations taken under the European Convention of Human Rights, namely concerning article 2 and article 8 of the Convention, as pertinently interpreted by the European Court of Human Rights[17] in its jurisprudence are a tool of fundamental heuristic relevance for the interpretation of Constitutional climate litigation. Thus, the revision of the Constitution is the result of the will of providing order into the environmental constitutional law backdrop with starting from the end of the 1980s the Italian Constitutional Court developed a rather dense jurisprudential repertoire[18], in which, due to the proper nature of jurisprudential law[19], a considerable taxonomic uncertainty connoted the general overview[20]. In order to deduce the possible outcomes of the Constitutional reform, it should be correct to premise, with introductory finalities a brief overview on the Constitutional jurisprudence in theme of environment[21], considering, along with the authoritative observation of Former President of the Italian Constitutional Court Valerio Onida, that the reform should not be taken into account as an innovation in the Italian legal system apart from the side of the recognition into the Constitution of the environmental protection principle because the object of the reform was developed by the Constitutional Court's jurisprudence retaining the environmental protection an implicit principle interpretatively derivable for the textual formulation of the already existing constitutional provisions[22]. At first sight, right after the establishment of the Court, an interpretive tendence of the protection of environment was developed on the combination between articles 2, 9, 32[23] , mainly focused on the corollaries of the Right to Health in article 32 Cost. One of the first key development in the Italian constitutional jurisprudence towards the environment issues is the statement contained in the sentence n. 141/1972 in matter of urban organization which represented the shift from a notion of urbanistic merely intended as the rational organization of the city not only devoted to the enhancement of the lives of individuals but also as a planning activity which also regards the territory in its entirety[24].

From the perspective of the protection of the territory, extensively intended by the Constitutional Court as comprising the environment, the first sentences could be read near the end of the 1950s with a sentence emitted in 1959 (Corte cost. n. 59/1959)[25]. In the decision-making process that the "Judge of the laws" adopted can be found the statement according to which the protection of territory ex art. 9 of Constitution shall be intended as the necessity of protection of all the natural beauties[26]. Another significant moment in the growth of the judicial sensibility towards this task is represented by the three sentences n. 167/1987[27], 191/1987, 210/1987[28] with the fundamental acknowledgment of the protection of the environment as a Constitutional Principle, adding this perspective, in the wake of the jurisprudence started with the pronouncements n. 239/1982 and 151/1986 which overcame the conception of protection of environment as merely the safeguarding of the natural beauty as expressed in the aforementioned 59/1959 among others, to the Rights expressly safeguarded by the Italian legal system[29]. Then, in 2001, with the integral reform of Title V of the Constitution in matter of legal order of autonomies operated through the entry into force of Constitutional Law n. 3/2001, recognized the protection of the environment within the state competences in the general allocation of legislative powers laid down in article 117 Cost[30]. From the approval of the Constitutional reform a vast jurisprudence was the drafted and it culminated with sentence n. 367/2007, in which the Consulta[31] held that the principle of the protection of the environment constitute a primary constitutional value, spotting that in a position of prominence than other constitutional rights. It could not be hidden that these jurisprudential developments constituted the essential backdrop on which the framers of Constitutional Law n. 1/2022 have relied. In this contribution an overview of the recent constitutional developments in theme of protection of the environment will be provided. Specifically, we will consider in the second section the intergenerational solidarity principle entered by the reform based on the consideration of the doctrinal context; in the third paragraph the Sentence of the Bundesverfassungsgericht on Climate Protection of 2019 will be analyzed in its possible heuristic relevance in the hermeneutics of Constitutional Law n. 1/2022 with particular considerations of the negative aspects of climate litigation towards Constitutional Court and lastly, in the fourth paragraph, we will try to sort conclusions on the basis of previous chapters.

2. "In the interest of future generations", a general overview of the Reform in the Italian legal context

Within the main innovations brought by the Constitutional reform, it could be affirmed that the intergenerational justice principle constitutes, unlike the general protection of the environment, a categorial revolution in the Italian legal system[32], despite being considered a mare codification of what has been written in the Constitutional Jurisprudence[33]. The intergenerational justice principle, for providing a philosophical and moral perspective, whose epistemic purpose is mainly external to the scope of this writing, has been largely addressed by Pope Francis in his encyclical Laudato Si' in several points, rooting the intergenerational solidarity aim in connection with the sustainable development finality to Biblical references[34]. Despite this considerable result, the Italian parliament brought changes to the Constitutional Acknowledgment of the protection of envir-

-onment among others, with consideration of the interest of future generations, it may be highlighted that in the comparative context Constitutional Law n. 1/2022 is one of the last contributions in this direction, in the vein of a link between the intergenerational justice and the sustainability principle[35], originally enshrined in official documents with the Rio de Janeiro Declaration of 1992[36]. The intergenerational principle is therefore contained in article 3 of Treaty of Lisbon and could be thus considered an obligation binding Member States to both legislative acknowledgement and judicial reasoning[37]. The Constitutional reform has held the occasion to enshrine in the Constitution the sustainability principle, as originally conceived by the Brundtland Commission[38] but then opted for the intergenerational solution which encompasses the sustainability principle as well[39]. Some doctrinal parties addressed the reform of article 9 with considerable criticism. Some argues that the call for intergenerational justice is rather ambiguous and characterized by uncertainty[40]. Some others consider that the intergenerational principles grounds its roots in the Italian legal system as a binding measure[41] in a recall to the sustainable development[42] as well as consider that the environmental protection policies are ontologically characterized by a "long term legislation" principle[43], casting the legal form of the constitutional reform with a sense of inutility. Further debate was raised over the possibility of the configuration of rights of the future generations. Within the Italian Academic literature two positions coexist. On one hand some scholars argue that it is impossible to affirm the existence of rights of the future generation, from the fact that there cannot be found a subject entitled to act for the protection of that right[44]. On the other hand, it is commonly accepted that the reflections upon the rights of the future generations shall be conducted with a particular reference to the specific duties imposed by the pertinent constitutional provisions in them of environment[45]. The main assumption could be resumed in delivering sustainable expenses to the generation of the future to let them provide sustenance to the fundamental rights referred to them, evoking thus the need of considering a principle of "environmental duty"[46] rather than founding all the analysis on the rights of future generations. Some concerns have been expressed by some doctrinal position to smoothen the intergenerational justice principle as connected with economic policy. According to some scholars, there would be the need of denying the interpretation of the norm as implying restrictive economic policy measures not to burden on the future generations with some species of pecuniary damage[47]. Constitutional Law no. 1/2022 provide that the legislator shall consider the interest of future generations and it clearly evoke that preemptive approach. Given the claim that there is a considerable difficulty to precisely pinpoint the rights of the future generations as compared with the rights of the present people it could be noted that indirect and farsighted[48] policy plans with well delimited objectives could contribute to prepare the conditions for the guarantee of those rights[49]. The principle of intergenerational solidarity itself evokes the need of long-term based policies, leading the reflection to reject the perspective of environmental protection policies rationalized only for the present living generations[50].

3. The judicial perspective for the intergenerational principle, considerations on the basis of the content of the Sentence of the German Constitutional Court on Climate Protection.

With consideration of the environmental protection and the policy pathways in enforcing it the analysis should then focus on the adjudication tier of the intergenerational justice principle, considering its possible effects on judicial reasoning and Constitutional adjudication. On this basis and starting from the textual formulation of article 20a of the *Grundgesetz,* the German Federal Constitutional Tribunal pronounced a sentence in which the key decisional tool was the necessity of long-term policies[51] in ensuring the protection of rights related to climate changes as conceived by the German Legislature in the *Klimaschutzgesetz* (hereinafter referred to as "KSG"), enforced as a framework law[52] which rationalized in a single form measure and dispositions as concepted in previous regulations and plans[53], endowed with the main objective in granting the implementation of the Paris Agreement's recommendatory content. The finality of the KSG in therefore achieving the climate neutrality by 2050, starting from the result that will have been achieved through the policies laid down until 2030. It could be noted that the Sentence of the German Federal Constitutional Tribunal will be considered as a milestone in climate litigation, since the fact that it encompasses the paradigm in which the possible outcomes in other country Constitutional Jurisprudence would be shaped[54]. Complaints were issued after the presentation of four direct recourse[55] towards the KSG essentially concerning the lack of objectives in terms of sustainable development in the period after 2030 in order to achieve the aforementioned climate neutrality, while providing objective concerning the reduce of the levels of Greenhouse Gases (hereinafter referred to as GHG) emissions, especially of Carbon Dioxide[56] from 1990 to 2030 under 55%, aiming at a declaratory of the *strictu sensu* illegitimacy of the disposition of the Climate Act or expecting the Court to solicit the Legislature make amendments to the KSG. It can be highlighted that KSG in fact limited its provision to the need of approving an implementation statute in 2025 to set measures to contain the expanse in emissions[57] and that the possible reject, of the court to the complaints presented would have resulted in an avowal of a legislative structure allowing competent Constitutional organisms to set measure not complying with the programmatic content of article 20a GG. The Court declared the KSG unconstitutional insofar it lacks targets in terms of GHG emission for the period after 2031 and it solicited the legislator to enact measure by the end of 2022 to update the KSG in conformity with the sentence's content. The result of the pronouncement of the German Federal Constitutional Tribunal is derived from the interpretation of the intergenerational solidarity principle enshrined in article 20a GG as imposing a duty[58] on public power to protect the environment in the interest of present and future generation rather than attributing a subjective right to a good environment for present and future generations[59]. The Constitutional duty of the protection of the environment paves the way for the link between such positive obligation and the need of protecting health, in the *status positivus* sense. The Court asserted that under article 2(2), first sentence of the *Grundgesetz* it is not possible to derive rights of the future generation as object of a positive obligation of the country, but this obligation could be only referred to the present genra-

-tion people's right to health. Despite the clear statement of the Constitutional Tribunal about the fundamental rights as enshrined in the Grundgesetz in pinpointing among others the fact that despite the recourse were admissible in light of the content of article 1(3) GG the infringement of the rights does not refer to a territorial criterion of admissibility in fact the Court stated that Germany has not violated its obligation of protection for a matter of jurisdiction, the Court demonstrates a strong tension towards the tendency of judicial creativity and, from a certain point of view activism. These could be in fact noted in the solicitation to the Republic to join in international commitment initiatives devoted to the fight against climate change but nevertheless this inference is not completely adherent to the intentions as retrieved from the letter of the pronouncement. The Court indeed recognizes the relevance of the present scientific state of art as a necessary backdrop material for the legislator to structure its policies in legislation[60]. This statement may dispel doubts on whether the Court has violated the discretionary of the legislator or it simply deducted the unreasonableness of the implantation of the law in indicating the necessity of aligning both with international standards and with the pertinent scientifical state of art in matter of climate change. Relevant consideration for the Italian Constitutional jurisprudence possible developments could be extrapolated from the German Constitutional Tribunal's considerations on the discretionary of the legislator in setting up measures in the KSG framework. On one hand the Court recognized that the permission of usage of 45% emission was not unconstitutional because it respected therefore the necessity, constitutionally conceived in article 20a of protecting the natural environments, leading the interpreter to assume that the decisional processes were found on the acknowledgement of the necessity of preserving the discretionary of the legislature, on the other hand, the statement of the unconstitutionality of the provisions lacking objectives for the period subsequent to 2030 might lead to assert that firstly, from the fact that the obligation of conceiving further objective lays down in international sources, that the "intergenerational" climate litigation encounters a transnational dimension[61]and secondly that the principle of discretionary of the legislature could be therefore limited in consideration of international commitments[62], recognizing in every case that the involvement in international forums and joint initiative constitutes a fundamental contribution to climate protection for a country, from the fact, acknowledge as well by the Court's reasoning[63], that the hazard coming from a single country is a contribution to a transnational problem which requires such form of intervention. It can be therefore affirmed that the legislator was tackled based on the lack of measures for the period starting in 2031 and finishing in 2050, the final date aiming for climate neutrality.

In light of the fact as expressed by the German sentence[64], while the Italian Constitutional Jurisprudence in terms of future generations interest, in the period preceding the enactment of Constitutional Law n. 1/2022, was essentially based in the balancing judgment between the content of article 81 of the Constitution in theme of national expense and balance and article 97, first comma

in matter of good functioning of the Public Administration with the necessity of safeguarding the juridical and economic certainty for the conditions to leave to future generations[65] raising from the textual formulation of the disposition. This establishes that the Administration should ensure, inter alia, the sustainability of the public debt. It is noteworthy that there could be possible outcomes concerning intergenerational principle of article 9 can implying judicial activism operations by the Constitutional courts on the input provided from the parties, especially in the possibility of verifying an activity, as laboriously accomplished by German Constitutional Tribunal, of pinpointing the fundamental rights one by one in balancing with the intergenerational solidarity principle. While the acknowledgement of intergenerational solidarity per relationem to another aspect of Italian constitutional order, namely the correct functioning of Public Administration. The sentence of the German Constitutional Tribunal can constitute the basis for the evolution of the Italian Constitutional Jurisprudence in matter of environmental protection. Evaluations could encounter a large amount of constitutional parameters, from the principle of solidarity in article 2 Cost. to the equality principle of article 3 Cost. to the necessity of considering the private interest as well, in the novella of article 41 considering the ecological aim in the exercise of private freedom with specific reference to corporations, in the abovementioned[66] formulation. Based on the German Constitutional court's judgment, anyway, it could be noted that this pronouncement is symptomatic of the role of judicial institutions in shaping the administrative bodies' action in climate protection[67]. The relevance of this claim varies in relation of the coverage of each jurisdiction's sentences effect to be referred to multi-level governance rather than just in the internal interference with administrative functions. The indications of the BVerfG pinpoint clear policy goals, which involve clearly both the legislator and the executive branch. This evokes, in more general terms, an alteration of the principle of the separation of powers, as authoritatively noted by Justice Antonin Scalia, in its work "The Doctrine of Standing as an essential element of the separation of powers"[68]. Apart from necessary specific and circumstantiated action to be adopted in the exercise of administrative function, climate litigation towards Constitutional court could be capable of shaping the basis of the entire legal system in which the sentence is enforced. This assumption relies on the fact of the impossibility of define the borders of the intergenerational solidarity principle as a legal policy tool. Despite far-sighted policies might contribute to the implementation of the acknowledgment of environmental protection, their value for Constitutional Adjudication remains merely moral, which could not entail in its entirety, in civil law systems and namely in the Italian one, the reasonableness threshold to be overcome for the declaratory of unconstitutionality. A different approach in intergenerational solidarity constitutional adjudication could be developed in a fruitful dialogue between the Court and the legislator, which let the Court assume the function of a pedagogue in consideration of the expertise which the internal structure of Constitutional and Supreme Court is endowed with.

[1] Juridical Commission of Pax Romana IMCS (International Movement of Catholic Students). A. Anna, A. Boadu Ayeboafoh, S. Dube, I. Fernando, T. M. Ghale, K. Idrogo, E. Okai, J. Okayo, X. P. Puelles Pantoja, F. Fonte.

[2] The notion of Constitutional Law represents the Constitutional revision law, the tool provided by the Italian Constitution to amend the Fundamental Chart. The procedure is laid down at article 138 which establishes that "Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. A referendum shall not be held if the law has been approved in the second voting by each of the Houses with most two-thirds of the members".

[3] The Constitutional law no. 1/2022 is the result of the approval, pursuant to article 138 of the Constitution, of the draft proposal "disegno di legge costituzionale n. 83 e abbinati-A". The draft proposal has been issued as the synthesis and the merging of eight different draft proposals presenting different sensibilities towards the acknowledgement of the environment in the Constitution.

[4] Constitutional law no. 1/2022 was published in the "Gazzetta Ufficiale" on February the 22nd 2022, no. 44. The document is accessible through the following link: http://www.gazzettaufficiale.it/eli/id/2022/02/22/22G00019/sg. A Doctrinal perspective is provided by Amirante, Domenico (2022), "La reformette dell'ambiente in Italia e le ambizioni del costituzionalismo ambientale", in Diritto Pubblico Comparato ed Europeo", vol. 2, IV. The author reminds that with reference to the acknowledgment of environmental protection in the constitutions three models may be derived. Firstly, "ab origine environmental constitutions", provided with environmental protection clauses at the time of their drafting; "revised environmental constitutions" which inserted environmental protection clauses medio tempore, in which we can pertinently insert the Italian Constitution after the approval of Constitutional law n. 1/2022 and "silent constitution in matter of environment" which don't present any referral to environment in the own provisions. This distinction constitutes a valid heuristic tool towards the comparative analysis. Stabilization of political matter may be understood in the broader processes of stabilization of the internal democratic structures, as outlined by an authoritative scholar, Biscaretti di Ruffia, Paolo (ed. 2004), "Le costituzioni di dieci stati di democrazia stabilizzata", Giuffrè.

[5] Frosini, Tommaso Edoardo (2022), "La XIX legislatura", in Federalismi.it, vol. 29, p. V.

[6] After the pertinent times requested by the Constitution. See with this purpose articles 73-74 Cost.

[7] Artt. 1-12 Cost.

[8] See, with the purpose of a general overview on article 9 of the Constitution in the precedent formulation, inter alia, Cecchetti, Marcello (2007), "art. 9", in Bifulco, Raffaele Celotto, Alfonso and Marco Olivetti (ed.), "La Costituzione Italiana, Commento agli art. 1-54", vol. 1, UTET Giuridica, for more detailed work see "letteratura" voice under the cited contribution; Crisafulli, Vezio and Livio Paladin, rev. Bartole, Sergio and Roberto Bin, "art. 9" (2008), in "Commentario Breve alla

Costituzione Italiana", CEDAM; Perlingieri, Pietro (2007), "art. 9" Commento alla Costituzione Italiana, Edizioni Scientifiche Italiane.

[9] The translation is the one of the work by Fuschi, Damiano (2022), "Environmental protection in the Italian Constitution: lights and shadows of the new Constitutional Reform", in I-Connect Blog, available at the following link: http://www.iconnectblog.com/2022/02/environmental-protection-in-the-italian-constitution-lights-and-shadows-of-the-new-constitutional-reform%EF%BF%BC/. The cited contribution general overview of the main possible outcomes of the Constitutional Reform.

[10] Translation of Fuschi, Damiano ibidem.

[11] Concerning comments about the precedent version of article 41 see, inter alia, Bifulco, Raffaele Celotto, Alfonso, and Marco Olivetti (ed.), "art. 41", La Costituzione Italiana, Commento agli art. 1-54", vol. 1, UTET Giuridica; Crisafulli, Vezio and Livio Paladin, rev. Bartole, Sergio, and Roberto Bin (2008), in "Commentario Breve alla Costituzione Italiana", CEDAM; Perlingieri, Pietro (2007), "art. 41" Commento alla Costituzione Italiana, Edizioni Scientifiche Italiane.

[12] As pointed out by Amirante, Domenica cit., IV. The author underlines as well the incremental tendence in the canonization of the protection of the environment in the Constitution. Starting from the 1980s, when a rather little number of nearly 40 Constitutions enshrined the environmental principle, considerable results were made. In fact, today 153 Constitutions on 193 of the Member States of the Un recognize the environment as a Constitutional parameter in their provisions.

[13] With this point Luporini, Riccardo, Fermeglia, Matteo and Maria Antonia Tigre (2022), "Guest commentary: new Italian Constitutional reform: what it means for environmental protection, future generation and climate litigation", in Climate Law Blog.

[14] Article 117, first comma of the Constitution presents the following formulation "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations". The translation is the one of constituteprojects.com website available at the following link: https://www.constituteproject.org/constitution/Italy_2020?lang=en.

[15] On this point see the evaluations of Rivera, Ilaria (2022), "Le tonalità dell'ambiente e le generazioni future nel cammino di riforma della Costituzione", in BioLaw Journal, 225-243.The general objectives of Paris Agreement as synthetically laid down in article 2, no. 1 of the document. The obljectives are a) Holding the increase of global average temperature to well below 2 Celsius degrees above pre-industrial levels and pursuing efforts to limit the temperature increase 1.5 Celsius degrees above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; b) increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development in a manner that doesn't threat food production and; c) making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient developments. For more specific dispositions of the Paris Agreement see the entire document available through this link: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[16] With the purpose of a synthetic comment towards the cited article of the European Treaties, here are listed, inter alia, some of the main commentaries towards the Foundational Documents of the

European Union Kellerbauer, Manuel, Klamert, Marcus and Jonathan Tomkin (2019), "The Eu Treaties and the Charter of Fundamental Rights: a commentary, sub", Oxford University Press; AA.VV. (2010), "Commentaire article par article de traités UE et CE", Dalloz; Tizzano, Antonio ed. (2014), "Trattati dell'Unione Europea", Le Fonti del diritto italiano, Giuffrè, Milano; Curti Giadlino, Carlo ed. (2010), "Codice dell'Unione Europea operartivo", Napoli; Priollaud, François-Xavier and David Siritsky ed. (2008), sub. artt. 42-46 TUE, in"Le traité de Lisbonne"; Von Der Groben, Hans, Schwarze, Jürgen and Armin Hatje (2015), "Europaisches Unionsrecht", Nomos, Baden Baden; Blanke, Hermann-Joseph and Stelio Mangiameli (2013), "The treaty on European Union", Heidelberg; Pocar, Fausto and Maria Caterina Baruffi ed. (2014), "Commentario breve ai Trattati dell'Unione Europea, CEDAM.

[17] For a general overview of ECHR jurisprudence towards the environmental issues see the general overview provided by the cited institution through this link: https://www.echr.coe.int/documents/fs_environment_eng.pdf.

[18] See, inter alia, Cecchetti, Marcello (2022), "Virtù e limiti della modifica degli articoli 9 e 41 della Costituzione", in Corti Supreme e Salute, vol. 1, 129.

[19] The nature of jurisprudential law is hereby intended from the side of its case-guided nature.

[20] M. Cecchetti, cit., 2022.

[21]Studies about the Constitutional jurisprudence in theme of environment were drawn up by the studying service of Constitutional Court in the past years. We make reference, along with a vast literature on the topic to Nevola, Riccardo ed. (2015), "La tutela dell'ambiente, dell'ecosistema e dei beni culturali nei giudizi di legittimità costituzionale", in Corte Costituzionale-Servizio studi,, Concenring the outcomes of the change in the allocation of legislative competences due to the entry into force of Constitutional Law n. 3/2001 in matter of reform of the autonomies (Enti Territoriali), namely of the different distribution in the revised article 117 Cost. See Bellocci, Mario and Paolo Passaglia (2015), "La giurisprudenza cosstituzionale relative al riparto di competenze tra Stato e Regioni in materia di "ambiente" e "beni culturali". See also, inter alia, Maddalena, Paolo (2012), "La nuova giurisprudenza Costituzionale in materia di ambiente", in Ambiente e Sviluppo, vol. 1, 5-13.

[22] Onida, Valerio "Ambiente in Costituzione" (2022), in Corti Supreme e Salute, vol. 1.

[23] Article 32 of the Constitution dispones "The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarentees free medical care to the indigent. No one may be obliged to undergo any health treatment except under the provisions of the law (ordinary law). The law may not under any circumstances violate the limits imposed by respect for the human person". This Article was one of the bases to interpret the right to a safe environment in the Constitutional Court case law before the Title V of the Constitution reform in 2001, which added the parameter of article 117, second comma, letter s), whose aspects will be analyzed infra.

[24] See Corte cost. n. 141/1972, point n. 3 lett A of *"ritenuto in fatto"*. Underlines as well this change De Benedetti, Cristina (2022), *"L'ambiente nella giurisprudenza della Corte costituzionale, dalla leale collaborazione alla sussidiarietà", in Diritto Ambiente, 2. A more recent pronouncement by the Constitutional Court acknowledges that in guise of the separation o between territory planning and landscape planning the unitary nature of the landscape planning influences the*

hierarchical method in territory planning. We specifically refer to sentence Corte cost. n. 182/2006.
[25] We refer to the sentence of the Constitutional court. n. 65/1959. The text of the sentence is available through this link: https://www.giurcost.org/decisioni/1959/0065s-59.html.
[26] Point n. 3 of the "considerato in diritto". A pertinent reference shall be directed towards an obiter dictum of the sentence in comment according to which the national legislation shall limit the hunting discretionary in the territories of the Regions because of the need of protection for the local fauna. We refer namely to point n. 7, let. B) of the "ritenuto in fatto". Here could be seen already the balancing reasoning between the right of the "land-user" and the need of a substantial integrity of the territory, not yet perceived in its notion of habitat; in fact, the legal reasoning was conducted by balancing. This last perspective is thoroughly analysed by Montaldo, Riccardo (2021)," Il valore costituzionale dell'ambiente, tra doveri di solidarietà e prospettive di riforma", in Forum Costituzionale, vol. 2, 442-459, specifically pages n. 442-443.
[27] In the decision-making process of sentence n. 167/1987 the Constitutional Court noted that the need of protection of the environment could prevale over the right to the national defense, which is enshrined in Constitutional principles as well as sacred duty of the citizen as laid down in article 52, first comma of the Constitution. We refer to point n. 4 of the "ritenuto in fatto".
[28] With sentence n. 210/1987 the link between the administrative action and the need of a protection of environment was noted as well. See the decision-making path through this link: https://www.giurcost.org/decisioni/1987/0210s-87.html?titolo=Sentenza%20n.210.
[29] See Montaldo, Riccardo (2022), "La tutela Costituzionale dell'ambiente nella modifica degli artt. 9 e 41 Cost.: una riforma opportuna e necessaria?", in Federalismi.it, vol. 13, 187-212; see in particular pages 188-189.
[30] The protection of the environment is expressly mentioned at article 117, second comma, lett. s
[31] The common usage term to indicate the Constitutional Court of Italy, as the palace in which its works take place is called "Palazzo della Consulta" (Consulta's Palace).
[32] On the intergenerational justice see
[33] This perspective could be also conceived in the vein of the solid multidisciplinary debate in defining the intergenerational justice, which had witnessed an international spread the academic and public debate. Within the italian academic literature see, inter alia, Porena, Daniele (2022), "Anche nell'interesse delle generazioni future, il problema dei rapporti intergenerazionali all'indomani della revisione dell'art. 9 della Costituzione", in Federalismi.it, vol. 15 121-143. The author argues the topic of the compliance of the internal legal order with international obligations. See pages 122-125 on this point.
[34] Franciscus P.P. (2015), Lett. Enc. Laudato Si', n. 22, 53, 67, 95, 109, 159, 160, 161, 162, 169, 190, 195. See chapter n. V entitled "Justice between the Generations". It is hereby highlighted the necessary link between sustainable development and the solidarity between generations (159); the need of revising the attitude of the everyday attitude towards environmental problems as a citizen (161); and the need of rethinking the ethical foundations and permeability of the environmental protection (162).
[35] Here is a list of Constitution, inter alia, expressly enshrining the intergenerational principle in the Constitutional provisions. Within the European Comparative context in the parties of the Council

of Europe and European Union the principle of intergenerational justice within Constitutional provisions concerning the protection of the environment shall be firstly address through analysing article 20a of the German Grundgesetz, in matter of "Protection of the natural foundations of life and animals". The cited article establishes that "Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by excecutive and judicial action, all within the framework of the constitutional order". Based on the textual formulation of article 20a a milestone sentence was pronounced by the Bundesverfassungsgericht, the German Constitutional Court, which will be infra object of our research interest. We make therefore reference to "Order of 24 March 2021-1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20". The need of consideration of future generations is contained in the French Constitution in the last sentence of the preamble of the "Charter for the Environment" which states that "in order to ensure sustainable development, choices designed to meet the needs of future generations should not jeopardise the ability of future generations and other people to meet their own needs". Portugal Constitution in article 66 in matter of "Environment and quality of life, second comma, let. d) states that in the promotion of a rational use of natural resources should be respected the principle of inter-generational solidarity. The Andorra's Constitution in the preamble contemplates the need of guaranteeing and environment fit for the life for the coming generations. The Luxemburg's Constitution at article 11bis in matter of Protection of the environment provides that "State guarantees the protection of the human and cultural environment and works for the establishment of a durable equilibrium between the conservation of nature, in particular its capacity for renewal, and the satisfaction of needs of present and future generations". More generally the Belgian constitutions, at article 7bis states that "In the exercise of their respective competences, the Federal State, the Communities and the Regions pursue the objective of sustainable development in its social, economic and environmental aspects, taking into account the solidarity between the generations". The interest of future generation, in Swiss Constitution is contemplated in a more general way, in the preamble, conceiving a general responsibility of the community towards future generations. The same acknowledgment is contained in the first and in the third sentence of the Preamble of the Constitution of Iceland. The protection of environment is disciplined in article 112 of the Constitution of Norway insofar as "every person has a right to environment that is conductive to health and to natural surrounding whose productivity and diversity are preserved. Natural resources should be made use since comprehensive long-term considerations whereby the rights would be safeguarded for future generations as well". The Swedish Constitution states, at article 2, second comma that "The public institutions shall promote sustainable development leading to a good environment for present and future generations". In Poland's Constitution the intergenerational justice principle is enshrined in two provisions. The first shall be found in the preamble of the Constitution, listing the consideration of future generation within the main principles to interpret the fundamental chart and in article 74, first comma, according to which, "Public authorities shall pursue policies ensuring the ecological security of current and future generations". The Constitution of Austria insert the intergenerational justice principle in the general provision of article 6 concerning the solidarity principle, especially in the vein of a pedagogical conception.

[36] We refer to the principle n. 3 in order to which "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. The text of the declaration is available athttps://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

[37] It is therefore established that "It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child".

[38] The sustainability principle evoked by the Brundtland commission, rather unanimously accepted as a common normative definition

[39] See Bartolucci, Luca (2022), "Le generazioni future: (con la tutela dell'ambiente) entrano "espressamente" in Costituzione, in Forum di Quaderni Costituzionali, vol.2, 21-39. The author underlines the Ban Ki-Moon declaration in 2013 concerning the institution of national commissions concerning the intergenerational principle. See pertinently the considerations laid down under note n. 55.

[40] Rescigno, Francesca (2021), "Quale riforma per l'art. 9", in Federalismi.it, Sez. Dottrina, 2-5.

[41] The solidarity principle is derivable from article 2 of the Constitution. The need of considering the needs of future generations could be based on this general provision. See for a positive attitude towards the intergenerational principle, Porena, Daniele (2017), "Il principio della sostenibilità: contributo allo studio di un programma costituzionale di solidarietà intergenerazionale, Giappichelli, Torino,

[42] Amendola, Gianfranco (2022), "L'ambiente in Costituzione, primi appunti", in Osservatorio sulla Criminalità sull'agricoltura e sul sistema agroalimentare.

[43] Cecchetti, Marcello (2022), cit., p. 145.

[44] See, inter alia, Luciani, Massimo (2008), "Generazioni future, distribuzione temporale della spesa pubblica e vincoli costituzionali", in Bifulco, Raffaele and Antonio D'Aloia, "Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale, Napoli. cited by Bartolucci, Luca (2021), "Il più recente cammino delle generazioni future nel diritto costituzionale", in Osservatorio Costituzionale, vol. 4, 212-230.

[45] Inter alia, Checcetti, Marcello "Virtù e limiti" cit., 2022.

[46] We will provide wider analysis on that discussing about the sentence of the Bundesverfassungsgericht, infra.

[47] Imarisio, Luca (2022), "La riforma Costituzionale degli articoli 9 e 41 della Costituzione: un (prudente) ampliamento di prospettiva del diritto costituzionale dell'ambiente", in Il Piemonte delle Autonomie, vol. 2.

[48] This implies considerations of future generation in public policy. However, in politics there is a considerable lack of tension towards these issues, resulting in a dialogue between the Court and the Legislator that could overcome the essential balance of the separation of powers. See the observations of Mensink, Eline (2022), "Intergenerational Justice: From Courtroom to Politics?", in Völkerrechtsblog.

[49] We note that in the Italian legal system an example with consideration of inheritance law it is admitted the possibility, for a person who is not already born to inherit from an ascendant since a testamentary disposition which expressly mentions them. Despite the circumstance that the rights of the "uncertain person" mature with the "birth event", it could be noted that here there is the possibility of pinpointing the rights of a person who has never come to existence, pertaining this subject certainly to the ensemble of people making up the future generations. This issue was object of a well-known sentence of the Italian Supreme Court in which few clarifications on the principle were provided, conducing the reasoning because of the textual formulation of article 462, first and third comma of the Civil Procedure Code. For the text of the sentence see "Cass. Civ., sez. II, sentence of March 22nd, 2012, n. 4621".
[50] Ibidem, p. 146.
[51] See note n. 3.
[52] Order of 24 March 2021-1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, p. 16/78. The Court further lays down the general policy objectives of the Climate Act, pointing out that ordinary law amendments are needed to fully realize the content of the KSG as well as the general one of the Paris Agreement.
[53] Order of 24 March 2021-1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, p. 15/78.
[54] Considerations could be done concerning the superimposition between the Constitutional Court and the Legislature in dealing with such subject. Reflections on these topics were done by most of the Constitutional academic literature. We make reference to Fonte, Francesco (2022), "Tra giudicato costituzionale e sentenze interpretative di rigetto. Verso la configurazione di una nomofilachia Costituzionale?", in Ius in Itinere.
[55] The Direct access to the Constitutional Adjudication procedure is enucleate at article 93 of the Grundgesetz, nr. 4, section 4a). The procedure is called "Constitutional Complaint" (in German Verfassungsbeschwerde). Within the ruling competences of the Bundesverfassungsgericht, the Court has the competence to rule on Constitutional Complaints, which may be files by any person alleging that one of his basic rights or one of his rights under paragraph 4 of Aarticle 20 or under Article Bundesverfassungsgericht 33, 38, 101, 103, 104 has been infringed by public authority". For a brief overview on the academic literature on Verfassungsbeschwerde see, inter alia, Gusy, Christoph (2006), "Die Verfassungsbeschwerde." Das Bundesverfassungsgericht im politischen System", in Verlag für Sozialwissenschaften, 201-213; Zweigert, Kurt (1952), "Die Verfassungsbeschwerde.", in Juristenzeitung, vol. 7, 321-328; Wahl, Rainer and Joachim Wieland (1996), "Verfassungsrechtsprechung als knappes Gut: Der Zugang zum Bundesverfassungsgericht.", in Juristenzeitun, 1137-1145. The possibility of presenting a Constitutional Complaint overcomes the borders of the German territories, by the fact that even a person living outside the area can effectively prove that the exercise of public powers has infringed their rights as well. Requisites of the presentation of a Constitutional complaint are constituted in the necessity of alleging which rights has been infringed by the exercise of public powers, considering three criteria: personally, directly, and presently.

[56] Order of 24 March 2021-1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, p. 12/78.
[57] Bodle, Ralph and Stephan Sina, "The German Federal Constitutional Court decision on the Climate Change act, in Eco-logic, policy brief, 10 May 2021, p. 2. Since the determination of the aimed levels of reduction of gas emission are submitted to the discretionary power of the competent constitutional or foundational institutions of the contracting parties, the Court then list the principal normative decisions of the European Union, pinpointing different objectives based on the sector on which gas emission reduction measures shall be applied
[58] This could be achieved, according to the Tribunal, by conceiving an obligation of the German State to participate in international networks to strengthen the mere legislative obligation with informal and local enactment of normative frameworks addressing climate issues by taking indirect measures directed to reducing the risk of climate change-related harms such as floods and other natural disasters. The principle is acknowledged by the BundesVerfassungsgericht in Order of 24 March 2021-1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, point 144.
[59] Winter, Gerd, (2022), "The intergenerational effects of fundamental rights: a contribution of the German Federal Constitutional Court to Climate Protection", in Journal of Environmental Law, vol. 34, p. 212.
[60] This may be affirmed starting from the fact that the Court begins is decision making processes by effectively outlining the present's scientific state of art in terms of effect of the GHG in contributing to the uplift of the global average temperature. See, with this purpose, Order of 24 March 2021-1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, points 16-38.
[61] Winter, Gerd cit., p. 221. Considerations could be made with reference to the fact that, as expressed in Schramm, Freya (2022), "Judges as narrators of the climate crisis? An illustrative analysis of the decision of the German Constitutional Court from March 24, 2021", in European Papers, vol. 1, n.1, 361-363, the judiciary is seen as a crucial actor in the definition of climate protection policies, both in official documents (see note n.2) and the political context, which is affected nowadays by several deficiencis in terms of structuring effective climate protection policies.
[62] Order of 24 March 2021-1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, points 148-150.
[63] ibidem
[64] Its relevance is therefore scholarly recognized Ekardt, Felix, and Katharine Heyl, (2022), "The German constitutional verdict is a landmark in climate litigation." Nature Climate Change, vol.12.8, 697-699.
[65] See, inter alia, Palombino, Giacomo (2020), "La tutela delle generazioni future nel dialogo tra legislatore e Corte costituzionale, in Federalismi.it, vol. 24/2020, pp. 263-267.
[66] See chapter 1.
[67] Peel, Jaqueline and Jolen Linn, (2019), "Transnational climate litigation: the contribution of the global south", in "The American Journal of International Law", vol. 113:4.
[69] Scalia, Antonin (1983), "The Doctrine of Standing as an essential element of the separation of powers", in Suffolk Law Review", 881.

6

LA ADICIÓN DEL APELLIDO DEL MARIDO COMO COSIFICACIÓN A LA MUJER EN EL ORDENAMIENTO CIVIL PERUANO

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RESUMEN

A lo largo de la historia, los matrimonios han constituido prácticas que se han realizado mancillando los derechos y libertades de las mujeres. El no tener elección, el sometimiento, y la pérdida de identidad y libertad son algunos problemas a los que las mujeres se han enfrentado al contraer nupcias. En las últimas décadas hemos tenido gran avance en cuanto a la eliminación de discriminación de la mujer; sin embargo, existen lugares en los que estas prácticas están vigentes. Perú, es uno de los 189 países que ha ratificado la "Convención sobre la Eliminación de todas las Formas de Discriminación contra la Mujer", del 18 de diciembre de 1979 (Nueva York); sin embargo, seguimos arrastrando prácticas y costumbres machistas que se han normalizado, y hasta positivizado en nuestro ordenamiento jurídico.

En este sentido, en el presente trabajo haremos un estudio profundo con mirada nacional e internacional de la dignidad de la persona, el derecho al nombre y a la identidad; lo que ayudará a concluir si tales permisibilidades jurídicas denigran la dignidad humana o no.

Palabras clave: Matrimonio, dignidad, nombre, identidad, cosificación

***SUMARIO**:*

I. INTRODUCCIÓN

El presente artículo se enmarca en la actualidad, un periodo en el que recientemente se ha tomado consciencia de la permanente sumisión y exclusión en la que han vivido y siguen viviendo muchas mujeres en diferentes partes del mundo. En este sentido, resulta importante revisar el ordenamiento civil peruano, ya que Perú, es uno de los tantos países que se ha sumado y comprometido con frenar la discriminación hacia la mujer; sin embargo, hoy se la sigue cosificando a través de costumbres machistas que se han normalizado, y que incluso han llegado a estar positivizadas en el ordenamiento jurídico.

El artículo 24 del Código Civil establece que "La mujer tiene derecho a llevar el apellido del marido agregado al suyo y a conservarlo mientras no contraiga nuevo matrimonio. Cesa tal derecho en caso de divorcio o nulidad de matrimonio. Tratándose de separación de cuerpos, la mujer conserva su derecho a llevar el apellido del marido […]". En esa misma línea, la Directiva DI-228-GRC/009 "Nombre de la Mujer Luego del Cambio del Estado Civil", emitida por el Registro Nacional de Identificación y Estado Civil – RENIEC, establece que, en caso de variación del nombre de la mujer, la adición del apellido del marido se hace con la preposición "de". La RAE define "de", como una preposición que denota posesión o pertenencia (entre otros significados que no competen al tema).

El Código Civil peruano establece en su artículo 234 que "el matrimonio es la unión voluntariamente concertada por un varón y una mujer legalmente aptos para ella y formalizada […] El marido y la mujer tienen en el hogar autoridad, consideraciones, derechos, y deberes y responsabilidades iguales". Dicha normativa precisa la igualdad que tienen ambos cónyuges al contraer matrimonio; sin embargo, el "derecho" de llevar el apellido del marido es solo para la mujer, no precisando ningún otro supuesto en que sea de manera contraria y en el que el marido tenga la facultad de llevar el apellido de su esposa.

En este panorama, en el presente trabajo revisaremos lo que es la dignidad humana, y del mismo modo, realizaremos un análisis sobre los derechos fundamentales en cuestión, el derecho a la igualdad, el derecho a la identidad, y el derecho al nombre.

Asimismo, conceptualizaremos y analizaremos de manera ejemplificada lo que significa la "cosificación de una mujer", para posteriormente entender si el llevar el apellido del marido antecedido de la preposición "de", es una de sus tantas manifestaciones.

Del mismo modo, daremos una mirada histórica y actual a la institución del matrimonio, para entender su esencia y sobre todo la posición que éste ha otorgado a la mujer a lo largo de nuestra historia y desde diferentes culturas. Esto nos ayudará a interpretar de manera acertada el objetivo y necesidad de facultar a una mujer el llevar el apellido del marido.

Finalmente, con lo desarrollado podremos concluir y confirmar si es que el artículo 24 del Código Civil es una norma jurídica que faculta y permite la cosificación de una mujer y por tanto saber si está afectando directamente a su dignidad como persona y a los Derechos Humanos.

II. DESARROLLO

2.1. DERECHOS FUNDAMENTALES EN CUESTIÓN

2.1.1. Dignidad Humana

La dignidad humana constituye el fundamento y razón de los ordenamientos jurídicos y derechos humanos; así, la Carta de las Naciones Unidas de 1945, reafirma que los derechos fundamentales se dan teniendo de base y fundamento la dignidad y el valor de la persona humana.

El Preámbulo de la Declaración de los Derechos Humanos (DUDH) (1948), expone que los pueblos de las Naciones Unidas han reafirmado en la Carta su creencia en los derechos fundamentales del ser humano, en la dignidad de la persona y en su igualdad entre hombres y mujeres, comprometiéndose a promover el progreso social y a aumentar la calidad de vida de todos los individuos.

Velásquez Ramírez (2021), señala que la dignidad humana es la esencia que identifica a cualquier ser humano y que lo diferencia de otros seres vivos. Asimismo, afirma que la dignidad es el merecimiento de respeto que posee todo ser humano por el solo hecho de serlo. Por ello, refiere que la persona humana es un fin en sí mismo, y cita textualmente a Kant (2002) quien insta a actuar considerando siempre a la persona humana como un fin y no como simplemente un medio. En este sentido, establece que el valor de la persona está en su dignidad, y ésta no puede ser objeto de intercambio. La dignidad está estrechamente relacionada con los derechos humanos y la democracia; ello en razón de que los primeros son la expresión jurídica de la dignidad humana, pues tienen como función garantizar su respeto.

En razón de lo dicho, Velásquez Ramírez (2021), finaliza señalando que la dignidad humana es el presupuesto más importante sobre el que se estructuran las sociedades y los Estados de democracia constitucional; constituye el principio rector y fundante de todo orden constitucional democrático, así como la génesis de los derechos fundamentales.

Es importante finalizar entendiendo lo dicho por Bieri (2017), que manifiesta que la dignidad también depende de la manera en cómo es el trato con los otros, pues está estrechamente ligada a la experiencia de la igualdad de los derechos, que se reconozcan los mismos derechos a todos los seres humanos, independientemente del sexo, etnia u condición económica; y que no haya distinción en el trato.

2.1.2. El Derecho a la identidad

Fernández Sessarego (1992), establece que la vida, la libertad y la identidad conforman una trilogía de intereses que son calificados como esenciales en la vida del ser humano, y en consecuencia merecen una privilegiada y eficaz tutela legal. A pesar de ello, el autor refiere que el interés que se ha dado al derecho a la identidad, recién empieza en las últimas décadas del siglo XX; y hace especial referencia a la jurisprudencia italiana del 6 de mayo de 1974, emitida por el Pretor de Roma[1] a

partir de la cual se puso en la mesa y en discusión a la identidad como un derecho que merece tener reconocimiento y tutela jurídica independientemente de otros derechos fundamentales como el nombre, la imagen; etc. Antes de la emisión de esta sentencia, cuando se hablaba del derecho a la identidad solo se la concebía en su dimensión estática, es decir se la reducía al derecho del ser humano a ser identificado frente a la Administración Pública por medio de sus datos personales que previamente han sido registrados, como son el nombre, su fecha y lugar de nacimiento, su estado civil, si domicilio, etc.

La DUDH del 10 de diciembre de 1948 establece en su artículo 6 de manera general que toda persona humana tiene derecho al reconocimiento de su personalidad jurídica. Más adelante, el Pacto Internacional de los Derechos Civiles y Políticos (PIDCP) refiere lo mismo en su artículo 16, sin hacer mayores pronunciamientos al respecto. Es la Convención Americana de Derechos Humanos (CADH) la que hace mayor énfasis en el tema, ya que establece en su artículo 3 que todo ser humano tiene derecho al reconocimiento de su personalidad jurídica, y además en su artículo 18 establece que todo ser humano tiene derecho a un nombre propio y a los apellidos de sus padres o al de uno de ellos.

Siguiendo a Jiménez Vivas (2021), la identidad es la condición única e irrepetible del ser humano. Está conformada por su forma física, sus creencias ideológicas y culturales, por su personalidad, rasgos psicológicos, etc. Asimismo, establece que la identidad personal está constituida por elementos estáticos que son los que no cambian en el tiempo y también por elementos dinámicos, que son los que sí cambian conforme al desarrollo de la persona. La identidad estática es conocida comúnmente como "identificación", y ello incluye el código genético, nombre, fecha de nacimiento, padres, etc. La identidad dinámica está integrada por elementos que varían, como son las creencias religiosas, ideológicas, perfil psicológico, etc. En ese sentido, el autor establece que la identidad es el conjunto de elementos estáticos y dinámicos que caracterizan e individualizan a un ser humano en sociedad; es el grupo de rasgos que hace que cada persona sea uno mismo.

Conforme el artículo de Yago Alonso y Paterna Bleda (2021), la construcción de la identidad personal es un proceso individual y colectivo. Además de las características que describen a las mujeres como únicas y diferentes, el proceso de identificación social es importante para entender el desarrollo del autoconcepto de género. La revisión de esta identificación tomando en cuenta las consideraciones sociales otorgan la base para el análisis sobre las múltiples concepciones que confluyen en la categoría social "mujer". En este sentido, el desarrollo de la identidad social de género está influenciado por las identidades sociales de las mujeres y por las actitudes que se tienen referente a esos parámetros. Haciendo hincapié en la importancia de revisar las actitudes vemos que se han hecho en función de los roles, derechos y responsabilidades que se asignan de manera diferente a los varones y a las mujeres, dando lugar a actitudes misóginas y profeministas.

2.1.3. El Derecho al Nombre

La historia del nombre se torna divergente, puesto que depende de la cultura en la que se desarrolle.

A pesar de que este elemento es manifestación principal del derecho a la identidad, es un tema que se ha tocado poco en las normas internacionales. Por ello, para tener un panorama completo sobre este atributo de la identidad, es importante dar una mirada a través de su historia.

A. Evolución historia del nombre

Siguiendo a Engels (1972) quien es citado por Jiménez Vivas (2021), para estudiar la evolución del nombre es importante empezar hablando de la institución de la "gens" como base de la familia primitiva. La "gens" fue el grupo humano integrado por las personas que se identificaban como parte de una descendencia común (reconocían a una antecesora, siendo incierta la paternidad, solo contaba la filiación materna), unido por instituciones religiosas y sociales, conformando una comunidad. Las gens contaban con nombres específicos, o un conjunto de nombres que solo los pertenecientes a éstas podían llevarlo.

En Grecia, la noción de "gens" cambia con el nacimiento de la riqueza privada, la democracia primitiva, la esclavitud y la formación del Estado, el derecho materno pasa a ser sustituido por el paterno; y se considera al nombre como prueba de la procedencia común.

Jiménez Vivas (2021), citando a Franciosi (1994), establece que más adelante, en Roma la gens romana tenía consciencia de una ascendencia común y del nombre compartido. En el interior de la gens romana se perfilaron grupos bajo la potestad del varón dado su carácter patriarcal; es decir, de las gens surgieron las familias romanas, encabezadas por un hombre al que denominaban pater; para ese entonces ya se hacía una distinción entre las gens y la familia, siendo que mientras las familias tenían un fundador específico, vivo o difunto, los integrantes de las gens recordaban un fundador mítico, irreal. En este contexto, el nombre del ciudadano romano estaba compuesto de tres elementos: el nombre propio (praenomen), el nombre de la gens (nomen gentilitium), y el apellido (cognomen) que distinguía al grupo familiar.

Durante la Edad Media, conforme lo expone Jiménez Vivas (2021), citando a Guevara Pezo (2004), mientras duraron las invasiones bárbaras solo se hizo uso de los prenombres (Atila, Alarico, etc.), pero posteriormente surgió la necesidad de una mejor individualización y comenzaron a añadirse vocablos a manera de adjetivos, por ejemplo "Guillermo el Conquistador"; el Imperio Romano del Oriente (imperio bizantino), conservó la antigua técnica nominal romana, usando parcialmente la técnica antes descrita.

Siguiendo la investigación de Ortiz Palenques (2009), es importante revisar el panorama español durante esta época, en que las Partidas de Alonso X "El Sabio" tenían vigencia, y que con el paso del tiempo significaron las fuentes de derecho supletorio, tanto para el reino de Castilla como para los reinos de las Indias, más aún cuando su vigencia cubre el proceso de formación de los actuales países hispanoamericanos. Es por ello, que muchos antecedentes jurídicos de los países latinoamericanos no pueden analizarse sin hacer referencia al estudio de instituciones jurídicas españolas. Las Siete Partidas de Alfonso X "El sabio" fueron un conjunto de normas redactadas durante el reinado de

Alfonso X; hacen referencia a distintos aspectos de la vida de los ciudadanos, y la razón de sus denominaciones. Jiménez Vivas (2021), citando a Ennis (1964), expone que entre las Partidas encontramos legislación referente al nombre, en donde se sancionaba al que cambiaba maliciosamente su nombre, o tomase el de otro; cabe precisar que conforme el autor, esta es la referencia más antigua hallada sobre la regulación del cambio de nombre. Asimismo, establece que el primer documento español en donde aparecen juntos prenombre y apellido es en el Cantar del Mio Cid, pues en el "Cantar Primero", se hace mención a los principales caballeros cristianos, resaltando nombres como Cid Rodrigo Díaz, Minaya Alvar Fáñez, Martín Antolínez, Muño Gustioz, Martín Muñóz, Alvar Salvadorez, Alvar Alvaroz, Galindo García, y Félez Muñoz[2].

Pasando a analizar la institución del nombre en Perú, primero es necesario situarnos antes de la conquista española. Durante la época del incanato, Jiménez Vivas (2021) hace referencia específica a los nombres en la lengua Runasimi, más conocida como quechua. Es así que la historia antroponímica del pueblo quechua ha pasado por tres etapas: autonómica, de contacto y de cambio. Respecto a la primera etapa podemos decir que el sistema quechua utilizó una sola palabra que funcionada como nombre, y estaba constituido por dos palabras cuando éstas guardaban una relación semántica; por ejemplo "Piqui Chaqui" (pies ligeros), "Wilka Uma" (Sacerdote Principal). Durante esta época se tenían costumbres que eran denominadas "Ceremonias de Iniciación", en esta ceremonia se le daba un nombre a los niños que tenían entre los 2 a 5 años de edad y seguidamente se procedía a realizarles el corte cabello.

En cuanto al apellido, durante la época del incanato el mismo autor refiere que no se habría utilizado, y que en su lugar se hacía uso de dos nombres y hasta un tercero de acuerdo a sus características personales, por ejemplo "Sumaq Huayta" que significa "hermosa flor". Durante la época del virreinato, los españoles hicieron que muchos de los nombres quechuas ancestrales pasen a ser el apellido y además realizaron una traducción de éstos al español con la finalidad de adoctrinarlos y terminar con la cultura inca[3].

Adicionalmente, es pertinente recordar que, durante esta época la Iglesia y su papel evangelizador marcaron y se arraigaron a muchas tradiciones culturales del pueblo peruano; por ello se adoptó la costumbre de tomar nombres del Santoral Católico[4] y de las advocaciones marianas[5], dando muchas veces como resultados nombres sumamente largos como por ejemplo "María del Rosario Perpetua de los Dolores".

Asimismo, otra de las costumbres adoptadas fue el utilizar el prenombre de la madre, del padre o del ancestro, y así se podían identificar prenombres repetidos a lo largo de varias generaciones.
Finalmente, en esta época del virreinato trajeron muchas personas como esclavos desde los pueblos africanos, y que, dado el contexto de esclavitud, solo eran identificados por un prenombre que designaba la persona que se consideraba su propietaria; el apellido solo podían tenerlo las personas esclavizadas que alcanzaban su libertad.

Durante la época de la República, Jiménez Vivas (2021) refiere que ya se abordaban muchos temas dentro del Derecho Civil, incluso teniendo un capítulo denominado “de las personas”; sin embargo, todo lo referente al nombre era un tema que trataba exclusivamente el Derecho Eclesiástico.

Volviendo a la evolución del nombre en el plano internacional, De Varennes y Kuzborska (2015), exponen que países de ámbito anglosajón como Australia, Canadá, Reino Unido y Estados Unidos, en algún momento de su historia, establecieron en su ordenamiento jurídico el derecho de la persona a cambiar su nombre cuando lo desee, y para ello no se requería de ninguna solemnidad o formalidad.

De manera contraria, en Europa continental empezaron a desarrollar una legislación después del siglo XV que solo permitía los nombres cristianos, tradicionales o escritos de acuerdo a normas de la cultura nacional.

Por otro lado, las practicas sobre la denominación de una persona en Asia y África eran más variadas, ya que estaban marcadas por las tradiciones culturales que no fueron erradicadas del todo durante la colonización europea. En cuanto al nombre en los Estados islámicos, se prohibieron algunos que no estaban asociados con sus creencias religiosas.

En este panorama, se evidencia que el derecho a un nombre atraviesa momentos y culturas distintas, si bien en el primer documento internacional de derechos humanos no se hace referencia a este, posteriormente en la Convención sobre los Derechos del Niño[6] del 20 de noviembre de 1989, y en la Convención Americana de Derechos Humanos se da cabida al derecho al nombre de manera específica como parte de los derechos de la persona.

B. Concepto de nombre

El Pacto Internacional de los Derechos Civiles y Políticos (PIDCP) de fecha 26 de diciembre de 1966 (Nueva York), regula en su artículo 24 que todo niño debe ser inscrito inmediatamente después de su nacimiento y deberá tener un nombre.

Conforme lo establece López Cerna (2018), el nombre es el medio de identificación que forma parte de los atributos de la persona, y lo define como la palabra que designa a un determinado individuo.
Jiménez Vivas (2021), precisa que el nombre es una institución que involucra a toda persona, y tiene una primera función individualizadora, es decir el resumen de características de cada persona, en otras palabras, la conceptualización de ésta. Su segunda función es la diferenciación de otros individuos, esto es su identificación, con la intención de resaltar un elemento propio, es decir la definición de la persona. Así también se le puede atribuir una tercera finalidad, la cual es el de mejorar la relación entre individuos. El nombre permitirá individualizar, diferenciar y situar a una persona en una posición determinada en una sociedad.

El mismo autor, mencionado en el párrafo anterior citando a Rodríguez (2014), establece que el

nombre no puede ser visto como un derecho autónomo y desligado del derecho a la identidad personal, sino más bien como un elemento que concreta este derecho. Asimismo, precisa que el nombre es el medio que sirve al ser humano ejercer cualquier derecho en sociedad y asimismo para asumir deberes y obligaciones. Es el elemento que permite relacionarse con otras personas y con el Estado.

En este sentido, Jiménez Vivas (2021) citando a Rubio Correa (1992), resalta la doble naturaleza del nombre, tanto el de ser un derecho como el de ser un deber; lo primero porque cada persona tiene la facultad de que se designe por su nombre para ser reconocido y para que éste no sea usurpado; y también es un deber porque el nombre que tiene cada persona no puede ser cambiado libremente, salvo cuando se tenga motivos justificados. El nombre está conformado por dos elementos. El primero es el llamado "nombre de pila", es la designación individual conocido como "prenombre", se lo conoce así porque antecede a los apellidos. El prenombre es elegido por los padres, familiares u otra persona responsable del recién nacido; cumple estrictamente la función de identificar a la persona. El segundo elemento que conforma el nombre es el apellido, éste es una noción heredada del cognomen romano y tiene la función de identificar a una persona como perteneciente a una familia, ello porque el apellido proviene de los progenitores. Cuando se requiera alguna precisión sobre la identidad de la persona se suma el prenombre junto al apellido y se tendrá como resultado el "nombre completo".

Sobre el número y orden de los elementos que conforman el nombre suele variar de acuerdo a cada Ordenamiento jurídico. Hay países en donde el prenombre va seguido del apellido paterno y posteriormente materno. Así también, es familiar la denominación "apellido de casada", que se manifiesta cuando la esposa adiciona a su prenombre el apellido del cónyuge varón, cabe resaltar que en países como Bolivia, Perú, Argentina, etc., esta práctica ha tomado un carácter optativo para la mujer.

El tema que nos ocupa en el presente trabajo muchas veces encuentra opiniones favorables que se fundamentan en la libertad que tiene la mujer de identificarse como desee, y ello incluye el poder considerarse estrictamente ligada al marido. Sin embargo, es importante recordar algunos límites sobre los derechos fundamentales. Abad Yupanqui (1992) expone que no todos los derechos fundamentales gozan de carácter absoluto. En este sentido, algunos pueden estar sujetos a limitaciones por la necesidad de resguardar otros derechos fundamentales. Por ello, para determinar de manera razonable estas limitaciones es necesario una adecuada interpretación constitucional que no haga prevalecer un derecho sobre otro, sino que realice una ponderación adecuada. El legislador está habilitado para intervenir en situaciones así pero siempre debe haber un respeto al contenido esencial de los derechos fundamentales y su dignidad como persona humana.

De Varennes y Kuzborska (2015), señala que es importante tener en cuenta que países como España, Islandia, Suecia, Japón, etc., en los cuales las autoridades prohíben ciertos nombres que pueden resultar ofensivos, o poco prácticos, por ejemplo, normalmente no se admitiría que a un niño se le ponga el nombre de un insulto, un símbolo o que se incluya en el nombre alguna cifra numérica; asimismo existe otros países como Estados Unidos o Reino Unido en donde se ve una mayor libertad de los padres al poner el nombre de sus hijos[7].

2.1.4. Derecho a la Igualdad

El artículo 1 de la DUDH refiere que "todos los seres humanos nacen libres e iguales en dignidad y derechos y, dotados como están de razón y conciencia, deben comportarse fraternalmente los unos con los otros". En ese sentido la igualdad se consagra como un principio universal para todos los ordenamientos.

Rojas Pretell (2020) citando a Praeli (1997), establece que el contenido del principio de igualdad entiende a ésta como igualdad formal ante la ley, a través del cual todos los seres humanos tienen derecho a que la norma los trate por igual, la cual después se ha extendido hasta hablar de una igualdad sustancial que implica el deber de que la ley otorgue igualdad de condiciones y oportunidades a las personas; así se diferencia la igualdad formal de la sustancial.

La violencia y la discriminación contra la mujer es consecuencia de la situación de desigualdad en la que éstas viven en muchas sociedades. Conforme el artículo de Verdú y Briones (2016), la experiencia humana se da en diferentes dimensiones, la dimensión material hace alusión a la experiencia física e inmediata, la dimensión estructural referido a la visión de la sociedad en conjunto, integrado mediante relaciones ordenadas; y la dimensión simbólica referida a ese mundo de significados, ideologías o realidad inmaterial que se relaciona con las otras dimensiones, generalmente como base o fundamento. En este panorama la violencia que se da en el ámbito simbólico es conocida como "violencia simbólica" y constituye una violencia invisible que incluso puede pasar por desapercibida en una determinada sociedad. Este tipo de violencia se da a través de la comunicación y el lenguaje, o la distribución de roles que la sociedad determina para los sexos. Antes de continuar es importante precisar el concepto de discriminar, siendo considerado por la RAE como el dar un trato inferior a alguien, es decir dar un trato diferenciado de manera que se menosprecie o minimice a un individuo, provocando la reducción de la persona o colectivo en cuestión. El lenguaje y la manera de expresarnos puede ser un reflejo de la discriminación social, pues se discrimina a las mujeres cuando se usan expresiones que encierran juicios de valor implícitos y estereotipos sexistas, sin darse cuenta que se está reforzando las estructuras de poder desiguales que tenemos en la sociedad. Asimismo, el uso del lenguaje puede originar maneras sutiles de discriminación que pasan desapercibidas para los hablantes ya que pueden llegar a constituir formas discriminatorias que están incorporadas y aceptadas en la propia identidad y sociedad. Las autoras citando a Bordieu (2000) precisan que la violencia simbólica ha logrado que la persona dominada, en este caso la mujer, se abandone y acepte el destino que se le ha dado socialmente, asumiendo sin pensar la forma de sumisión que se le ha impuesto. Esta violencia simbólica ha significado la socialización a través del discurso y la costumbre.

La UNESCO (2017), establece que la igualdad de género hace referencia a la igualdad de derechos, compromisos y oportunidades de mujeres y varones, niñas y niños. La igualdad no refiere que hombres y mujeres sean semejantes, los derechos no dependen del sexo que tienen, sino que la igualdad de género se refiere también a otorgar una mejor vida en lo que incluye intereses, necesidades y las prioridades de todos los seres humanos, reconociendo la diversidad de los

diferentes e incomparables grupos de mujeres y hombres.

En su parte introductoria, la Convención sobre la Eliminación de Todas las Formas de Discriminación Contra la Mujer (CEDAW) de fecha 18 de diciembre de 1979, establece que la discriminación hacia la mujer viola el principio de la igualdad y el respeto de la dignidad humana. En su artículo 1, explica taxativamente qué se entiende por "discriminación contra la mujer", estableciendo que ésta es toda distinción, exclusión o restricción que se realice en razón del sexo y que tenga como fin menoscabar o anular el reconocimiento, sobre la base de la igualdad del hombre y la mujer, del goce o ejercicio de los derechos humanos y libertades fundamentales en los espacios políticos, económicos, sociales, culturales, civiles, etc. Por ello, en su artículo 2, insta a los Estados a otorgar una protección jurídica a los derechos de la mujer teniendo como base el principio de igualdad con los hombres.

La Constitución Política del Perú, consagra en su artículo 1, inciso 2 que "Toda persona tiene derecho a la igualdad ante la Ley. Nadie debe ser discriminado por motivo de origen, raza, sexo, idioma, religión, opinión, condición económica o de cualquier otra índole".

El artículo 234 del Libro III del Código Civil Peruano establece literalmente la igualdad entre los cónyuges: "el matrimonio es la unión voluntariamente concertada por un varón y una mujer legalmente aptos para ella y formalizada con sujeción a las disposiciones de este Código, a fin de hace vida en común. El marido y la mujer tienen en el hogar autoridad, consideraciones, derechos, deberes y responsabilidades iguales".

2.2.LA COSIFICACIÓN DE LA MUJER

Conforme lo establecen Gonzales y Torrado (2019), la cosificación de la mujer se refiere al proceso de construcción social por el cual se llega a considerar a todas las mujeres como un todo homogéneo; un proceso que las objetiviza, a ellas y a sus cuerpos como si fueran cosas, negando su heterogeneidad y su papel de sujetos y actores políticos. Las mismas autoras manifiestan que por la cosificación se niega toda autonomía y subjetividad, despojándolas de sus derechos civiles y políticos.

Sanahuja (2018), refiere que la cosificación de mujer es el uso que se le hace a ésta o a su imagen para objetivos que no la dignifican como persona humana. La cosificación deshumaniza a las mujeres y las concibe como objetos que no tienen la capacidad de pensar y que pueden ser expuestos, y utilizados como se desee. La autora resalta que la cosificación hacia la mujer ha estado presente en toda la historia de la humanidad; sin embargo, en estas últimas décadas se ha venido experimentando preocupación, pues esta cosificación es una forma de violencia machista con la que se convive día a día. Asimismo, la autora hace énfasis en las consecuencias tan amplias y negativas que trae la cosificación, entre ellos problemas de salud, físicos y psicológicos.

Alonso Álvarez y otros (2020), citan a Loughnan (2017), quien establece que la cosificación es el

proceso por el cual una persona es vista y tratada como objeto; concretamente este proceso se da cuando a dicha persona se le concibe separada de su cuerpo y sus funciones, reduciéndola a la condición de instrumento.

Sanahuja (2018) nos ofrece un breve listado de realidades donde podemos encontrar cosificación, como en los medios de comunicación, las letras de las canciones, el trato a las atletas femeninas, los disfraces infantiles, los juguetes de niños y niñas, determinadas exigencias en los lugares de trabajo ("señorita de buena presencia"), el vocabulario que tenemos, etc. Y muchos otros ejemplos que equiparan a las mujeres con objetos, y que las hemos normalizado e interiorizado.

Winn y Cornelius (2020), citando a Fredrickson y Roberts (1997) establecen que la auto-objetivización o auto-cosificación se da cuando una persona se concibe como un objeto o cosa, y señala que es un problema que se evidencia mucho más en mujeres y niñas que en varones.

2.3.EVOLUCIÓN HISTÓRICA DEL MATRIMONIO

Conforme Vásquez García (1998), el matrimonio es el acto jurídico que crea la unión conyugal. Es la unión voluntaria de un varón y una mujer de acuerdo al ordenamiento jurídico preestablecido y que produce efectos jurídicos personales y patrimoniales. Constituye la base fundamental del Derecho de Familia, siendo una de las fuentes de la organización de la familia.

El matrimonio es una figura que ha tenido una evolución de acuerdo a cada cultura en la que se manifiesta. Estando nuestro sistema jurídico alineado al sistema romano-germánico, conviene dar una mirada a la historia del matrimonio en estas culturas, y también al matrimonio cristiano, que hasta hace poco, en el Perú, producía los mismos efectos que un matrimonio civil. Para ello, echaremos mirada a la investigación de Rodríguez Iturri (1993) que ofrece un estudio completo sobre la historia del matrimonio en estas tres culturas.

En la Ley de las XII Tablas, específicamente en la V y la VI se aborda el tema del derecho de familia y el derecho de sucesiones. En ellas se limita legalmente el poder absoluto que tenía el hombre sobre su familia, quien era conocido y denominado en este entonces "paterfamilias". Asimismo, se reguló la posibilidad de que la mujer se divorcie ausentándose durante tres días seguidos en del domicilio conyugal, siempre y cuando tal ausencia sea con ese propósito. Esta antigua normativa revela la figura de poder que se le atribuían a los hombres respecto a la esposa e hijos; y frente a ello el Derecho se vio en la necesidad de regular normativamente el matrimonio, y la posibilidad del divorcio, para limitar de cierta manera el poder que el paterfamilias tenía sobre su familia.

Conforme lo manifiesta el autor citado, el matrimonio romano, tuvo como una de sus principales características que, para que el acto del matrimonio sea válido, medie el consentimiento entre las partes contrayentes. En la cultura romana se hablaba de la figura del manus (mano) dentro del matrimonio, que significó el poder del marido sobre la mujer. Posteriormente, con el paso de los años empezaron a sumarse características y a darse otras modalidades. Para ese entonces, el

matrimonio no se trataba de un acto jurídico, por lo que no estaba sujeto a modalidad alguna, se trataba de un "hecho social" en el que la ley no tenía nada que ver.

En la cultura germánica, en un principio, había cabida al matrimonio forzoso y en cuanto a las familias, reinaba la potestad absoluta del padre sobre ésta. Al igual que en muchas culturas, el matrimonio germánico también tuvo un proceso de cambio y evolución. Primero, empezó a hablarse del consentimiento como elemento necesario para que se celebre el matrimonio, pero también la Historia nos deja dicho que este consentimiento, cuando venía de la novia, a veces no era tomado en cuenta y no constituía un elemento jurídico vinculante. Asimismo, este matrimonio venía acompañado de prácticas tradicionales en las que se dejaba ver el traspaso de poder que surgía entre el padre y el novio. Una de estas prácticas consistía en que el día en que se comprometían los novios, éste debía llevar regalos a la familia de la novia, y una vez recibidos el novio la tomaba de la mano de ella y la colocaba sobre sus rodillas, de ese modo adquiría la potestad sobre la mujer.

Posteriormente, en el periodo franco, tomó más relevancia el carácter contractual del matrimonio, pero se tornó como un contrato de arras, por el cual el hombre pagaba al que tenía el poder sobre la mujer para poder llevársela. A la par se dio el matrimonio por rapto, que culturalmente también era válido; para ello, era necesario el acuerdo de la mujer en este rapto, que haya un testigo y que después se pague lo correspondiente a la familia. A pesar de las diferencias en ambas modalidades, debemos decir que finalmente en la cultura germánica, el "consentimiento" de ambos contrayentes pasó a ser un requisito necesario para considerar válido el matrimonio.

Por otro lado, es importante dar mirada a la historia del matrimonio cristiano, el cual ha tenido notable influencia sobre el matrimonio civil del país estudiado. Desde el punto de vista cristiano, en un inicio, la ceremonia del matrimonio era vista como un traslado de la mujer del poder paterno al poder marital y también se hablaba de la conclusión del matrimonio con el cumplimiento del acto carnal. Con el paso de los años, y tras diversos concilios y reuniones eclesiales se ha llegó a considerar el matrimonio como uno de los siete sacramentos de la Iglesia, el que tiene como principal requisito y característica que medie el consentimiento y voluntad de los contrayentes. Asimismo, se dijo que el matrimonio al ser un reflejo de la unión de Cristo con la Iglesia, es una institución divina y por tanto indisoluble, es decir no cabe el divorcio; ello apuntó a proteger la dignidad de los contrayentes, especialmente el de la mujer, que culturalmente era mal vista y humillada cuando su esposo la abandonaba. Es importante destacar que para la Iglesia, los fines del matrimonio son el hacer vida en común y el derecho de procrear.

2.4.EL NOMBRE DE LA MUJER CASADA

En este punto se estima relevante la investigación llevada por Rojas Pretell (2020), que siguiendo a Wilson (2009), expone los resultados de la encuesta realizada a varias mujeres casadas o que alguna vez lo estuvieron para profundizar y entender el tema de los apellidos de las mujeres casadas. Las entrevistadas manifestaron que se encuentran en una situación compleja con supuestos culturales cuando se les da la opción de cambiar sus apellidos tras contraer nupcias, sobre todo por lo que

acarrea el estar casada, el tener hijos y familia. Las mujeres identifican el apellido de casadas con un problema importante ya que reconocen de por medio fundamentos como la estabilidad social y cambio. Para las personas entrevistadas la función de los apellidos se ve tanto en la identidad individual y las conexiones sociales para lidiar con los conflictos; la elección del apellido está cargada de significados sociales, además de ideas como el pensar que con ello aumenta la posibilidad de que la relación funcione.

Conforme el artículo de Savage (2020), en la actualidad hay muchas mujeres que optan por llevar el apellido de sus esposos en diferentes países. Si bien la tendencia ha disminuido en comparación de la anterior generación, es evidente que en la actualidad estas prácticas aún persisten en muchos países del mundo occidental.

El nivel con el que se dan estas prácticas puede variar de acuerdo al país, pues mientras en unos el apellido del cónyuge se adiciona al primer apellido de la mujer, en otros se llega a cambiar completamente el apellido de origen por el del esposo. En países de habla inglesa, como Reino Unido, y Estados Unidos, esta tradición está arraigada, aun cuando actualmente no existe ningún precepto legal para adoptar el apellido del marido. Asimismo, en países de Europa occidental, como Bélgica, Francia, Italia, Alemania, etc., a excepción de España, Islandia y Grecia, siguen la misma tradición.

Siguiendo la misma investigación, podemos decir que esta práctica increíblemente se mantiene en países como Noruega, líder en igualdad de género, en donde la mayoría de mujeres siguen adoptando el apellido de sus esposos.

La autora, cita en su artículo la investigación de Ducan y su equipo (2019)[8], quienes identificaron dos razones especiales por la que las mujeres siguen adoptando el apellido de sus maridos; la primera razón es la persistencia del poder patriarcal y la segunda es el ideal de “buena familia”, ello en razón de que se concibe la creencia de que compartir el nombre del cónyuge es muestra del compromiso y acoge a la esposa e hijos dentro de una unidad. Además, algunas mujeres aceptan el cambio de nombre por tradición, mientras que otras lo hacen con emoción por acoger los apellidos del marido, ya que se han detectado que hay féminas muy ansiosas por asumir el apellido del esposo y que lo consideran como “parte del romance”. La investigación también vincula a esta práctica con otras tradiciones patriarcales como el que el padre entregue a su hija antes de la boda o que sean los varones quienes deben proponer matrimonio.

Respecto al segundo motivo expuesto, Ducan y su equipo concluyeron que para muchas mujeres tomar el apellido de la pareja se percibe como una manera de mostrar un compromiso y unión a la sociedad. Asimismo, se concluyó que esta práctica estaba muy arraigada en las mujeres que ya habían tenido hijos, incluso algunas acogieron el apellido de sus esposos después de dar a luz; ya que durante la investigación se destacó el sentimiento de preocupación de que los hijos puedan confundirse o ser infelices porque sus padres tienen nombres diferentes. La investigación considera que esta práctica perpetúa la creencia de que el esposo es la autoridad, el líder de la casa.

La investigación de Ducan (2019) nos ofrece algunas cifras para tener una idea del número de mujeres que optan por llevar el apellido de sus maridos En Estados Unidos, la mayoría de mujeres casadas acogen el apellido de sus esposos cuando contraen nupcias, 70% según el análisis de los datos obtenidos. En Reino Unido esta cifra se incrementa casi al 90% según los datos recogidos en el 2016; siendo que la edad de las mujeres que deciden acoger esta práctica oscila entre los 18 y 30 años de edad. Asimismo, en Reino Unido, un sondeo del 2016 demostró que al 59% de mujeres aún quisieran acoger el apellido de sus esposos al contraer nupcias, y el 61% de los hombres están de acuerdo y quieren que se haga así. Otra encuesta dio como resultados que el 11% de jóvenes de 18 a 34 años en Reino Unido en la actualidad están haciendo uso de sus apellidos compuestos cuando contraen matrimonio, se trata de una práctica que tradicionalmente era realizada por las familias más adineradas.

Asimismo, esta investigación demostró que las mujeres mayores, más educadas y económicamente independientes, en su mayoría, prefieren optar por mantener su nombre de origen, mientras que las más jóvenes y con salarios más bajos deciden adoptar el apellido del marido.

Es imposible desligar esta investigación con lo establecido por Verdú y Briones (2016) quienes afirman que en todas las manifestaciones de la violencia simbólica se evidencia una invisibilización de la mujer como sujeto protagonista del que se realcen cualidades intelectuales o profesionales diferentes a los valores que tradicionalmente le son asignados. Asimismo, establecen que la idea femenina de "ser para los demás" sigue presente, y se ha normalizado la concepción de que la mujer está estrechamente ligada con el cuidado, la complacencia y la disponibilidad para con de los otros.

2.5.EL NOMBRE DE LA MUJER EN LATINOAMÉRICA

2.5.1. México

Conforme el artículo de opinión de Montes De Oca Sicilia (2019), hasta hace algún tiempo era común que las mujeres usaran, incluso para aspectos legales, el apellido del marido. La manera en la que se llevaba era adicionándolo a su apellido paterno antecedido de la preposición "de". En la actualidad, esta costumbre se ha dejado de lado; ello porque en México se empezó a utilizar la credencial de elector, conocido como IFE o INE, que se ha convertido en la identificación oficial de todos los mexicanos. El literal c), del numeral 1 del artículo 200 del Código Federal Electoral Mexicano establece que la credencial para votar deberá contener el apellido paterno, el apellido materno y el nombre completo. En ese sentido, las mujeres mexicanas usan sus apellidos de nacimiento en cualquier trámite legal.

Asimismo, es importante señalar que el artículo 168 del Código Civil Federal de México establece que el marido y la mujer tendrán autoridad y consideraciones iguales, en consecuencia, resolverán de común acuerdo todo lo que concierne al manejo del hogar, la formación de los hijos, y a la administración de los bienes que tengan.

2.5.2. Paraguay

La Ley N° 1 de Reforma del Código Civil Paraguayo del 23 de diciembre de 1985, deroga el artículo 49 de su Código Civil, que establece que la mujer casada adicionará a su apellido el del esposo, asimismo establece que puede excusarse de esta obligación si es que es una conocida profesional o artísticamente conocida por su nombre de soltera.

En consecuencia, en el artículo 1 de esta ley de derogatoria establece que tanto la mujer como el varón tienen igual capacidad de goce y ejercicio de derechos civiles. En su artículo 6 establece que el los cónyuges tienen en el hogar iguales deberes, y responsabilidades. En su artículo 10 establece que la mujer casada podrá hacer uso del apellido de su cónyuge a continuación del suyo, pero ello no implica un cambio de nombre de ella, que es el que finalmente está en la partida del Registro Civil; además precisa que la viuda tiene la facultad de usar el apellido de su marido mientras no contraiga nuevo matrimonio o unión de hecho. Finalmente establece que el marido tendrá la misma opción de adicionar el apellido de su esposa al suyo propio.

2.5.3. Colombia

Colombia ha pasado por un contexto patriarcal, pues ha estado sumergida en un largo periodo en donde las mujeres consideraban la necesidad de tener un hombre que les represente ante la sociedad, lo que otorgaba a sus parejas cierto poder sobre ellas [9].

En 1974 se promulgó el decreto 2820, a través del cual se dieron algunos derechos que significaron un avance en esta lucha por la igualdad entre hombres y mujeres en el matrimonio. Así, se estableció que ambos cónyuges tienen conjuntamente la dirección del hogar y que estará a cargo de uno, solo cuando el otro no pueda ejercerlo. Respecto al nombre, la mujer estaba obligada a tener una sola identidad, pues al casarse se adicionaba el apellido del marido a su apellido paterno, antecedido de la preposición “de”, y suprimiendo su apellido materno. En caso de enviudar era necesario agregar al apellido del padre “viuda de” seguido del apellido del esposo fallecido.

La modificación de agregar la proposición “de” al nombre de las mujeres casadas empezó en 1970, a través del decreto 1260 del 27 de julio de 1970, el mismo que estableció en su artículo 3 que toda persona tiene derecho a su individualidad, y en consecuencia al nombre que legalmente le corresponde; este decreto estuvo sujeto a interpretaciones que permitieron seguir con la costumbre de cambiar el apellido de las mujeres casadas.

El artículo 6 del Decreto 999 de 1988 en Colombia sobre las correcciones del registro civil establece que la mujer casada podrá adicionar o suprimir, a través de escritura pública, el apellido de su esposo precedido de la preposición “de”, en los casos en los que la mujer hubiere adoptado o sido establecido por ley.

2.5.4. Argentina

Siguiendo la investigación de Giordanino y De Cucco Alconada (2017), hasta 2014, Argentina era el

único país de Hispanoamérica que usaba solo un apellido, el paterno. La mujer casada tenía la facultad de optar por utilizar la preposición "de" del apellido del marido o eliminarla.

El Código Civil y Comercial de la Nación Argentina del 1 de octubre de 2014, da un giro y cambio trascendental sobre el tema, pues el artículo 67 de dicho cuerpo legal establece que cualquiera de los cónyuges puede optar por hacer uso del apellido del otro, con la preposición "de" o sin ella. Cuando una persona es divorciada no puede usar el apellido del otro, a excepción de motivos razonables. La facultad de usar el apellido del otro cónyuge también se extiende al viudo o viuda mientras no contraiga nuevo matrimonio.

2.5.5. Bolivia

El Código Civil Boliviano, aprobado por DL 12760 del 6 de agosto de 1975, establece en su artículo 9 que toda persona tiene derecho al nombre conforme a ley, y éste comprende el nombre propio o individual y el apellido paterno y materno. Respecto al cambio de nombre se admite con las formalidades y en los supuestos que la ley establece.

En el artículo 11 del mismo cuerpo legal se establece que la mujer casada conserva su propio apellido, y puede optar por agregar el de su esposo precedido de la preposición "de", lo que servirá como distintivo de su estado civil; extendiendo esta facultad aun en estado de viudez. Asimismo, el artículo establece que los títulos profesionales consignarán el apellido propio, sin adicionar el del marido.

2.5.6. Chile

El ordenamiento jurídico chileno competente respecto al tema, esto es el Código Civil de la República de Chile, promulgado el 14 de diciembre de 1855 (el cual ha pasado por diversas modificaciones), la Ley 4808 de Reforma de la Ley sobre el Registro Civil, promulgada el 10 de febrero de 1930 y el Decreto con fuerza de ley 2128 del Reglamento orgánico de Registro Civil promulgado el 10 de febrero de 1930, no prevén ningún supuesto en que se faculte a alguno de los cónyuges llevar el apellido del otro. Es decir, en Chile el marido y la mujer, al contraer matrimonio mantienen sus apellidos, no existe un apellido de familia común.

2.6.EL NOMBRE DE LA MUJER CASADA EN LA LEGISLACIÓN PERUANA

La Constitución Política del Perú de 1993, especifica en su artículo 1 que "La defensa de la persona humana y el respeto de su dignidad son el fin supremo de la sociedad y del Estado". De igual forma, en su artículo 2, inciso 1 que "Toda persona tiene derecho a la vida, a su identidad, a su integridad moral, psíquica y física y a su libre desarrollo y bienestar […].

En el ordenamiento civil peruano, el derecho al nombre se regula de manera amplia en el Libro I "Derechos de las Personas", Título III, artículo 19 del Código Civil Peruano, el mismo que establece: "Toda persona tiene derecho al nombre. Este incluye los apellidos". El artículo 24 de ese mismo código establece: "La mujer tiene derecho a llevar el apellido del marido agregado al suyo y a

conservarlo mientras no contraiga nuevo matrimonio. Cesa tal derecho en caso de divorcio o nulidad de matrimonio. Tratándose de separación de cuerpos, la mujer conserva su derecho a llevar el apellido del marido […]"

Conforme a lo publicado por la Gerencia de Asesoría Jurídica del Registro Nacional de Identificación y Estado Civil en el 2014, el nombre es un derecho y un deber del ser humano. Se lo entiende como derecho porque a cada individuo se le debe designar un nombre, y que este sea reconocido por las demás personas, sin que sea cambiado ni usurpado. Al mismo tiempo, lo considera un deber porque en la sociedad cada persona tiene la obligación de tener un nombre, y este no puede ser cambiado cuando lo desee. Finaliza señalando que el nombre es una expresión idiomática que sirve para identificar y distinguir a cada ser humano ante las demás personas que conforman una sociedad; en este sentido la persona tiene derecho a ser identificado por su nombre y el deber de identificarse con él.

En este punto, es importante detenernos a revisar lo establecido por Jiménez Vivas (2021), quien teniendo en cuenta el Ordenamiento Jurídico peruano, resalta una de las características adicionales del nombre: la inmutabilidad. Afirma que para que el nombre cumpla con todas sus funciones es necesario que sea "firme". La idea de un nombre cambiante afecta negativamente a la seguridad jurídica y al nombre mismo; es decir el nombre no serviría de manera óptima ni como derecho ni como deber. El autor incide en que un nombre susceptible de fácil o frecuente cambio no cumplirá con informar de manera razonable acerca de la identidad del individuo al que pertenece.

Siguiendo la jurisprudencia peruana, la Sala Civil Suprema Transitoria de Lima, resolviendo la Casación N°3580-2012 Ayacucho[10], indicó que, por regla general, el cambio de nombre no se admite; sin embargo, existen casos excepcionales por los que se procede cuando existan motivos justiciables que lo ameriten.

El Código Civil Peruano de 1984 establece el principio de inmutabilidad del nombre en el artículo 29, que a la letra dice:"Nadie puede cambiar su nombre ni hacerle adiciones, salvo por motivos justificados y mediante autorización judicial, debidamente publicada e inscrita. El cambio o adición del nombre alcanza, si fuese el caso, al cónyuge y a los hijos menores de edad". En razón a ello, el cambio de nombre, del prenombre o del apellido, los casos de adición, sustracción e inversión de prenombres, pueden realizarse por razones justificadas y mediante un proceso "no contencioso" conforme a ley.

Volviendo a lo establecido por Jiménez Vivas (2021), vemos que el Ordenamiento Jurídico peruano también admite el cambio de nombre en instancias no jurisdiccionales, ya sea en sede administrativa o en sede notarial. El tema que nos ocupa en el presente trabajo es un cambio de nombre (adición) de la mujer casada en sede administrativa, pues el Estado peruano ha otorgado la facultad al Registro Nacional de Identidad y Estado Civil (RNIEC), de realizar este tipo de operaciones.

Siguiendo la investigación de Calderón (2014), hasta el 2007, en el Perú, cuando una mujer casada decidía llevar el apellido de su esposo, se le suprimía el apellido materno, poniendo en su lugar el apellido del cónyuge. Sin embargo, a partir del año señalo, el Registro Nacional de Identificación y Estado Civil (RENIEC) estableció que el apellido del esposo debía ir luego del apellido materno de

la esposa, y ya no era necesario que la casada pierda su apellido materno, ello porque más adelante, esto dificultaba considerablemente el proceso administrativo para recuperar sus apellidos de origen en caso de viudez o divorcio.

Posteriormente, RENIEC, a través de su Resolución Jefatural N° 370-2009-JNAC/RENIEC del 24 de junio de 2009 aprueba la Directica DI-228-GRC/009 sobre el "Nombre de la Mujer Luego del Cambio del Estado Civil"; así en las disposiciones específicas de la Directiva, específicamente en el numeral 6.1, establece que la mujer que contrae matrimonio puede mantener su nombre de soltera sin modificaciones o también puede optar por agregar a sus apellidos el del esposo a través de la actualización de su Documento Nacional de Identidad (DNI). Para esta modificación es necesario que el primer apellido del esposo sea precedido de la preposición "de", así como la modificación al estado civil al de "casada". Asimismo, en el numeral siguiente establece que la mujer que ejerció este "derecho" reconocido en el artículo 24 del Código Civil peruano, puede optar por suprimirlo y seguidamente solicitar la actualización de su DNI. Este derecho de adicionar el apellido del marido al suyo cesa en caso de divorcio, variando el estado civil a "divorciada". Este derecho puede conservarse si el esposo fallece, y si es de consentimiento de la mujer puede agregar el término "VDA" antes del apellido del fallecido.

Conforme las normas civiles peruanas, al ser el nombre un atributo inmutable, el cambio de nombre resulta un proceso minucioso y excepcional; sin embargo, en el caso de las mujeres casadas no se requiere mayor ajetreo ni "razón justificada" para cambiar su nombre en sede administrativa. Las posibilidades de cambio de estado civil de una mujer también significan las posibilidades de cambio de nombre y por ende de la desaparición de la característica de "inmutabilidad" que posee este atributo, afectando indirectamente su derecho a la identidad.

Siguiendo el artículo de investigación de Calderón (2014), según los trabajadores de RENIEC, un 30% de las mujeres casadas optan por llevar el apellido de sus esposos.

El artículo en cuestión significa consentir de manera silenciosa la idea patriarcal que tienen los hombres de dominación sobre las mujeres; ideas que dan como consecuencias cifras elevadas de violencia de género. Veamos para ello los índices de violencia tanto física como psicológica presentada en el Perú hasta el año 2019.

Asimismo, Perú, ha firmado y ratificado varios instrumentos internacionales que le comprometen a la lucha por la igualdad de género. El artículo 6 de la Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra la Mujer "Convención de Belém do Pará", del 9 de junio de 1994, establece en su artículo 4 que, entre otros, la mujer tiene derecho a que se respete la dignidad inherente a su persona y el derecho a la igualdad de protección ante la ley y de la ley. De igual forma, el artículo 6 regula que toda mujer tiene derecho a una vida libre de violencia, que incluye el derecho a estar libre de toda forma de discriminación y el derecho a ser valorada y educada libre de patrones estereotipados de prácticas sociales y culturales basados en conceptos de inferioridad o subordinación.

Es importante precisar que el artículo 8, literal b) de la misma Convención establece que los Estados Partes deben adoptar en formar progresiva las medidas necesarias para modificar prácticas socioculturales de hombres y mujeres para luchar contra los prejuicios y costumbres y diversos patrones que se fundamentes en la inferioridad o superioridad de cualquiera de los géneros o en los roles estereotipados que legitiman la violencia contra la mujer.

Durante la IV Conferencia Internacional de la Mujer en Beijing, llevada a cabo en septiembre de 1995, el Estado peruano realizó la suscripción a la Declaración de Beijing y la creación de la Plataforma de Acción respecto a la situación de la mujer, buscando promover la igualdad, el desarrollo y la paz para todas las mujeres del mundo. A partir de esta Conferencia, cada cinco años, se realizaron encuentros con el objetivo de revisar el cumplimiento de los compromisos asumidos en la Declaración de Beijing[11]. En el año 2015, el Estado peruano participó de la cuarta revisión a la Conferencia de Beijing (Beijing+20), para lo cual realizó un encuentro preparatorio en marzo de 2015[12]. Durante esta revisión, se trazaron algunos objetivos comunes, entre ellos el de eliminar la legislación discriminatoria y abordar normas sociales que permiten la discriminación y violencia contra las mujeres. En este sentido, observamos una vez más que, a nivel internacional, el Perú ha asumido el compromiso de actuar frente a normas discriminatorias y excluyentes para las mujeres; sin embargo, dentro del conjunto de sus normas civiles, encontramos el artículo 24 del actual Código Civil peruano que al permitir denominarse a una mujer como propiedad del esposo, está arrastrando costumbres patriarcales positivizadas en normas jurídicas que debieron derogarse hace mucho.

III. CONCLUSIONES

A través del estudio y revisión de varias instituciones y conceptos pertinentes para abordar este tema, se puede concluir que:

Primera.- El artículo 24 del Código Civil peruano atenta contra el derecho a la identidad, pues permite que la mujer pueda cambiar de nombre en varias circunstancias dependiendo de su estado civil, alterando de esta manera el contenido estático del derecho a la identidad como lo es el nombre, que se supone debe ser el mismo desde el nacimiento, salvo casos precisos en los que se encuentre en juego la dignidad de la persona.

Segunda.- El artículo 24 del Código Civil peruano está vulnerando el derecho de igualdad, principio nacional e internacional; esta vulneración se da en la medida en que en ninguna otra parte del Código Civil peruano se otorga el “derecho” de que el marido pueda llevar el apellido de su esposa como ella el de él; aun cuando legalmente estos están en las mismas condiciones y tienen los mismos derechos y deberes. No existe un trato igualitario a personas que están en condiciones iguales, hay una discriminación escondida bajo un mal denominado “derecho”.

Tercera.- Por sus orígenes e historia, el matrimonio, ha sido una práctica que acarreaba la sumisión de la esposa y el poder absoluto del hombre sobre todos los miembros de la familia. Prácticas como la de acoger el apellido del esposo y suprimir el apellido de origen, dadas en un contexto patriarcal, se han ido manteniendo hasta la actualidad, llegando incluso a estar reguladas en el ordenamiento civil. El artículo 24 en cuestión, es muestra de esta subsistencia de prácticas patriarcales.

Cuarta.- El artículo 24 del Código Civil peruano es una muestra de cosificación de la mujer amparada en el ordenamiento civil de este país, más aún cuando se precisa que el apellido del esposo debe ser antecedido de la preposición "de"; palabra que hace referencia a la pertenencia de algo hacia alguien; por lo que este artículo permite que la mujer se identifique como objeto de su cónyuge atentando contra su dignidad como persona humana. Consideramos inviable la posibilidad de extender este "derecho" a que ambos cónyuges puedan llevar el apellido del otro, ya que ello significaría aumentar esta posibilidad de cosificación también al hombre y de ello no resultaría ningún avance en la perspectiva de la igualdad de género y respeto de la dignidad humana.

Quinta.- El artículo 24 del Código Civil peruano va contra los esfuerzos por conseguir la igualdad de género, ya que es evidente que se considera más importante al varón, en el sentido en que solo éste tiene la posibilidad de que se lleve su apellido, y no la mujer; visto de otra forma es como darle al esposo el papel principal y a la esposa un papel secundario, sin ninguna base ni fundamento aceptable.

Sexta.- El artículo 24 del Código Civil peruano contraviene la Constitución Política del Perú, puesto que ésta en su artículo primero considera que el fin supremo de la sociedad y del Estado es la defensa de la persona humana y el respeto de su dignidad; al tener en vigencia en el ordenamiento civil un artículo que legitima la cosificación de la mujer no se está ejerciendo óptimamente la defensa de la mujer y mucho menos el respeto de su dignidad.

Séptima.- El artículo 24 del Código Civil peruano debe derogarse, pues es una norma que da cabida a la cosificación de la mujer y por tanto es contraria al artículo 1 y al artículo 2.2. de la Constitución Política del Perú.

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[1] Sentencia tomada en referencia por Carlos Fernández Sessarego en su artículo "Derecho a la Identidad Personal". La Sentencia del Pretor de Roma de fecha 6 de mayo de 1974 reconoce el derecho a la identidad personal en su naturaleza dinámica ya que dicho pronunciamiento hace referencia a la identidad personal como un nuevo interés de la persona que merece ser protegido por el ordenamiento.
[2] Poema anónimo del Mio Cid – Parte del "Cantar Primero":

" ¡Qué bien estaba luchando sobre su exornado arzón
Mio Cid Rodrigo Díaz, es buen Campeador!
Con él Minaya Alvar Fáñez, el que Zorita mandó,
El buen Martín Antolinez, aquel burgalés de pro;
Muño Gustioz que del Cid fuera el criado mejor;
Martín Muñóz el que un día mandara en Montemayor.
Alvar Salvadorez y también Alvar Alvaroz,
Y el buen Galindo García, caballero de Aragón;
Y Felipe Muñóz, sobrino de mío Cid Campeador.
Además de los citados todos cuanto allí son
Van a socorrer la enseña y a mío Cid Campeador"

[3] Por ejemplo, se hizo la traducción de Killa a Luna, de Willka a Santos, de Aukka a Guerra, de Tikka a Flores, de Mayu a Ríos, etc.
[4] Conjunto de personas que la Iglesia Católica considera como Santos y asumidos como referentes de vida cristiana.
[5] La Iglesia Católica considera Advocaciones Marianas a las maneras de referirse a las apariciones, dones o tributos de la Virgen María.
[6] Tratado internacional aprobado el 20 de noviembre de 1989, que reconoce que los niños (personas menores de 18 años) son seres humanos con derecho de pleno desarrollo físico y a expresarse libremente. Disponible en: https://www.un.org/es/events/childrenday/pdf/derechos.pdf
[7] El autor hace principal referencia al artículo de la BBC News "Vea quién, qué, por qué: ¿Por qué algunos países regulan los nombres de los bebés?" del febrero de 2013. En este señalan países como

Islandia, Alemania, China, etc., que tienen estrictas normas gramaticales para salvaguardar la integridad psicológica de los menores de nombres que resulten denigrantes. Disponible en http://www.bbc.com/news/magazine-21229475

[8] Conformado por académicos pertenecientes a la Universidad de Oslo y la Universidad del Oeste de Inglaterra.

[9] Artículo del Blog "Deshilachando Derecho" (2017), en donde se enmarca el contexto patriarcal por el que ha pasado Colombia en referencia al nombre, y ello constituyó una molestia para las mujeres, pues la autora expone un ejemplo tomando en cuenta la experiencia de su madre, quien fue bautizada como: Ana Dolores Granados Bernal, cuando se casó su nombre pasó a ser: Ana Dolores Granados de Espinosa, luego enviudó y su cédula se modificó a: Ana Dolores Granados Viuda de Espinosa; finalmente al contraer un segundo matrimonio, su nombre volvió a cambiar por: Ana Dolores Granados de Hernández. Todo ello nos coloca en un escenario en el que la identidad estática puede variar incluso sin que uno lo decida, trayendo consigo diversos problemas jurídicos y no jurídicos. Disponible en: https://deshilandoelderecho.blogspot.com/2017/10/el-apellido-de-la-mujer-casada-en.html

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[11] Léase la Declaración de Beijing del 14 de septiembre de 1995. Disponible en: https://www.iknowpolitics.org/es/learn/knowledge-resources/declaraci%C3%B3n-de-la-cuarta-conferencia-mundial-sobre-la-mujer

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7

THE NEED AND APPLICATION OF ENVIRONMENTAL IMPACT ASSESSMENT (AND RELATED TESTS) IN THE SOUTH ASIAN (ESPECIALLY IN SRI LANKA) SOCIAL, ECONOMICAL AND POLITICAL SPHERE

W. I. S. Fernando, Sri Lanka

1. Introduction

The principle of Sustainable Development is relatively new to the sphere of environmental law if one considers the timeline of introduction of environmental law to the legal field in a formal manner. Even so, the concept has brought about a significant change which has been identified as essential to the protection of the environment. Environmental Impact Assessment is currently being used in over 100 countries as a main mechanism of keeping development projects in line with the concept of sustainable development.

The textbook definition of Environmental Impact Assessment (hereinafter referred to as EIA) as provided by Larry Canter is the "systematic identification and evaluation of the potential impacts (effects) of proposed projects, plans, programs, or legislative actions relative to the physical, chemical, biological, cultural and socio-economic components of the total environment."[1] The dominant philosophy behind conducting an EIA is that no matter how well-intentioned the developments are, human intervention is bound to have negative impacts on the environment and those are inevitable.[2]

In Principe 17 of the Rio Declaration, it is stated that EIA, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority. And many other following conventions have included principles emphasizing the importance of EIA. EIA was introduced for the first time in the world in United States in year 1969 by the National Environmental Policy Act (NEPA).[1] And the very first EIA was performed for the construction of Trans-Alaska Pipeline in the United States of America.[2]

Thereafter, it was accepted and proven that EIA is indeed a comprehensive and telling tool which could be instrumental for the upkeep of the principle of Sustainable Development, other States (as well as International Organizations) including those of South Asian region started to adopt the procedure after 1980s[3]. There are variations in how EIAs are being carried out around the world. The procedure can also be different from one another. But the main philosophy and intention behind the process stays the same.

However, the socio-economic background in South Asian countries have been a hindrance to the genuine practice of EIA. There are a number of reasons behind these failures and those reasons have kept South Asian countries from moving towards realizing their Sustainable Development Goals in the intended timeframes.

Hence, this paper is aimed at examining the impact of EIA on the Sustainable Development in South

Asian countries, specializing in Sri Lanka under the influence of its socio-economic background and intends to provide recommendations for the melioration of it.

2. Implementation of Environmental Impact Assessment in South Asia

Most South Asian countries, including small island nations such as Sri Lanka have exemplarily practiced the principle of Sustainable Development even before the "West" became aware of it. Ancient hydraulic civilization of Sri Lanka is a living piece of evidence for that sustainability factor as tanks and canals built more than two thousand years ago are still functioning with minimal repairing.[1] But the colonialisation of Sri Lanka along with the population spike in 1900s created a plethora of environmental issues. The development was so rapid that there was little to no attention given to the environmental protection or sustainability factor of those projects. Natural resources were exploited and the current generation has started to feel the repercussions of it. These practices continued the same way into the post-independence era and it remains to this date.

The practice of Environmental Impact Assessment has been considered widely in South Asia as their primary mechanism of environmental management to be used in both public and private investments.[2] Almost all the EIA processes in South Asian region is said to be based on the process introduced by NEPA. But the objectives of EIA in South Asia have proven to be different from those of the system enacted by NEPA.[3] The prime distinction is the fact that EIA in South Asian countries have specifically mentioned the need to present mitigative measures to be in line with the public and private investment projects. The significance has automatically transferred from the "environment" to the "investment project".

There could be multiple motives behind this logic. Obviously, almost all the States in South Asia are still in a developing or under-developed stage. Therefore, the focus of governing bodies has still not impactfully shifted to preservation of environment and sustainable development. On the surface of it, it seems as if the governments are giving prominence to rapid development which is rather short-term over long-term sustainability.

When looking at environmental assessment tools introduced by the NEPA, one can identify a couple of objectives those tools are meant to achieve:

i) avoid, minimize or compensate for the adverse biophysical, social and other effects of development projects

ii) protect natural systems and ecological processes to maintain their functions[4]

In order to achieve these objectives, the process of EIA should at least be similar to the originally introduced approach. But it has become a quite questionable practice in the South Asian region due to the lack of actual motive of both investors and the government to realize the aforementioned objectives through EIA.

2.1 EIA System in Sri Lanka

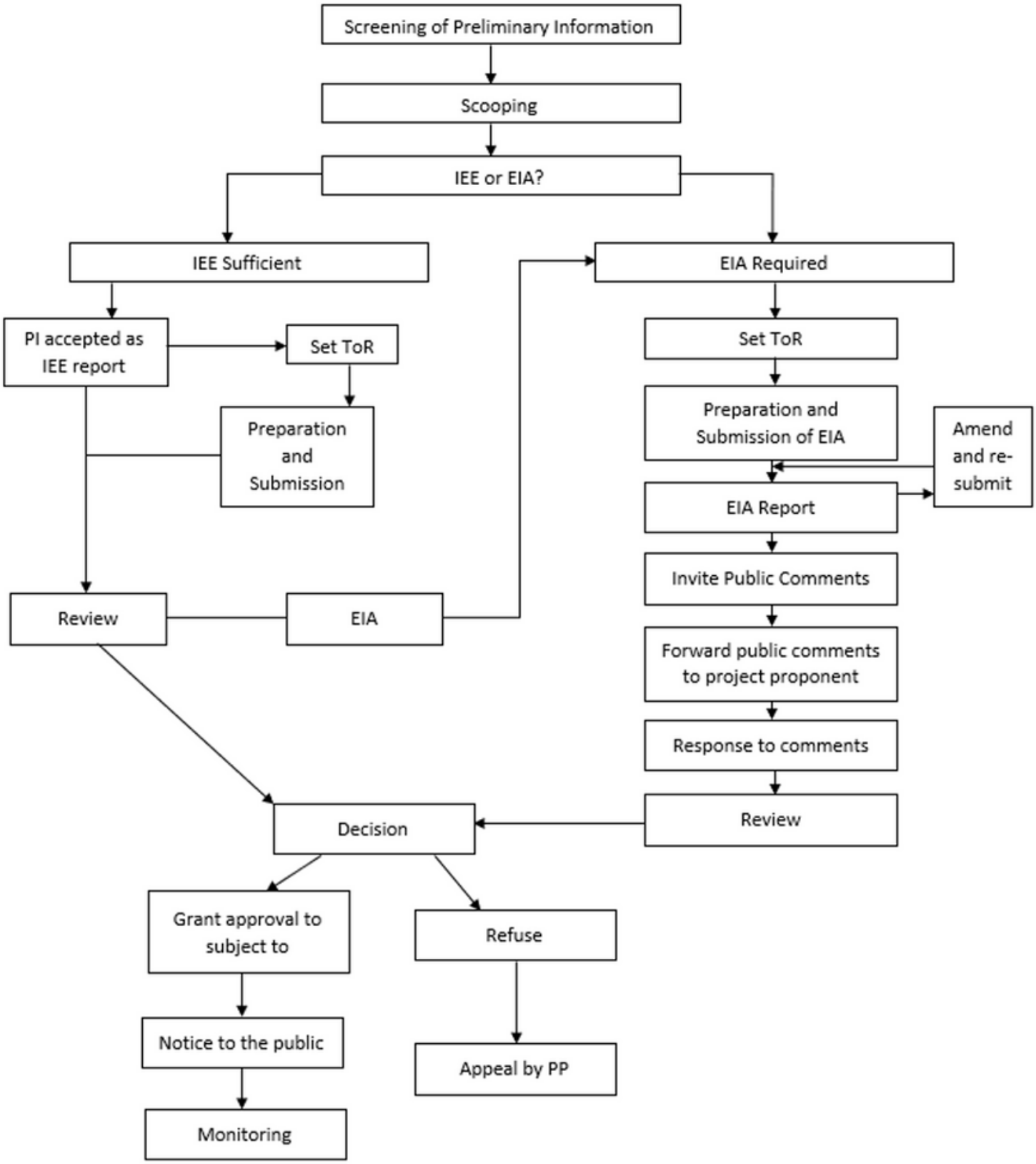
Factually, Sri Lanka was the foremost country in South Asia to enact environmental regulation which was the National Environmental Act No. 47 of 1980. But it did not consist of any powers relating to EIA. In the year 1981, Coast Conservation Act[1] included a legal framework for EIA. But still, it had limited application and was only effective in relation to the defined coastal zone.[2]

Finally, EIA was made mandatory to the whole country in 1988 by the National Environmental Act (Amendment) No. 56 of 1988. Publication of required orders and regulations subsequently made the process operative in its full potential in Sri Lanka in the year 1993[3] after the publication of Government Extraordinary Gazette No 772/22 of 1993 which contained the list of prescribed projects.

The process of carrying out an EIA has been described in the Part IV C of the National Environment Act (Amendment Act)[4] and Extraordinary Gazette abovementioned[5]. There are two levels of EIAs provided for Sri Lanka and it is based on the significance of environmental impacts.[6]

- Initial Environmental Examination (IEE)
- Environmental Impact Assessment (EIA)

The latter is more comprehensive and it is mandatory to be carried out if the anticipated environmental changes and damages are grave. There are many parties involved in the process but the main stakeholder is the Central Environmental Authority (CEA). Diagram 1 comprehensively lays out the EIA process currently practiced in Sri Lanka.


Screening of Preliminary Information
Scooping
IEE or EIA?
IEE Sufficient
EIA Required
PI accepted as IEE report
Set ToR
Preparation and Submission
Set ToR
Preparation and Submission of EIA
Amend and re-submit
EIA Report
Invite Public Comments
Review
EIA
Forward public comments to project proponent
Response to comments
Review
Decision
Grant approval to subject to
Refuse
Notice to the public
Appeal by PP
Monitoring

3. Why is the Implementation of EIA in South Asian Region below par?

The ideal method to identify the mishaps in the process of EIA in the South Asian Region is to compare it with the original process introduced by the NEPA.

3.1 Institutional Leadership

The governmental or non-governmental body responsible for the implementation of an effective environmental impact assessment is crucial to the proper application of it and achievement of its objectives.

In the United States of America, the EIA is carried out by a specialist federal agency capacitated under the regulations of the NEPA.[1] It carries the sectoral mandate to regulate related activities that may affect the environment and to supervise the process, carry out public consultations and more.[2]

However, the South Asian approach has been different in this case as well. The responsibility of hiring a proper agency to carry out an EIA lies on the shoulders of the investors and developers. They also have the duty of supervising the process. This approach has its pros and cons. For example, this could benefit the government in terms of expenses but, on the other hand, the outcome of the EIA could be less legitimate. The environmental authority of the country only plays the role of an "evaluator".[3] But, Bhutan and Sri Lanka are exceptional cases in this aspect as their legislation allow sectoral agencies to approve EIAs.

3.2 Statutory Limitations

The application and implementation of Environmental Impact Assessment has been troublesome in Sri Lanka for a number of reasons even though it is considered one of the most developed systems among the South Asian region.[4]

One of the major reasons is the fact that the list of prescribed projects provided in the Extraordinary Gazette abovementioned[5], limits the application to those on the list only. The list is exhaustive and it defines the prescribes projects according to their type and magnitude.[6] And this statutory limitation acts as one of the prominent constraints of carrying out EIA in a fruitful manner which ensures the sustainable development of the country. For instance, according to the relevant Extraordinary Gazette, when it comes to projects related to resettlement, an EIA should only be carried out only when the project exceeds resettling of 100 families[1]. This allows smaller projects to operate freely without any such restriction risking violations of this numerical limitation. And in a practical as well as scientific point of view, a guarantee cannot be given that resettlement projects of under 100 hundred families would not affect the sustainable development of the country. Further, these limitations create plenty loopholes for the development contractors as well as political influences to meddle with the process.

This is common to all South Asian countries except Afghanistan. The ground to be under the scrutiny of EIA is either the type of the project or the financial aspect of it.[2]

3.3 The Need of Expertise

Most South Asian countries lack the necessary expertise to carry out the EIA effectively. The interest of the Sri Lankan youth to go into this particular field has not been enough according to sources and therefore, the vacuum still exists making the process lengthier. On one hand, it slows down crucial development projects and on the other hand it makes one question the quality of the report created. According to available data, training courses implemented in Sri Lanka in collaboration with Central Environmental Authority has been able to train about 600 people over the years but it does not fulfil the requirements.[1]

There are many underlying rationales behind the lack of human capital in the industry in South Asia. The relatively diminutive attention and recognition given to the process of EIA (almost any process related to the preservation of the Environment, to be exact) is one of them. It is evident when looking into the development history of South Asia that, as opposed to their rich history of environmental preservation, the recent trends were not exactly in favour of sustainable development but only "development".

Further, the younger generations of South Asia do not seem to view a career path related to preservation of environment or related activism as a future prospect. These trends have to change as a whole in order for a country to achieve sustainable development.

3.4 Public Participation

The statutory provisions in a lot of South Asian countries[2] including Sri Lanka require the EIA to be released to the public in order the obtain public comments[3]. The only legal exception is Bangladesh.[4] But the accessibility of these reports to the public are very low. These reports are noticed in a newspaper only once and there are only a handful of members of the public who actually pay attention to such matters. Besides, the general public along with activist organizations have a tendency to twist and turn these reports willingly to halt or slow down the development processes.[5]This situation is actually common in the South Asian political background because a lot of ulterior political motives are at play during development projects. But this affects the subsistence of sustainable development in the country as well as the region. Public participation is also not actually a mandatory step according to legislation in Sri Lanka and Bangladesh.

Additionally, the step of public participation occurs rather late in the process of EIA. By then, a lot of crucial decisions in relation to the relevant project have already been made. It makes the public participation process informative and concern-raising but does not really have an impact on the actual report or the implementation of the development project.[6]

. Conclusion

All in all, it has come to light that the failure of the South Asian regional states to effectively implement the concept of Environmental Impact Assessment has been a major cause in them falling behind their targets of achieving Sustainable Development Goals.

And the impact this failure has on the overall conservation of environment is colossal and raises a plethora of concerns. Climate change is a worldwide issue that we, as a global community, are facing and it is mostly due to the mistakes of humans and their activities. Therefore, it is fundamental to take all the necessary steps to preserve the environment and its natural cycles so that the future of the earth becomes less bleak.

Hence, it is essential that States in the South Asian Region of the world take into account the voids of their legislation and other loopholes created due to their social, economic and political environments and fill those.

This can be done by aligning the objectives of the current EIA process with those of the ideal process introduced by NEPA. Encouraging public participation could divert the process to a better path because it allows the general public as well as otherwise uninvolved experts to voice their opinions.

Lastly, educating the younger generations about the preservation of environment and consequences of not doing so, from a small age, will be a plausible solution to this issue on the long-term. It will not only create a generation aware of their activities but also spark an interest in them to take up a career path related to that providing more expertise to the region.

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[18] ibid
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[20] Government Extraordinary Gazette No 772/22 1993 (Sri Lanka)
[21] ibid
[22] Hennayake (n 2) 58
[23] Lima (n 7) 2
[24] Hennayake (n 2) 59
[25] Lima (n 7) 3
[26] Section 23BB (3) National Environment Act (Amendment) Act No. 56 1988 (Sri Lanka)
[27] Public participation in Bangladesh is up to the discretion of Director General of the Department of Environment
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8

THE CITY IN THE UNIVERSITY, THE UNIVERSITY OF CITIES

Marco Tarallo, Italy

The city is the main contemporary place where problems and social contrasts are clearly manifested. Injustices and inequalities take on a geographical concreteness in physically walking the streets and neighborhoods and in identifying their economic and symbolic relationships[1]. International studies show that some structures, due to their nature and activities, are capable of modifying these relationships and help healing geographical and social wounds. The university is one of them[2]. In Italy, a policy aimed, albeit in a disorderly way, at reviving territories was precisely the dissemination, in the last century, of new universities in areas where they were traditionally absent[3]. The establishment, twenty years ago, of new departments in Novoli, a district of Florence, was part of the wider redevelopment of the area. Last October, the opening of a new pole of health professions in Scampia, a well-known suburb of Naples, made headlines.

The University therefore has beneficial effects for the places where it is located. The resulting industries and services, the attraction of students and highly qualified professionals necessary for teaching and administration, the production of knowledge and original high-value skills, the protection of legality that an institution of higher education guarantees, all this and more acts as a factor of dynamism for the territory and opens up new spheres of opportunities for the inhabitants[4].

However, the University alone does not constitute a guarantee of positive urban transformation. The University is a multiplier of resources and perspectives but in a hostile or non-permeable context it will see its effects significantly reduced[5]. The most virtuous cases are evident in the so-called university cities, those centers by tradition, by vocation but also by dimension interdependent on their own universities, with which they weave essential relationships of interest and identity. In these cases the mutual benefits are evident and can be reconstructed historically, as in the cases of Bologna and Padua. Other cases, more common and indeed typical of the Italian panorama, see the University as one actor among many in city life, often not among the most significant ones and sometimes in a state of real, however golden, isolation. There are also seats of ancient and prestigious universities, which do not have the characteristics of university cities because, even in the presence of important poles, their collective life is influenced by other interests and balances. Cases of this type are Naples, Rome, Pisa or Florence. These important universities experience an episodic, or punctual, or in any case unfavorable relationship with the city for their communities of scholars and workers[6].

The resolution of these problematic nodes is a concrete and possible way for the improvement of critical issues of the contemporary city, in the perspective of a civil ethics adopted by public and private decision-makers and by social actors.

In addition to the inequalities already mentioned, the contemporary city experiences the spread of forms of functional illiteracy as elements of crisis, in correspondence among other things with partly new forms of poverty and increasingly complex collective relationships, and which therefore nourish the need for a literacy of citizenship no longer limited to the classic "reading, writing, calculating" but extended to higher skills in linguistic understanding and critical analysis. Pressures on the financial resources of municipalities and universities are another problem which is particularly acute, with direct consequences on public management and the guarantee of rights. A final criticality for some cities is constituted by the concentrated and massive invasion of visitors, who contribute to the development but in a disordered, superficial and potentially harmful way to the well-being of the inhabitants.

A governance of the current dynamics is possible in the construction of a different relationship between the city and the University. The University, due to its Italian characteristics, has at its disposal, on the one hand, premises and structures scattered throughout the city and sometimes suburban territory; on the other, high-value human capital both in training and specialized. However, it is constantly looking for financial support, project collaborations and collective recognition. The city as a political entity has political and regulatory tools to intervene in depth in the local fabric. Above all, it has the increasingly urgent need to respond to contemporary challenges: psychophysical ailments, urban congestion, widespread illegality, the fragility of a shared public culture and ethics, existential precariousness (work and identity) of social groups, touristification[7].

The meeting of these two dimensions has in itself the possibility of a new systematic model of co-management of problems. On the one hand, opening the universities, their spaces, their structures to citizens and visitors would allow the city to truly enter places of higher education, creative thought and original knowledge. Careful planning of agreements between the rectorate, departments and decision-makers, private entities, the third sector and associations, a complete remodeling of university functions, timetables, services, spaces would result in a movement open to all, with numerous benefits provided a respectful harmonization with the traditional aims of the University. The co-managed organization of a wider and more accessible cultural offer by means of an all-out alliance between the city and the University in the territory of the latter would result in a formidable platform for welcoming the aforementioned contemporary problems. The organization of itineraries, seminars, round tables, presentations, musical and experiential events in the University by means of its human, structural and intangible resources would represent an expansion and a resignation of the urban entertainment offer, a perspective of multilevel free time[8].

The free use or at a social price of dynamic, creative and original culture would intervene on the problems of the contemporary city. It would allow for a work of cultural redistribution in favour of the social strata for which culture is difficult to access even as an aspiration, the psychophysical and existential criticalities of the fragile members of the community would find an outlet and resolution tools in an environment designed to welcome questions of meaning, a meeting of diversities, recognition of value.

The gaps in the skills for an informed, self-aware and active public life would find relief in a cultural offer felt less and less as hostile and separated from everyday life, more and more as a right, an amusement, a significant part of life, in a true exercise of democratic education where all the participants would discover themselves as non-passive actors. Ultimately, this set of policies would affect the tourist overcrowding of certain specific areas, in favour instead of a dilution on the territory of visitors in correspondence with the university structures, which would be increasingly co-present, due to their building characteristics intertwined with the urban phases of the city, in the historical centers and in the developing suburbs, with considerable benefits also for newly attractive neighbourhoods. The essay of experiences of this type is already present today in the initiatives of unfortunately only temporary opening of the universities to the citizens, in correspondence with the 'nights of the researcher', with the days of free access and with the third mission initiatives[9].

The city would therefore enter the University, obtaining essential possibilities for an innovative approach to civil problems. By placing itself in co-management with it, the city would obtain this result even at much lower costs than traditional and unilateral initiatives, because it would take advantage of an already existing and shared wealth of resources. On the other hand, the University would find itself more properly becoming the University of the city than today, because it would no longer be a divided and secluded place, the seat of knowledge and of a community perceived with distrust, rightly and wrongly, as elitist, with all the current consequent problems in the relationship between knowledge and society. Instead, it would become a recognized and supported place, economically but also in terms of reputation, by those actors who would inhabit it, from individual personalities to public and private bodies, associations and civil bodies. In it, that political and democratic role of education to shared public morality, to the lowest common denominators of collective life, would be recoverable. There the common and daily practice of the construction and diffusion of a common civil ethics would take place, which would touch the various critical spaces of our contemporaneity[10]. From the perception of a common good, to the relationship with communication, to the value of the immaterial dimensions of man, up to the construction of a new feeling of «public happiness», the University would truly belong to the city because it would be the place where the members of society would graft the dialogic and progressive construction of the common plural and democratic way of living, the cultural and sentimental edification of the community into a real, visible, and concrete process of «everyday plebiscite».

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REPORTS

8

RELIGIOUS FREEDOM IN INDIA-TOTAL OR TITULAR?

Annika Anna, India

India is a highly diverse society. A country best known for its unity in diversity is the birthplace of some religions and a home to many for thousands of years. The Present Constitution of India ensures freedom to profess, practice and propagate all beliefs and religions. The freedom of religion and faith as a right is also mentioned in the Universal Declaration of Human Rights, 1948. But do these rights translate into reality? This paper centres on the Indian Christian populace and seeks to find an answer to that question.

OBJECTIVES

1. To find out the laws and codes concerning religion- Indian and International.
2. To compile the data received through a survey of the viewpoints of the minority community in India (Christians)
3. To give an analysis of how human rights have transcended into actual reality concerning religion.

RESEARCH QUESTION

Is Religious Freedom in India total or titular?
Does the Indian Christian populace feel threatened due to the difference in their faith as to the majority?

RESEARCH DESIGN

The research is inductive. A questionnaire was made and data sampling was done through a survey. Personal interviews were also conducted with the people at the forefront.

INTRODUCTION

The word "religion," which comes from the Latin word *Religare*, means "to tie, or to bind fast." One can think of explaining religion as holding on to or being tethered to the divine with a bond through this etymology. Humans have a natural inclination to acquaint with and bond with the divine.
Religion, belief and faith bring a sense of structure and an array of hope to multitudes across the globe. It enables them a desire to look toward a pleasant future and helps them feel secure amid arid times. It also helps them relate and connect with people with similar beliefs. In the Bible, the greatest commandment is to love the Lord. The second greatest is to love thy neighbour (Matthew 22: 37-39). Love for God and service to humanity are of utmost importance in Christianity. These tenets help bring together the people of God for a benevolent cause.

However, the main rationale behind religion seems to be flustered with a surge in the constriction of liberties concerning the faith. Religious Freedom has been a reason for conflicts and wars across groups, communities and nations with tragic consequences. Religious minorities are often prejudiced in their native soil as they are perceived to be of

different identities as compared to the majority. They are vulnerable in their homelands to resentment and intimidation. Bloodshed, disruption and thousands of lives being compromised in the name of religion is no new information. Religion has been a reason for conflict since time immemorial. But more so, how much more can religion be a reason for bringing peace and harmony to the world? The possibilities are endless.

India, the birthplace of many major world religions, is also an ethnic mosaic. It has always taken pride in its diversity. The makers of the Indian Constitution were percipient of the inconsistencies that could result from these differences and endeavoured to frame an inclusive and just institutional structure for an independent India. The Preamble to the Indian Constitution speaks of liberties of thought, expression, belief, faith and worship; available to every individual belonging from all walks of life.

Yet in recent years, there is a rise in bigotry against religious minorities. The institutional agencies and organisations have meddled around the tenets of constitutional liberties under the pretence of safeguarding the rights of majoritarian sects. There has been an escalation of enforcement of policies with an agenda of fortifying the Hindu Nationalist objective. Around eighty per cent of people in India belong to the majority religion, yet they are being deluded into thinking that their religion and identities are in grave danger of extinction by the marginal sections of different religions. As for the side-lined sections belonging to other faiths, many watchdog organisations report a steep rise in the increasing intolerance towards them. Their rights become ostensible and their interest is at peril. There are many

For research, a survey was conducted among the Indian Christian populace enquiring several questions relating to the liberties enjoyed in their country. It was found that most Christians feel unsafe due to the increasing factionalism in the country. The increasing virulence is a matter of grave concern for the protection of the interest of minorities.

LEGAL PROVISIONS RELATING TO FREEDOM OF RELIGION AROUND THE WORLD AND IN INDIA

INTERNATIONAL PROVISIONS:

Article 1 of the UN Declaration of Human Rights, 1948 reads "All human beings are born free and equal in dignity and rights". Identifying the precise point of time when rights evolved is not possible. However, one thing that we can know is that rights have been since time immemorial. Human rights came to be mentioned as Natural Rights in early modern Europe. John Locke, Austin, Bentham, Thomas Hobbes, Grotius, Hugo and many more have laid the foundation of the legal framework of rights that we now possess.

The inclusion of faith in human rights has been a topic of debate for some intellectuals and academicians. In 1993 the Human Rights Committee, an independent body of 18 experts selected through a UN process, described religion or belief as “theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.”

The Common thoughts, precepts and values concerning religion and beliefs were arranged and codified through treaties, agreements, settlements, accords and declarations from the early twentieth century.

· **Universal Declaration of Human Rights (1948)**:- The United Nations recognized the importance of freedom of religion or belief in the Universal Declaration, **Article 18** of which states **"Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his [her] choice."**

· **The International Covenant on Civil and Political Rights (Civil and Political Covenant)**:- **Article 18** of the Civil and Political Covenant is analogous to the article mentioned in the Universal Declaration. It is broadly perceived to be one of the most important—if not the most important—articles on freedom of religion or belief. It reads as:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their convictions.

· The **Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief**:- This Declaration was adopted on 25 November 1981 by the General Assembly as a resolution. Article 4 of the Declaration is specifically of great value concerning religious liberty:-

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise

PROVISIONS AT THE REGIONAL LEVEL:-

There are several similar specialized human rights instruments at the Continental or Regional level. One could find many agreements, declarations and conventions related to the matter in question:

EUROPE-

· Council of Europe:- Article 9 – Freedom of thought, conscience, and religion, Convention of protection of Human Rights and Fundamental Freedoms, Rome 1950
· European Union: Article 10 – Freedom of thought, conscience and religion Charter of Fundamental Rights of the European Union, 2000; Organisation for security and cooperation in Europe (OSCE), Conference on Security and Cooperation in Europe Final Act, Helenski 1975 and concluding document of Vienna meeting 1986 of representatives of the participating states of the conference on security and cooperation in Europe.

AFRICA-

· African Union: African Charter on Human and People's Rights, adopted June 27, 1981.
Article 8
Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

AMERICAS-

· The organisation of American States (OAS): American Declaration of the rights and duties of man, adopted at Bogota, 1948 (articles 3 and 22)

American Convention on Human Rights, adopted at San Jose, November 22, 1969, (Article 12 – Freedom of Conscience and Religion)

ASIA-
Although one cannot find many prominent conventions in Asia, there are still some agreements:-
· **Conference Declaration on Freedom of Religion or Belief in Southeast Asia** 1 October 2015, Bangkok, Thailand (Organised by International Commission of Jurists)

· **(SEA-AIR) project: (Southeast Asia: Advancing Inter-Religious dialogue and Freedom of Religion or Belief)** The SEA-AIR project is implemented in consortium with The Network for Religious and Traditional Peacemakers, Finn Church Aid, Sathirakoses Nagapradipa Foundation, Islamic Relief Worldwide, World Conference for Religions for Peace Inc., and World Faiths Development Dialogue, which was the lead organization in drafting the four policy briefs. This project was funded by the European Union.

INDIA

· Following its independence, the **Preamble to the Constitution** was amended in 1976 to include the word "secular". It has also been ruled as the basic structure of the constitution by the Supreme Court of India.

· The **Constitution of India** guarantees the right to freedom of religion to not only individuals but also religious groups in India. This is enshrined in Articles 25 to 28.

· **Article 25 (Freedom of conscience and free profession, practice, and propagation of religion**) This article guarantees the freedom of conscience, the freedom to profess, practice, and propagate religion to all citizens.

· **Article 26 (Freedom to manage religious affairs)** This Article provides that every religious denomination has the subsequent rights, regarding morality, health, and public order

§ The right to form and maintain institutions for religious and charitable intents.

§ The right to manage its affairs in the matter of religion.

§ 3. The right to acquire immovable and movable property.

§ 4. The right to administer such property according to the law.

· **Article 27 (Freedom as to payment of taxes for promotion of any particular religion)**

According to Article 27 of the Constitution, No taxes shall be levied on the proceeds which are directly used for the promotion and/or maintenance of any particular religion/religious denomination.

· **Article 28 (Freedom as to attendance at religious instruction or religious worship in certain educational institutions)**

This article authorises educational institutions that are maintained by religious groups to disseminate religious instruction.

§ This provides that no religious instruction shall be provided in State-run educational institutions.

§ Educational institutions administered by the State but that were established under any endowment or trust which requires that religious instruction shall be imparted in such institutions are exempt from the above clause (that no religious instruction shall be provided).

§ Any person who attends any educational institution recognized by the State or receiving State aid shall not be required to participate in any religious instruction that may be imparted in such institution, or also attend any religious worship in such institutions unless he/she has given consent for the same. In the case of minors, the guardians should have given consent for the same.

· The **Ministry of Minority Affairs, the National Human Rights Commission (NHRC)** and **the National Commission for Minorities** have been established by the governmental institution to inspect religious discrimination and to make recommendations for the redressal of grievances. These institutions do not have any power on their own. However, their instructions are generally followed by the Central, State and local establishments. These organizations have assisted in the investigation of many cases of religious tension, including the establishment of the implementation of "anti-conversion" bills in numerous states, the 2002 Gujarat violence against Muslims and the 2008 attacks against Christians in Orissa.

CONTEMPORARY CIRCUMSTANCES- WORLD SCENARIO

The United Nations and similar organisations have acknowledged the principle of religious liberty for more than a semi-century and have taken measures for the consolidation of the principles through guidelines and policies. But then again, concurrently one could find from the reports of many watchdog organisations, interest groups and journalists around the world on persecution and discrimination of minority groups, sectarian
hostilities, that the goal is far from being accomplished.

A report published by Pew Research Centre in 2019 indicates that both government-reinforced restrictions on religion and communal aggression concerning religion have amplified around the world. The report traces levels of religious restriction across five regions, including the Americas, Asia-Pacific, Europe, Middle East-North Africa, and sub-Saharan Africa. Concurring to the report, government restrictions on religion have increased around the world, with more laws and policies impeding religious practice and governments favouring certain religious factions above others.
In some states with atheism at its epicentre of ideology, (take for example China, and North Korea) the states inflict the minorities as they feel exposed and threatened by their beliefs of someone being superior to them. For other states, the governments play the majority card to their unfair political advantage claiming to defend and uphold the identities of the majority.
Apart from institutional persecution, one could find the prevalence of Non-governmental hostilities in some countries like Nigeria, India, Pakistan, Iraq, and Syria. The predicament of religious persecution is alarming and increasing. People in six of the world's nine most populous nations (China, India, Indonesia, Pakistan, Nigeria, Russia) — some 3.7 billion people total — are not free to exercise the most fundamental freedom of conscience and address the transcendent as they so unreservedly desire. In such nations and many smaller ones, people cannot worship freely, let alone live a life of faith.
Religious freedom is in jeopardy on an extensive scale. It is a primary and fundamental human right that determines how individuals, families and communities acknowledge the excellence of the divine. We, as advocates of change in society, must combine efforts for a free society and demand that governments and people respect the liberty of religion, belief, faith, and conscience for every individual.

CHRISTIANITY IN INDIA- WORKS AND CONTRIBUTION

If we look at the state of affairs in India, one could find a series of persecutions of Christians in Indian history. Christianity has been regarded as an alien religion, newly introduced in the country by the British and used as an instrument for the advancement of their imperialist and colonialist agendas. But nothing could be further from the truth. Christianity in India is as ancient as Christianity itself!

Introduction to Christianity: - According to the records of St. Thomas Christians, Christianity was introduced in the Indian Subcontinent by Thomas the Apostle, who arrived in the Malabar region (Presently, the state of Kerala) in 52 AD. The St. Thomas Christians were called *Nasrani*, which means the followers of Jesus the Nazarene in the Syriac language. St. Thomas, after spending years spreading the good news in the sub-continent was martyred in 72 AD and buried in Mylapore. The Church is believed to be firmly consolidated by the 6th -7th centuries, with a strong influence from the Eastern Church. The Indian Christians were greatly influenced by the Syrian way of worship and used Syriac as their liturgical language.

Catholicism in India: -
The Catholics are known for their good work towards society. Acts of Charity, like the establishment of Schools and hospitals, are famously associated with their missions.

The Portuguese missionaries introduced the Latin Catholic Church. The missionaries of the different orders (Franciscans, Dominicans, Jesuits, Augustinians, etc.) accompanied the Portuguese Conquerors and mobilised along the coastal region of India, where the Portuguese dominated.

The earliest mention of Catholic Missionaries in India is of John of Monte Corvino, a Franciscan sent to China to become prelate of Peking in around 1307. He travelled from Persia to India by sea in 1291. He arrived in the Madras region and preached for thirteen months and baptised about one hundred persons.

St. Francis Xavier, the pioneer Jesuit missionary to India- arrived in Goa, the Portuguese capital on 6th May 1542. He belonged to the Society of Jesus, which was founded by St. Ignatius. He served in South India and Ceylon (Sri Lanka) for almost three years and built 40 churches around the during his ministry. He was much loved by the children as he gave many contributions to their development. His successors, such as Robert De Nobili and Matteo Ricci followed his footsteps, rendering their service for the greater glory of God. Acts of Charity, like the establishment of Schools and hospitals, are famously associated with their missions.

Robert De Nobili, a Jesuit Missionary came from Portugal. He worked for the unification of the higher and depressed castes. He brought them together under one roof which was a great accomplishment. He contextualised his teachings and greatly contributed to the Tamil culture.

When talking of the contribution of the Catholics to Indian Society, one can never forget Mother Teresa, an Indian-Albanian Nun, Who founded the Missionaries of Charity in 1950. Mary Teresa Bojaxhiu founded her congregation and in 2012, it has grown to be prevalent in 133 countries and consists of four thousand and five hundred nuns. Her organisation started and even continues in the present to cater to the marginalised, the sick and the homeless. Their house people dying of HIV/AIDS, Leprosy and even Tuberculosis. Their organisation rubs soup kitchens, dispensaries, portable clinics, orphanages and schools throughout India, and even beyond.

Mother Teresa received much recognition for her contribution to society. She received the Ramon Magsaysay Peace Prize in 1962 and even the Nobel Prize in 1979.

Protestant Missionaries: -

The Protestant missions worked throughout India during the latter half of the second millennium. Many Lutheran, Baptist, Methodist and other denominations worked in the country.

Bartholomew Ziegenbalg, a Danish Lutheran Missionary arrived in 1706 at the age of 23. He prepared the Tamil-German Lexicon and also translated the New Testament to Tamil straight from Greek.

In 1793, **William Carey**, an English Baptist Minister, came to India as a missionary. Carey and his family secretly landed in Calcutta to begin mission work through a boat. He worked in Serampore, Calcutta and established the Serampore College. Named the father of Modern Missions, He also translated the Bible into Bengali and Sanskrit, continuing with these labours until he died in 1834.
Carey also had a significant contribution in criminalising the Social evil of Sati in 1829, a custom of burning a Hindu woman to death on the funeral pyre of her husband. He translated the bible into 6 languages and the New Testament into 23. He established 126 schools in and around Bengal. In Carey's lifetime, the mission printed and distributed the Bible in whole or part in 44 languages and dialects. He's also known to translate Indian books like the Ramayana, which is a Hindu epic, to English.

It is noteworthy to emphasise that although William Carey was an English Missionary, he found shelter in the Danish Colony.
The British East India Company delimited the subcontinent politically and militarily and banned Christian missionaries from their provinces.
Missionaries were not supported by the British Company. They were believed to hinder the commercial advancement of British imperialism in the country due to their revolutionary works for change in society. The East India Company associated and conjoined with the Royals and the elite classes of the country. The elites were displeased when the missionaries highlighted the social evils prevailing in the society, particularly, the ostracization of the depressed castes and the subjugation of women in their social order.

The All India Conference of Indian Christians (AICIC) played a pivotal role in the struggle for independence against the British.
They advocated for the attainment of Swaraj and even opposed the partition of India based on religion into India and Pakistan.
The AICIC also was opposed and turned down the opportunity for separate electorates for Christians. They asserted that the faithful "should participate as common citizens in one common, the national political system"

The All India Conference of Indian Christians and the All India Catholic Union formed a working committee with M. Rahnasamy of Andhra University serving as President and B.L. Rallia Ram of Lahore serving as General Secretary. In the joint committee, they framed and prepared a 13-point memorandum for religious freedom for both organizations and individuals. This memorandum was sent to the Constituent Assembly of India, and in turn, their contributions came to be ruminated in the Constitution of India.

PRESENT SITUATION

The present situation is alarming. The Pro-Hindutva Propaganda has been on an all-time rise since the 2014 elections and the ruling of the BJP (Bhartiya Janata Party). Christians are targeted for their faith in many areas. Their activities are closely monitored and scrutinized minutely. Although the Constitution ensures the freedom to profess, practice and propagate one's religion, the state has been making anti-conversion laws on the pretence of safeguarding the interest of the majority.

Human Rights Watch in 2019 expressed that numerous killings against religious minorities in India have gone unpunished because of collusion or indolence.

In the year 2020, the **United States Commission on International Religious Freedom (USCIRF)**averred that the BJP Government under Narendra Modi, the Prime Minister of India "allowed violence against minorities and their houses of worship to continue with impunity and also engaged in and tolerated hate speech and incitement to violence". The commission had recommended for the past three years to label India " a country of particular concern" which is the lowest group in the classification of countries based on religious liberty

The World Watch List has ranked India the 10th country after Iran in its 2022 report and expresses the intensification of the persecution of Christians. The World Watch List is an annual report prepared and published by the World Watch Research team of the Open Doors Organisation. The list ranks 50 countries where it is most difficult to profess and practice the Christian Faith. The research team surveys the violence against Christians as well as religious freedom for Christians in five areas of life, namely, private, family, community, national and the Church. The reports stated that anti-conversion laws and the pandemic proved to be a double whammy for Christians. They were deliberately overlooked in some areas when aid and food were distributed during the pandemic.
The report states that the Hindu extremists regard Christians and other religious minorities as true Indians and aim for the purification of the nation of their impact and existence. The extremists use systematic and often hostile targeting of Christians and other minorities. Their one weapon is the misuse and exploitation of social media to spread misinformation and strife among the citizens.

The Citizenship Amendment Act, of 2019 was an amendment to the Citizenship Act of 1955 and was enforced on January 10, 2020. It facilitates fast-track citizenship to six

undocumented non-Muslim communities from Pakistan, Bangladesh and Afghanistan. The non-Muslim refugees will be given citizenship after residing in the country for five years, instead of eleven. It approved a National Population Register (NPR) towards a countrywide National Register of Citizens (NRC). Three United Nations Rapporteurs forewarned that omission from the NRC could ensue in "statelessness, deportation and prolonged detention." This amendment clearly shows the discrimination of minorities based on their religion.

ANTI-CONVERSION LAWS IN INDIA

In the Pre-independence Era, some princely states had anti-conversion laws to protect their Hindu Identity. Jodhpur, Patna, Bikaner, Surguja, Kalahandi, Udaipur, and Kota were princely states with these laws.

Post Independence, The Government of India has proposed a national anti-conversion law several times. In 1954 the first bill was proposed and was called the Indian Conversion Bill. The rationale behind this bill was to license the missionaries, and anybody who gets converted should be registered with the Government officials. However, the bill did not get the required support in Lok Sabha. Since then, the bill has been renamed as Backward Communities Bill, (1960) and. Freedom of Religion Bill (1979) but hasn't been passed since the lack of a majority in the legislatures.

Presently, 10 Indian states have passed anti-conversion laws in the country and are being proposed more. One amusing thing worthy of being noted is that they are named "Freedom of Religion" laws and not "Prohibition of Religious Conversion or anti-conversion". Most of the anti-conversion laws consist of three parts

- Ban of forceful conversion allurement
- Notice period
- Punishments

India, in harmony with articles 18 and 19 of the Universal Declaration of Human Rights added Article 25 in Part III of the Constitution as a Fundamental Right. Article 25 of the Constitution cannot be challenged or misinterpreted by any means. The Constitution protects the right to freedom of religion to its citizens, individuals and organisation. The Anti-Conversion laws are promulgated on the pretence of prevention of forced or induced conversions.
The US State Department has said that the rise in anti-conversion laws in India by several states is seen as the consolidation of 'Hindutva' (ideological Hindu Nationalism).

Orissa Freedom of Religions Act of 1967.

The state of Orissa was the first to enforce such a law. The law states that "no person shall convert or attempt to convert either directly or otherwise any person from one religious faith to another by the use of force or by inducement or by any fraudulent means nor shall any person abet any such conversion." The punishment could be up to 1-year imprisonment and a fine of 5000 rupees or 2 years of imprisonment and 10,000 rupees fine in case of a woman, minor or person belonging to a scheduled caste/tribe.

Chhattisgarh Religion Freedom (Amendment) Act, (1968 and 2006)

This act requires those wishing to convert their religion to seek the permission of the local district magistrate 30 days in advance. The district magistrate will accept or reject the request after studying the case. The legislation is widely seen as a move by the BJP government to check the alleged growing influence of Christian missionaries in vast tribal areas in the north and south of the state.

Madhya Pradesh Freedom of Religion Act of 1968

The Madhya Pradesh 'Freedom of Religion Act' requires that a convert produce a legal affidavit that s/he was not under any pressure, force, or allurement. The conversion was by their own will after a thorough evaluation of the said religion. According to this law, anyone who writes or speaks or sings of 'divine displeasure' (with an intention to induce forced conversion using threat) can be imprisoned for a period of up to two years and fined up to five thousand rupees.

The Christians challenged these laws under the ground of the law being a violation of their fundamental right under Article 25 and protested on the basis that evangelisation or propagation was an important tenet of their religion. However, the Supreme Court upheld the validity of the laws and did not consider it to be ultra vires stating that "What is freedom for one is freedom for the other in equal measure and there can, therefore, be no such thing as a fundamental right to convert any person to one's religion".

Arunachal Pradesh Freedom of Religion Act of 1978

The Arunachal Pradesh government enacted this Act to protect the tribals of Arunachal Pradesh from forced conversions of any kind.

Tamil Nadu Prohibition of Forcible Conversion of Religion Bill 2002

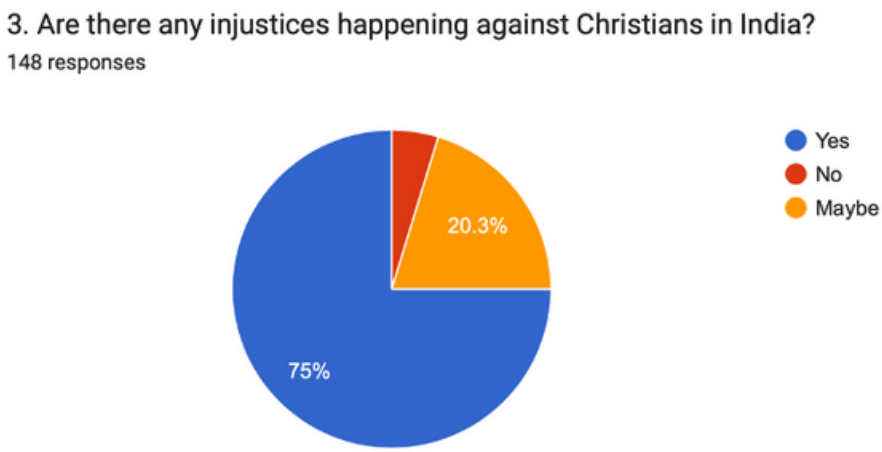
The BJP-led government passed the Tamil Nadu Prohibition of Forcible Conversion of Religion Bill 2002 it was soon repealed by the Jayalalitha government came to power.

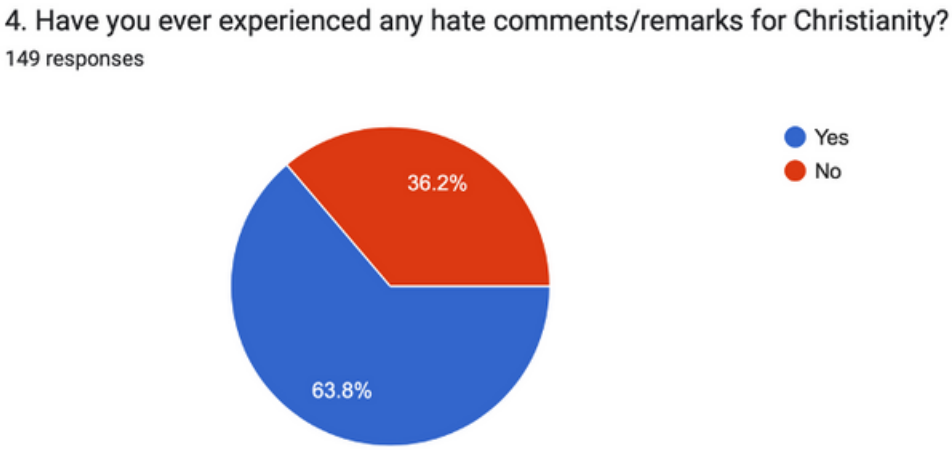
Gujarat Freedom of Religion Act 2003

This Act prohibited the conversion due to inducement or coercion. The act was passed by Narendra Modi, the then Chief Minister of the state and called it a central achievement of his election to office.

2. Which denomination do you belong to?

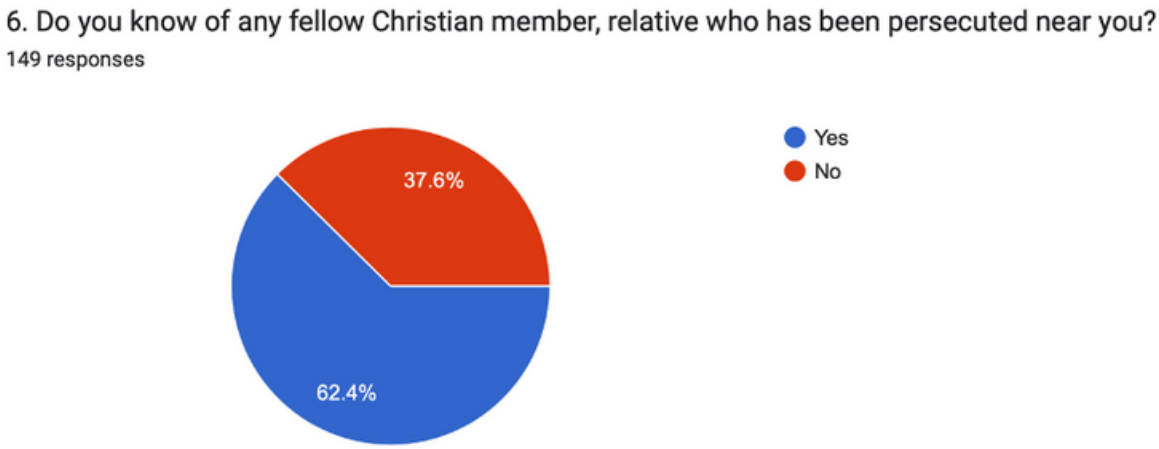
The individuals surveyed were from various denominations like the Roman Catholic, Protestant, Church of North India, Church of South India, Methodist, Pentecostal, Baptist, Brethren, Assemblies of God, Orthodox, Brethren, Marthoma, Evangelical, Syro-Malabar, Malankara Marthoma Syrian Sabha, Jacobite Syrian, and Charismatics.

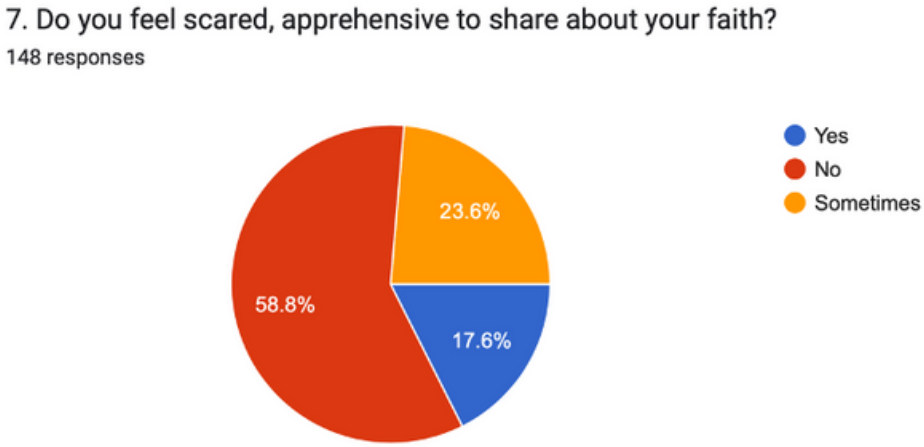


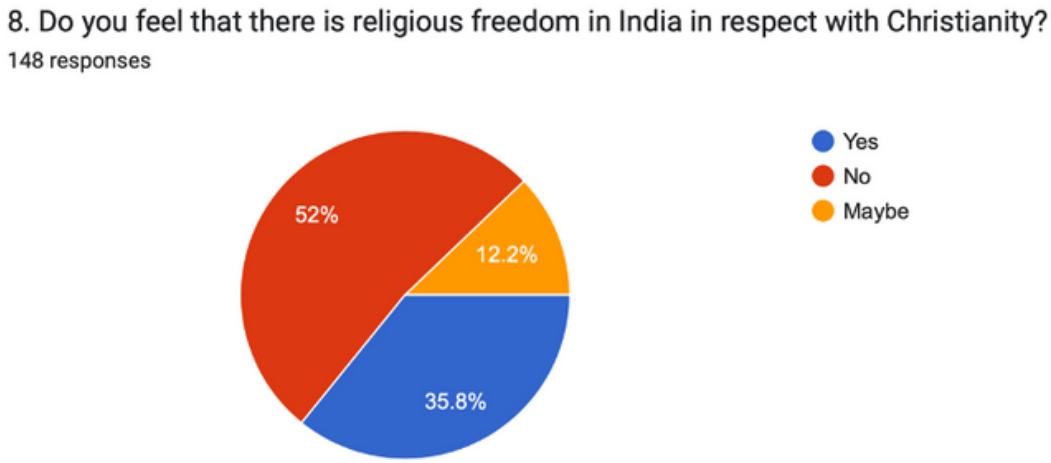


5. Have you ever been threatened because of your faith? (Please mention details if yes)

Many respondents were never personally threatened. The Persons were threatened said they were beaten, threatened by religious fanatics, put false charges against and interrogated, threatened in school, blamed, abused and beaten while being video recorded, mocked and made fun of their beliefs.

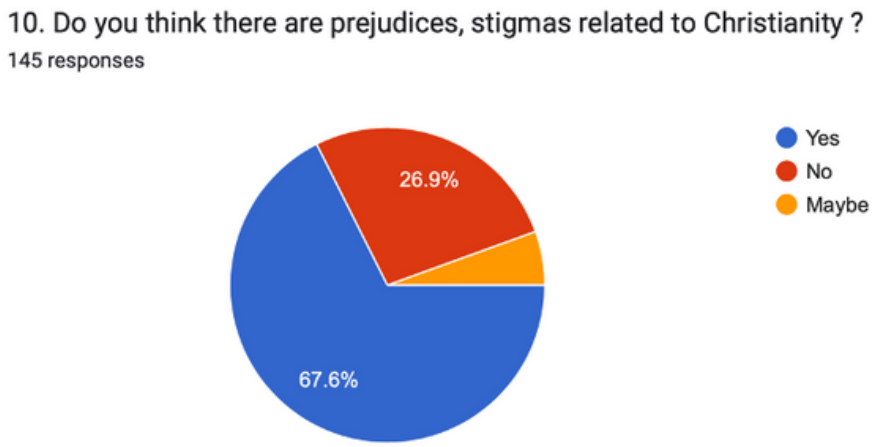






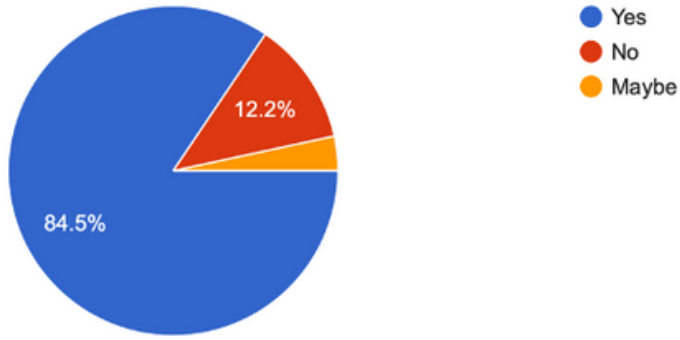
9. Has your church ever been persecuted? (Please mention experience if yes)

There were many negative responses to this question. However, the respondents whose church did face persecution said their churches were attacked by stones, threatened with guns and knives, surrounded by 300 fanatic people, their priest was tortured, put false allegations of forceful conversion by Hindutva people, had violence in their church with a police case filed, their masses were disrupted and made to vacate the rented place of worship service and stopped from completing their church construction.



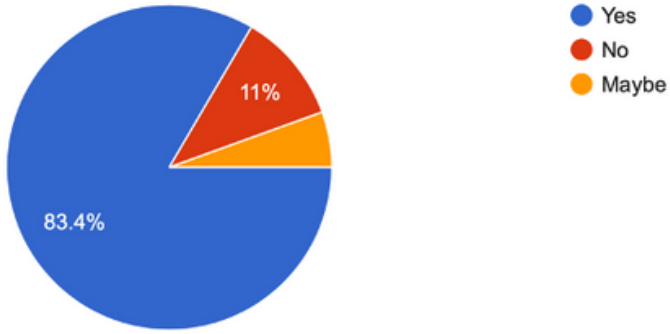
11. Do you feel that there is any resistance to people from other religions converting to Christianity in India?

148 responses



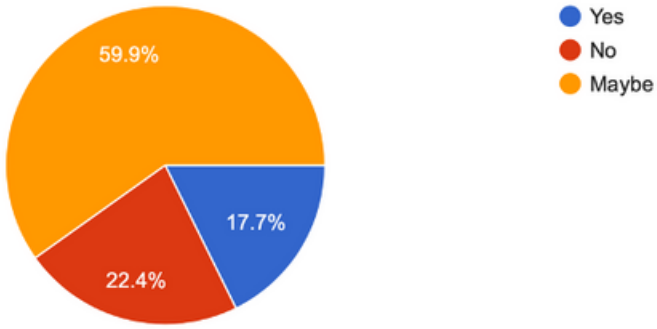
12. Do you think the new converts to Christianity get targeted for their faith in India?

145 responses



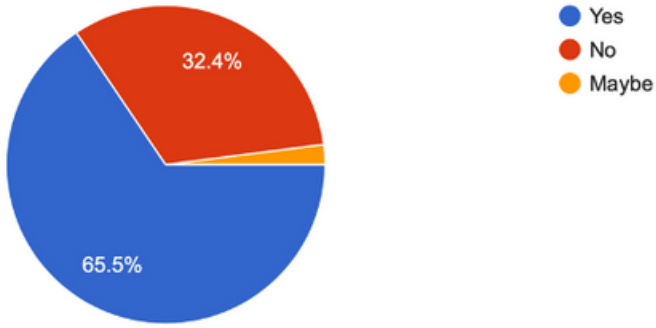
13. Do you feel that if you report to the police about any harassment, attack or persecution, they would cooperate?

147 responses



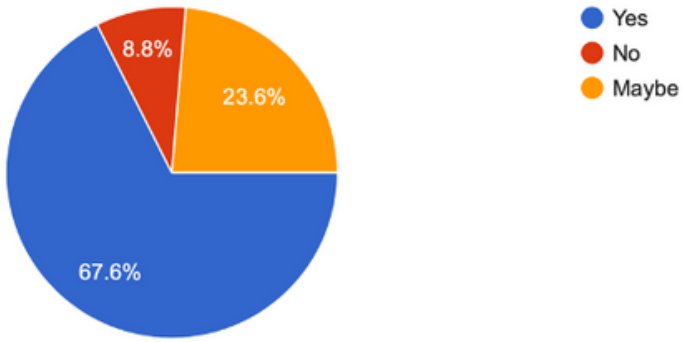
14. Do you think that people from other religions in your neighbourhood have negative mis-conceptions about Christianity?

148 responses



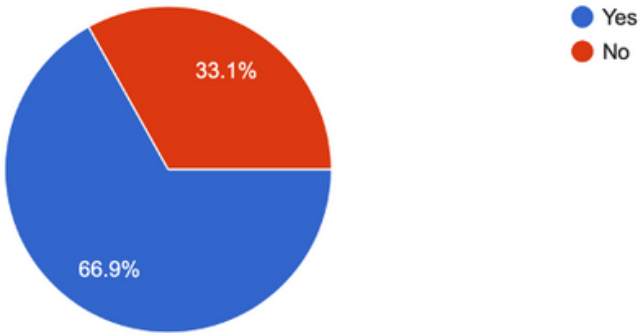
15. Do you think the Christians leaders, Priests, Pastors get targeted in India because of their faith?

148 responses



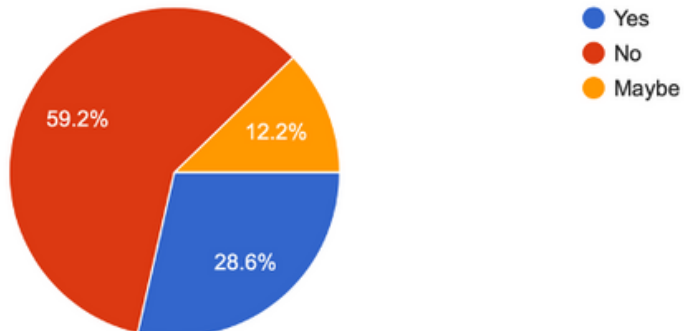
16. Have you heard of the police mishandling Christians Leaders/ Priests/ Members?

148 responses



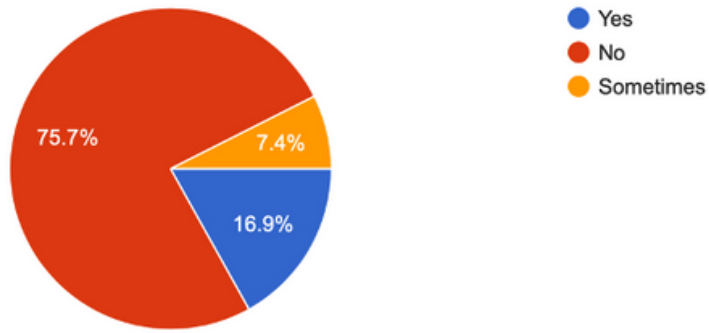
17. Do you think people who are reported for attacking, persecuting Christians actually get prosecuted for their misdemeanours?

147 responses



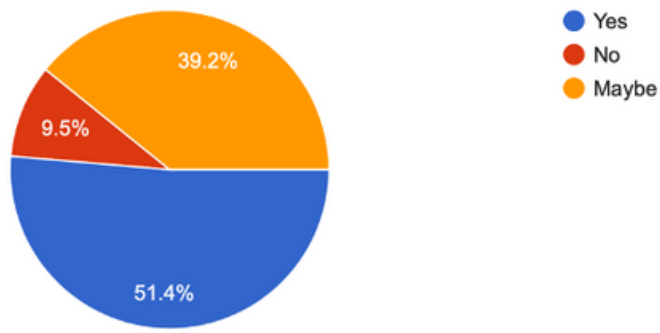
18. Do you think the persecutions/ attacks to minorities gets rightly covered by the Indian media?

148 responses



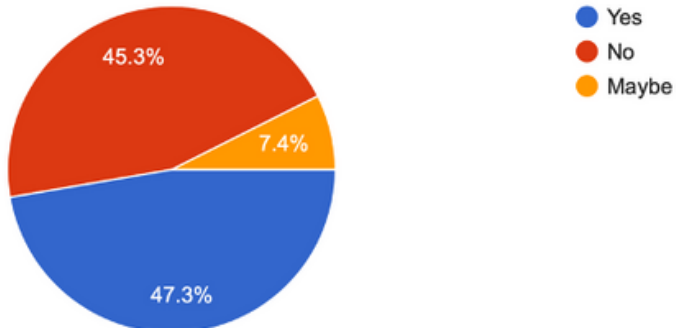
19. Do you think that media is often used as a tool to circulate miscommunication, hatred for the minorities?

148 responses



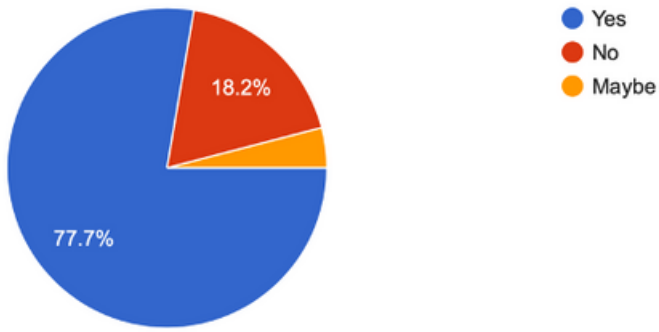
20. Do you think that common people from religions in majority know about persecutions happening to Christians?

148 responses



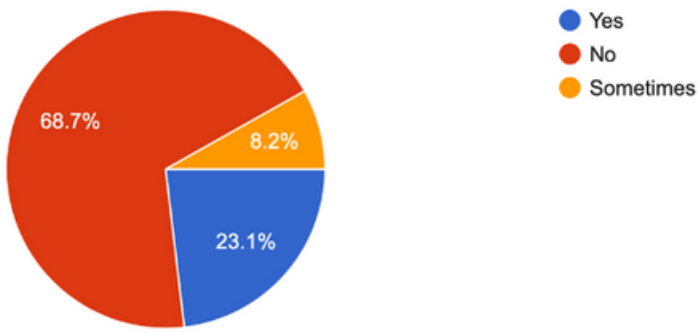
21. Do you think such attacks are politically motivated?

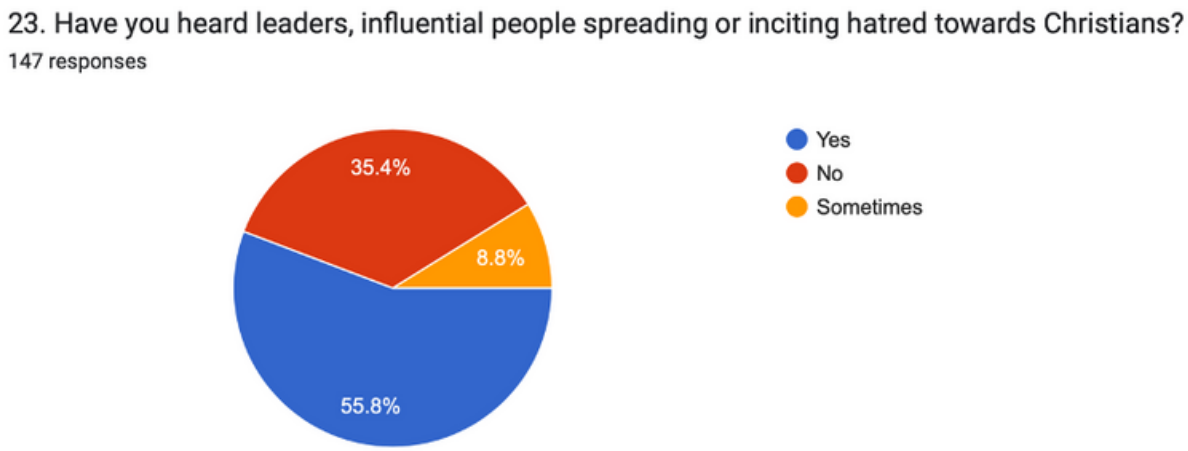
148 responses



22. Do you think the present government support the minorities?

147 responses





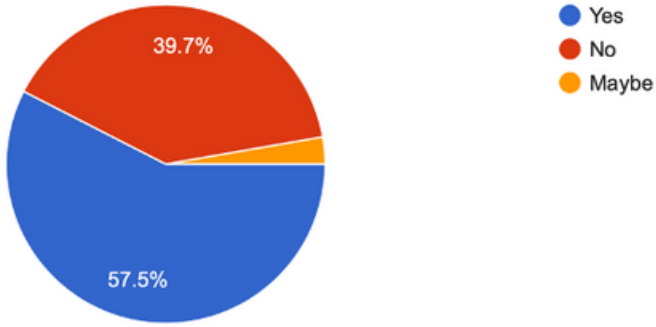
24. Please comment with your opinions, and thoughts about the present situation of religious freedom in India.

One person expressed that the Christians were well treated in India. Some said they were never ill-treated and they had all the liberties. The respondents opined that though the constitution provides for freedom of religion, intolerance and hatred towards them are growing. Their right to religion is unable to be exercised. Minorities are often not considered. All religions must be treated equally but they are restricted from sharing and propagating their faith. One respondent even went to the extent of saying that freedom of religion is a myth now. One respondent expressed that Hindutva outfits and the ruling party are spreading hatred concerning minorities even though Christians are normally peacemakers while forgetting the fact that Religion is a personal choice and our Constitution guarantees the same.

Many of the NGOs which were into philanthropic work with foreign aid had to stop their activities due to amendments in FERA and FEMA act as also under the garb of regulating UOI is targeting and blocking foreign funds to Christian NGOs. Even Pastors and religious leaders are implicated in false criminal and molestation cases and put behind bars. Under the guise of Anti conversion laws, pastors and evangelicals are targeted even though no one can forcefully convert someone to another religion. The other said that Often wrong notions and hatred are spread through false information. The majority of masses are in some cases provoked. Some said the present government is putting efforts into making this country from a secular to a religiously homogenous country.

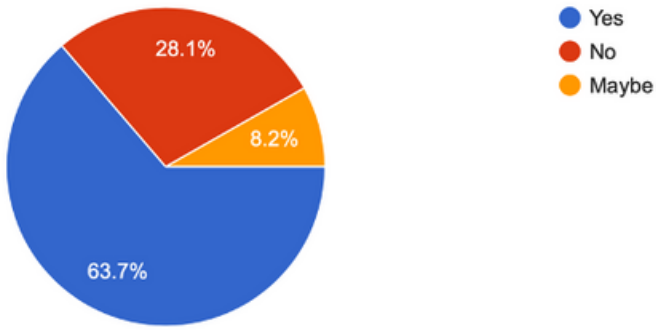
25. Have you heard of anti-religious conversion bills being passed in India?

146 responses



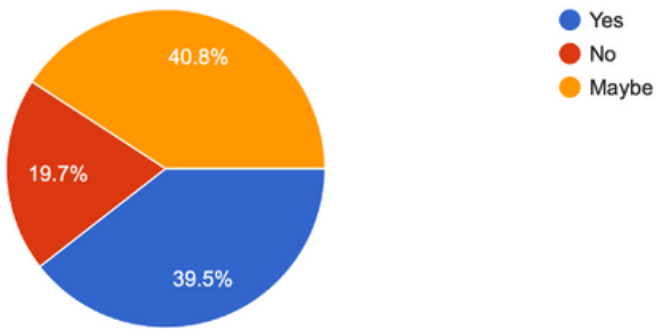
26. Do you think these laws are being passed to discriminate and target the minorities?

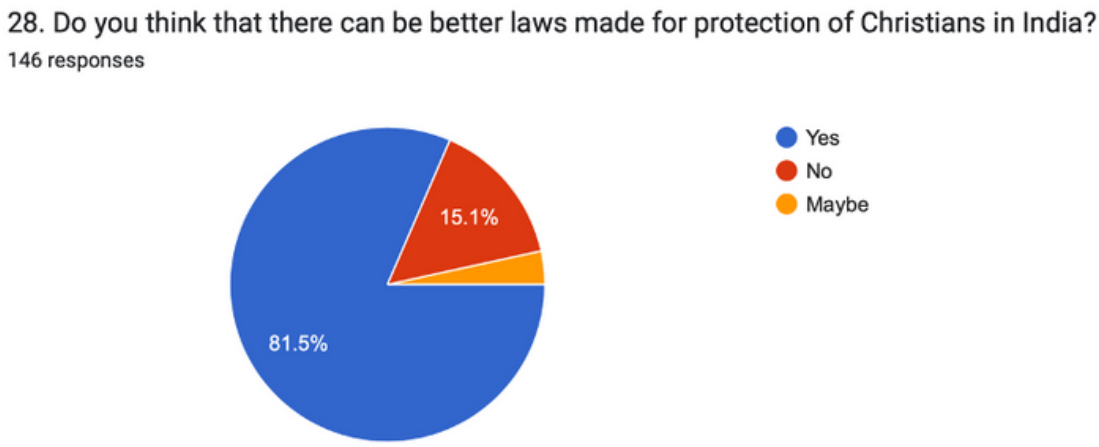
146 responses



27. Do you think many people from minorities are migrating to other countries because of the hatred/ attack they are experiencing in India?

147 responses





29. Do you know about any organisations/movements that aid and help the persecuted Church and its members?

The respondents mentioned organisations like AICUF, Magis Society, CAN International, Persecution Relief, Evangelical Fellowship of India, Open doors International, Masih Shakti Samiti

30. Please mention ways/ give suggestions on how the present circumstances of Christians can be improved.

There were varied responses to this question. One person said that India is a diversified country with all major religions of the world. The harmony should be kept. Another said that the right to freedom of speech and practising our religious faith needs to be exercised. But another also believed that such rights be only exercised within the purview of the constitution. Some said that the Indian Constitution grants the right to religion in India, and if that is followed without any amendments, it will help.

One respondent said that every person should be treated equally. Many stated that the awareness around this issue must be rightfully spread. Certain people said that Christians must not be harassed.
A number of people also suggested that there should be stringent penal provisions against the vandalism of properties and attacks on Christians. Many more said that there should be a strict curbing on the groups spreading violence against minorities. One said that the church must not be burned down and the church worship services must not be disturbed. One expressed for the government to have a dedicated channel to track any persecution.
Being the minority in India, Christians must be assured by the political leaders of their co-existence and given full rights to the practice and propagation of their faith.

One suggestion was for the modification of minority law. Laws should be implemented and executed and those responsible for creating hate should be prosecuted. There must be proper laws to prevent so-called moral policing. One said that laws should be changed in favour of minorities.

There were who believed that the change in government could lead to better circumstances. Political support would bring a change.

Another suggested that more people must know about the persecution happening to Christians around India and that we must be given as much liberty as it is given to Hindus. One said that Christians need to be more vocal and should learn to address the press.

One also perceived that Christian leaders who come as representatives of our faith are either bad communicators or unable to present our views. They should make aware the people of our contribution in nation building

One further stated that if all the misinformation and misleading through media can be stopped, a lot can be changed. The poison that has been fed to the people by the media should be highlighted and the truth be brought to light. One suggested that efforts to convey to the government must be strongly made, If social media would catch the said issue, it would make a huge difference.

One expressed to have continued faith in God. Several respondents suggested humbling oneself and praying in such times and also for the present government to understand and respect the rights of minorities. One respondent suggested that there must be financial assistance for low-income Christians too.

There must be freedom to go to church without any fear in rural cities.

Some said that Christians must be prepared for any kind of circumstances that may come. A number of respondents suggested that Christians must be united. Only when they would learn to take a stand unitedly, then can the scenario be changed. There is a need to be united as one body to fight for rights in unity. One said that the rights must be exercised more boldly. One also stated that there can be better opportunities for Christians if the division between themselves can be removed. Christians must also be honest and wise in evangelism and preaching. One respondent expressed that there must be more interaction with parishioners and Christian people. Many suggested the existence of better associations and unions of Christians within the country for representation and advocacy of their rights.

Some opined that Christians must not humiliate Hindu gods, their culture must be respected. Christian organizations must not give unearned gifts. They should strictly behave, respecting people of other faith. One also believed that the constitution of India is sufficient to protect Christians. Then some asserted not to have conversions, spread the gospel, and only serve society. One believes that one must do good to everyone in society without focusing on conversions.

students and workers should reflect Christ by our behaviour even if we couldn't tell them the full Gospel.
Then some believed that God's plan should not be restricted and quoted Matthew 5:10 "Blessed are those who are persecuted for righteousness ' sake, For theirs is the kingdom of heaven."

One asserted that textbook education cannot be changed, but it can be surely implemented in life. They went forth and also quoted Gandhi in saying that “if only we live like Christ, then India can be changed.

9

AN OVERVIEW OF THE ENVIRONMENTAL AND CLIMATE CHANGE LAWS IN SOUTH AFRICA

Salome D. Dube, South Africa

1. Introduction

Due to the ongoing environmental degradation and climate change crises the need for enacting environmental and climate justice laws has become more urgent in South Africa Legislative action is now required to achieve environmental and climate justice especially in light of the serious consequences that climate change has for human rights. The discussion focuses on the environmental and climate justice legal framework currently in place in South Africa, highlighting its benefits and drawbacks emphasising the major variables it affects, and offering recommendations, particularly for climate issues that are not sufficiently regulated.

2. environmental and climate change legal framework

In South Africa, the current constitutional and statutory framework serves as the foundation for achieving environmental justice. According the Constitution of the Republic of South Africa, 1996, "everyone has the right to an environment that is not harmful to their health or well-being." The enabling law for this clause is the National Environmental Management Act (NEMA), it is serves as a tool to realise the constitutionally guaranteed right and to further environmental justice. It does so by expressly recognising environmental justice and fair access to natural resources and benefits as essential principles that must guide environmental governance in the nation. There are also more laws that regulate environmental issues, such the so called 'specific environmental management Acts', including but not limited to National Water Act, National Environmental Management: Waste Act, National Environmental Management: Air Quality Act and other pieces of legislation like the Water Services Act , the National Forests Act and the National Heritage Resources Act.
On the other hand, South Africa has a very long history of not having any legislative legislation or policies that directly address climate change. A few examples of environmental laws and policies that have been implemented to address the climate change issues are the Carbon Tax Act, and the Disaster Management Act.

3. evaluation of the current legal framework

The Environmental laws operational in South Africa have so far proven to be capable of achieving environmental justice, if implemented correctly. They provide safeguards that ensure accountability by different players when partaking in environmental activities. For instance, South African statutory provisions provide for possibly extended liability for pollution or environmental degradation.

This means not only corporations can be held liable but personal criminal liability can be extended to directors, employees and agents as contemplated by the NEMA, particularly its Schedule 3 offences. Additionally, the NEMA and SEMAs allow a person who is unhappy with an environmental authority's decision to, if necessary, seek a judicial review of the decision in a court or tribunal under the Promotion of Access to Justice Act. However, in most cases, the aggrieved party may only seek such a review through the courts after exhausting all internal remedies allowed by the relevant environmental legislation.

On climate justice, the current environmental laws do not sufficiently address the climate issues, which presents a barrier to the realisation of climate justice. Environmental laws seek to address issues pertaining to land, water, air pollution, and related issues; whereas, climate laws must specifically regulate activities that result in global warming through greenhouse gas emissions. This lack of climate justice laws, is apparent in the relatively few climate change-related claims brought before the courts in South Africa, notwithstanding the fact that most people are affect and the geography predisposes the country to climate change induced disasters.

In the High Court case of Earthlife Africa, a case that was brought before the court in March 2017, challenging the plan to construct the 1,200 MW coal-fired Thabametsi power plant, the applicants' concern that the National Environmental Management Act did not fully take into account the project's effects on climate change, was acknowledged by the court. Fortunately, the court ruled that such concerns are pertinent, and that the project's clearance was illegal because the concerns were not included in the project.

4. Effect on Human Rights

Environmental justice in South Africa is not entirely dependent on the laws that are operational, it is deeply rooted in the painful colonial past, particularly the apartheid system, where there was racial segregation of the oppressed black majority being exiled to unfavourable lands. For this reason, environmental justice is something that is very difficult to achieve in South Africa. This is due to the fact that these regions continue to be the most affected by environmental and climate disasters, the repercussions are more noticeable now than ever before. The same can be said about climate "injustice".

This is apparent in the frequency of droughts and increase in floods, primarily in the provinces of the Eastern Cape, Western Cape, and KwaZulu Natal, particularly places occupied by the less privileged. Human rights have been diminished in that there has been a reduction of the rights to food, water, housing, life, and health as a result of deaths, evictions, and food shortages brought on by the harsh weather and climatic circumstances. Another factor, though indirect, which is crucial to highlight which negatively effects on human rights is the government's slow pace of enacting laws or policies that ensure that businesses and establishments act responsibly to lessen their impact on the environment and to help the victims. The government has not taken enough measures against such entities, there have not been enough monitoring mechanisms or checks and balances.

Most importantly, not everyone is fully aware of how droughts and other disasters are related to climate change. The general public, who are those most affected, have not been participating enough in pressing the government for action. By becoming aware of the situation the public will act from an informed position and call the government to account. Private non-governmental organisations have led the charge in advocacy, but their capabilities are constrained. Therefore, the public's absence of engagement constitutes a violation of their human rights.

5. The anticipated Climate Justice Law

The Climate Change Bill, the "Bill", was formally introduced to Parliament on February 18, 2022, by the Department of Forestry, Fisheries, and the Environment. The Bill will provide South Africa's first legal framework for addressing the effects of climate change if it is enacted into law. In the context of sustainable development, the Bill's principal goal is to allow the creation of an effective response to climate change and a long-term transition for South Africa to a low-carbon and climate-resilient economy and society.

The Bill emphasises the urgent threat that climate change poses and the necessity for an effective, progressive, and gradual response. The goals of the Bill can be succinctly summarised as follows: (i) ensure a just transition to a low-carbon economy and society; (ii) give effect to South Africa's international commitments; (iii) make a fair contribution to the global effort to stabilise greenhouse gas, "GHG" concentrations; and (iv) provide for a coordinated and integrated response to climate change.

6. Recommendations

In light of national or international conventions and treaties that safeguard the rights of the population of the relevant country, claims based on rights may be made against governments or businesses. Climate change is best seen as a human rights issue rather than an environmental issue. There is a compelling argument for conceptualising climate change as a human rights concern given the size and scope of human susceptibility to climate-induced dangers across the African continent. There are several reasons why climate litigation based on human rights justifications might be especially successful. To start, a history of constitutionalism in the global south has contributed to the effectiveness of human rights arguments in global south climate litigation.

This surge of constitutionalism has not only made room for the mobilisation and activity of civil society, but it has also given judges more confidence and encouraged judicial assertiveness, if not activism, in many jurisdictions. If regarded as such, there is a good likelihood that accountability will be attained quickly. Access to justice is facilitated through public engagement and informational availability.

6. Conclusion

Due to the frequent occurrence of natural disasters like drought and flooding, the topic of promoting climate justice in South Africa remains crucial. Human rights have suffered from lack of legislative action however, the new Bill, which is likely to become law, appears to hold a lot of potential and promise for the realization of climate justice. However, if climate justice is to be accomplished, public engagement, understanding and participation remain crucial.

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About Pax Romana

Pax Romana is the name for a family of Catholic lay movements engaging students, intellectuals and professionals since 1921.

The International Movement of Catholic Students (IMCS-Pax Romana) founded in 1921, brings together Catholic university students and national student movements with a shared mission of mobilising for faith and action. As a youth-led youth movement, IMCS promotes student leadership and responsibility in life, the Church's mission and in the world. While the name and structure of each national movement within IMCS often differs from country to country, IMCS members are united by our spirituality of action and a shared commitment to the option for the poor, the marginalised and creation, our common home. Currently IMCS has more than 88 national member movements and federations coordinated by six regional secretariats and the international office based in Paris, France. IMCS has regional offices in four continents: IMCS Africa (Nairobi, Kenya); IMCS Asia Pacific (Manila, Philippines); JECI-MIEC Europe (Paris, France); and MIEC-JECI Latin America (Quito, Ecuador).
www.imcs-miec.org

The International Catholic Movement for Intellect al and C lt ral Affairs (ICMICA-Pax Romana) is a global community of Catholic intellectuals and professionals engaged in the world with a spirituality of action. Since 1947, ICMICA has united a wide range of individuals, small communities, national movements, and international networks with a shared commitment to support one another across borders and to integrate faith and action for a more just world. Inspired by the Gospel and the Catholic social tradition, ICMICA members are committed to the option for the poor, integral human development, interreligious dialogue, and the empowerment of women and young professionals. In Africa, Europe, and Latin America, the movement is served by regional teams. ICMICA includes several networks of specific professions, including The International Secretariat of the Catholic Lawyers (MIJC); The International Secretariat of the Catholic Engineers, Agronoms and Industrialists (SIIAEC); and The International Secretariat of Catholic High School Teachers (SIESC).
www.icmica-miic.org