SECULAR RIGHTS AND MONOPOLIES OF MORALITY: REFRAMING THE LEGAL DISCOURSE OF ABORTION IN THE PHILIPPINES

by

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Abstract

This thesis introduces and develops the idea of "secular spaces." It proposes a role for the courts in protecting such spaces, and supporting core values behind secularism, rather than engaging in mechanical line-drawing exercises between state and church, the secular and the religious. This idea of secular space is not premised on a complete disentanglement of secular and religious realms but rather builds on the idea of a social space benefiting from state protection as well as from non-intervention. It is a contested and an overlapping space but one which can allow the courts a more meaningful vantage point from which to exercise their role in promoting the values behind secularism and secular state practices. Because the issue of abortion in the Philippines spans both spheres, public/private and secular/religious, the courts need to consider a broader approach in their judgments, one that remains attentive to the Constitutional framework of both religious freedom and women's human rights. The challenge here is to view the issue of abortion and the resulting rights contest not solely or primarily as a competition for legitimacy in which all debates, even the ethical, can and ought to be settled with finality before the courts of law.

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"We must make universal claims but we must make them with both conviction and humility." Christina L.H. Traina, *Feminist Ethics and Natural Law: The End of Anathemas* (Washington D.C.: Georgetown University Press, 1999)

"The state issues calls for tolerance not because it is or can be tolerant, but so we will be and it does not have to be – so it can act like a state." Wendy Brown, *Regulating Aversion, Tolerance in the Age of Identity and Empire*, (New Jersey: Princeton University Press, 2006)

I
Introduction

The central claim of women's human rights has been the assertion of women's capacity as rights bearers. However, what the entitlement to rights means for women has actually changed over time as well as across cultural contexts.[1] Earlier (although by no means less relevant) claims for status equality with men, as well as non-discrimination, have given way to a myriad of women's human rights claims for social justice within societal hierarchies as well as across geo-political boundaries.[2] While personhood, dignity and worth remain core concepts to rights, including women's human rights, feminist challenges to liberal notions of the autonomous individual and the self push us to confront both the limits and possibilities of human rights in securing both human freedoms and social justice.

This thesis focuses on the overlap between liberal rights and secularism, where public and private realms are most thoroughly blended, and their boundaries obscured. It is here, as Alison L. Boden notes, that "religious sentiment is often a matter of public policy, officially or

[1] Andrea Cornwall and Maxine Molyneux, "The Politics of Rights-Dilemmas for Feminist Praxis: An Introduction," *Third World Quarterly*, 27:7 at 1177.

[2] *Ibid.*

unofficially."[3] This overlap is most pronounced in the case of abortion. As Roslind Petchesky points out, "anti-abortion ideology presents an aura of religiosity, more than actual theology, separating the godly from the ungodly, the innocent from the dammed."[4] Petchesky notes further that"the legal recognition of the right to have an abortion as privacy has not assured women of either the material means nor the moral support and political legitimacy in their decisions to have an abortion."[5] For Harrison and Cloyes, the assumption that pro-lifers have a monopoly on the moral factors that ought to enter into decisions about abortion is the greatest strategic problem facing pro-choice advocates.[6] When portrayed as co-existing and conflicting freedoms, women's human rights and religious freedom are on a collision course in the area of women's reproductive self-determination.

In the Philippines, where the issue of abortion continues to be suffused by the dominant discourse of sex as sin,[7] falling back on the idea of secular rights can reinforce the conflict between anti-abortion positions and women's reproductive decision-making as one being about religion and non-religion (or even anti religion).

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[3] Alison L. Boden, -*Women's Rights and Religious Practice: Claims in Conflict*, (New York: Palgrave and Macmillan, 2007) at 8.

[4] Roslind Pollack Petchesky, *Abortion & Woman's Choice: The State, Sexuality & Reproductive Freedom, Preface to the 1990 Edition* (Boston: Northeastern University Press, Rev.1990)

[5] *Ibid.*

[6] Beverly Wildung Harrison and Shirley Cloyes, "Theology and Morality of Procreative Choice," *Feminist Theological Ethics Reader*, Lois K. Daly, ed. (Louisville, Kentucky: Westminister John Knox Press, 1994) at 222

[7] Carolina S. Ruiz Austria, Abigail V. Acuba, Clara Rita Padilla et.al., "From Mortal Sin to Human Right: Redefining the Philippine Policy on Abortion," *Women's Journal on Law & Culture*, Vol.1, No. 1 (Womenlead Foundation, Inc., 2001) at 87-105. See also: Carolina S. Ruiz Austria, "Sex, Sexuality and the Law: The Construction of the Filipino Woman's Sexuality & Gender Roles in the Philippine Legal System," *Women's Journal on Law & Culture*, Vol.1, No. 1 (Womenlead Foundation, Inc., 2001) at 25-54

Recent developments in rights discourse [8] demonstrate how feminists are taking up the task of moving beyond privacy arguments rooted in possessive individualism, particularly in the area of sexual and reproductive rights: [9]

> Women's interests and aspirations are gradually being translated into nationally and internationally recognized rights. One of these rights is the right to decide whether to reproduce or not to reproduce. This right has become an integral part of modern woman's struggle to assert her dignity and worth as a human being. Although women were historically valued only because of their childbearing capacity, women are now coming to value themselves and expecting others to value them as decision makers with regard to their own reproduction. Conservative traditions are not accustomed to recognizing women, and even less to valuing women, as decision makers in their own lives or in the lives of their children, families or communities. The modern emphasis, however, is to *respect and equip women to be responsible decision makers in the lives they centrally affect.* (Emphasis added)

In this process of engagement, rights have become the discursive tool of choice by which to elaborate a counter if not alternative moral standard for viewing sexuality and sexual behaviour, one that emphasizes the rootedness of women's reproductive decisions within their own web of relationships and particular situations. This time the state is no longer being asked simply to refrain from interference. Instead, it is called on to provide the enabling conditions for women's reproductive-decision making:

> The struggle to achieve women's reproductive freedom cannot succeed in the long run if conducted as a civil liberties struggle for individual privacy. At bottom it is a deeply cultural and social conflict for which legality provides at best a thin protective cover. In other words, "minimizing government involvement" can also

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[8] Sonia Correa, "From Reproductive Health to Sexual Rights: Achievements and Future Challenges," available online: <http://www.hsph.harvard.edu/Organizations/healthnet/reprorights/docs/correa.html>; See also: Sonia Correa ,"Holding Ground: The Challenges for Sexual and Reproductive Rights and Health: In Dialogue with Sonia Correa," *Development* 2005, 48 (4), 11-15

[9] Rebecca J. Cook, "Human Rights and Reproductive Self Determination," (1995) 44 *Am.U.L.Rev.* 975-1016, at 976

> mean indifference, or outright opposition, to positive state interventions to fund or secure access to services.[10]

I submit, however, that the secular character of women's human rights claims invoked against religiously-based and cultural norms that perpetuate gender inequality and discrimination inhibits a more profound interrogation of sexual morality, which securing women's reproductive freedom requires. While human rights language affords women the space to articulate an alternative account of moral aspirations, especially when it comes to decision-making in reproduction, a rigid conception of separate secular and religious realms only highlights the conflict between state and church authority over women's bodies. Characterizing rights as secular presupposes an inflexible partition between the spheres of state and church and does not recognize that claims for women's rights tend to be articulated and contested in both secular and religious terms. Likewise, the dichotomy ultimately frames the conflict as one between individual and group or community rights, neglecting to note that within religious traditions, various groups are proposing alternative interpretations of core religious principles, many of them making use of human rights language in the process.

With these considerations in mind, this thesis explores the role of the courts in protecting "secular spaces" which can support core values behind secularism rather than engaging in mechanical line-drawing exercises between state and church, secular and religious. This idea of secular space is not premised on a complete disentanglement of secular and religious realms but rather builds on the idea of a social space benefiting from state protection as well as non-intervention. It is a contested and an overlapping space but one which can allow the courts a more meaningful vantage point from which to exercise their role in promoting the core values

[10] Boden, *Supra* note 3.

behind secularism and secular state practices. Because the case of abortion in the Philippines is an issue which spans both spheres, secular/religious and public/private, the courts need to consider a broader approach in their judgments, one that remains attentive to the Constitutional framework of both religious freedom and women's human rights.

By locating a tension between rights and religion within the debates of the 1986 Philippine Constitutional Commission on the controversial "equal protection of the life of the mother and the unborn from conception" provision, I propose an interpretation of religious freedom which envisions a role for the courts in facilitating discussion and debate instead of potentially ending such exchanges and bringing conversation to a grinding halt.

I begin by providing a brief overview of critiques of secular rights, in which feminists take sides for and against secular modernity. I then trace the development of secularism in the Philippines, putting forward a critique of conventional accounts of the introduction of secularism through American colonialism. I discuss two concepts of secularism, one articulated by anti-colonial movements and the other by American colonialists, situating each on its position vis-á - vis Roman Catholicism, which prior to American colonialism was the state religion. I draw on the historical significance of these concepts of secularism which can help us arrive at an understanding of secularism that emphasizes the value of pluralism instead of taking "non-establishment" and "separation" as the ends or goals of religious freedom. I argue that attentiveness to a pluralistic ideal is important for courts whose decisions on the Constitutional principles of the freedom of religion and women's human rights, and women's reproductive

decision making in particular, should "guarantee rights that are not theoretical or illusory but rights that are political and effective.[11]"

I outline the Philippine policy on abortion (focusing on penal law) as well as the Philippine constitutional provision on the unborn, and juxtapose these with the Constitutional principles on women's human rights and the freedom of religion, in the context of the Philippine commitments to international human rights conventions. Continuing with an analysis of the limitations of secular rights and their usage in claims for reproductive decision-making and self-determination, I follow Kathy Rudy's critique against liberal rights building on her insight:

> The abstract right to abortion offers the pregnant woman the option of regaining her non-pregnant status in order to fully and competitively participate in the public sphere. Abortion thus functions as an equalizer. Any woman who does not want a pregnancy can simply have it removed and thus immediately return herself to the universal position: the abstracted liberal self. The idea that pregnant women might desire more choices than "being pregnant" or "not being pregnant" – such as more adequate child care or larger systems of kinship, in which the cost and burden of raising a child is spread among many – is beyond the limits of liberal imagination.[12]

The challenge, I submit, is not to view the issue of abortion and the resulting rights contest solely and primarily as a competition for legitimacy in which all debates, even the ethical, can and ought to be settled with finality before the courts of law. It is further submitted that a focus on legalization whether a criminal law and police-led or privacy couched in liberalism oversimplifies the issue. Indeed, while a moral prohibition on abortion[13] has remained fairly

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[11] *Tysiac v. Poland* (European Ct of Human Rights), Application No. 5410/03 (2007).

[12] Kathy Rudy, *Beyond Pro-Life and Pro-Choice: Moral Diversity in the Abortion Debate*, (Boston: Beacon Press, 1996) at 98

[13] John Connery, S.J., "The Jewish Background," Chapter 1, Abortion, *The Development of the Roman Catholic Perspective*," (U.S.A.: Loyola University Press, 1977) at 7-21 Connery points out that in the Pre-Christian era, the

consistent across the major religious traditions, the punishment of women as well as the characterization of the harm in abortion as the "taking of human life" developed comparatively recently.

The treatment of abortion as a crime has also been criticized as the least effective means of preventing abortions. Rebecca Cook and Bernard Dickens point out that "the history of abortion regulation through criminal law has proven dysfunctional to the protection of reproductive health at the levels of both clinical and public health services."[14]

While this thesis does not purport to discuss the complex relationship between law and morality exhaustively, it takes issue with the often yawning gap between the liberal language of reproductive choice and women's moral decision-making. It takes off from Michael L. Tan's call to examine more closely the narratives and experiences of (Filipino) women who undergo abortion.[15] Because the conventional understanding of moral questions in the abortion discourse (namely the valuation of life and sexual conduct) ignores everyday interactional morality, it neglects the very stuff of women's reproductive decision-making. Neither the fierce enforcement of moral codes which purport to correspond to social values on the one hand, nor state non-interference which entails an absence of social support promotes women's moral and deliberative autonomy. Liberal ideals behind the freedom of thought and religion can properly orient the

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earliest penalized act was causing a miscarriage and dismemberment in Jewish law rather than self-induced abortion. Likewise the "harm" addressed in the prohibition of abortion and causing an abortion ranged from an injury to the husband of the woman who had a miscarriage to an injury or loss to both mother and father; it included as well "having diminished the multitude." Roman penal law did not move into the area of abortion until the end of the second century of the Christian era. Before this, abortion was in the domain of the *pater familias* and not Civil Law.

[14] Rebecca J. Cook and Bernard M. Dickens, "Human Rights Dynamics of Abortion Law Reform," (2003) *Human Rights Quarterly*, 25 at 4.

[15] Michael L. Tan, "Fetal Discourses and the Politics of the Womb," (Supplement: 2004) *Reproductive Health Matters*, Vol. 12, No. 24 at 157-158.

courts to be wary of state intervention, protect minorities and alert them to the dominance of particular religious institutions. However, it is not enough for the courts to allocate spaces for "difference" without being attentive to relationships of power among competing and co-existing traditions. The courts should be attentive as well to the underlying competing claims for ethical and moral standards between dominant groups and minorities, not only among, but also within religious traditions. When it comes to abortion, strategies that move away from penal law and a system of harsh punishments can draw attention to other duties of the state, as well as emphasize the practical aspect of guaranteeing women's human rights.[16]

II
Women's Human Rights: For and Against Secular Modernity

The narrative of secular modernity has been called a "sacred cow" of contemporary social theory and of intellectual history in general, affirming the story of Western history's radical shift in the sixteenth century, when religion was purportedly pushed aside in the creation of the new social order.[17] However it is invoked, secularism is widely understood in the Western tradition as synonymous with the decline of religion. [18] But while the formal break between church and state is the defining characteristic of secular modernity, this break or division has clearly not materialized in uniform ways across history.

Saeculum is the Latin for world, century or age, and the terms *saeculare* and *saeculum* connote an absence of religious feeling or a worldly rather than otherworldly approach to life. In

[16] *Supra* note 11. See also cases discussed below (Part VIII)

[17] E. Mendieta, "Society's Religion: The Rise of Global Theory, Globalisation and the Invention of Religion," *Religions/Globalisations, Theories and Cases*, D.N. Hopkins, L.A. Lorentzen and G. Verstraete, Eds. (Durham & London: Duke University Press, 2001) at 46-65.

[18] Ananda Abeysekara, Desecularizing Secularism, Postsecular history,Non-judicial Justice and Active Forgetting, (2006) *Culture and Religion*, Vol.7, No. 3, at 207.

modern history, secularism later came to represent both the decline of religion and its exclusion from public life.[19] Modern political thinkers developed their idea of the secular state in the context of criticizing Papal power and the role of religion in politics. Meanwhile, religious historians trace the separation of church and state from the "insistence of the medieval church leaders that the church be free from control by temporal rulers."[20] But while the idea of the "secular" as a separate sphere, one that contains the state apparatus, resonates in modern political theory, there is hardly a unitary understanding of the "secular" as devoid of the "divine." Indeed, secularism can mean a disbelief or scepticism in the supernatural or mere disagreement about the particulars of religious doctrine or religious worship which can both be accommodated within the principles of separation and non-establishment.[21]

The concept of secularism evokes several distinct sense today either as (1) substantively as an underlying philosophical position (reason) as opposed to religious revelation; (2) instrumentally as the state practice of both supporting religious pluralism and guarding against establishment; or (3) descriptively in reference to a separate sphere or realm insulated from religion, usually corresponding to the "public sphere" and sometimes equated with the state. While secularism continues to be widely affirmed as a principle, its practice and pursuit across jurisdictions varies widely.[22]

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[19] Emmet Kennedy, *Secularism and its Opponents from Augustine to Solzhenitsyn*, (New York: Palgrave 2006) at 1.

[20] Brian Tierney, *Religious Rights: An Historical Perspective, Religious Human Rights in Global Perspective*, J. Witte Jr. And J D Van der Vyer, Eds., (Netherlands, Kluwer Law International: 1996) at 19.

[21] *Supra* note 19 at 1.

[22] Kevin Boyle, Freedom of Religion in International Law, *Religion Human Rights and International Law*, Javaid Rehman & Susan Breau, Eds, (Boston: Martinus Nijhoff, 2007) at 29. "Formal and complete separation as in France, United States, Turkey and India, policed by Constitutional rules remains exceptional. The range of relationships between secular power and religions including in Islamic countries is diverse and in constant adaptation."; See also: Karel Dobbelaere, Towards and Integrated Perspective of the Processes Related to the Descriptive Concept of Secularization, (1999) *Sociology of Religion*, Vol.60, Issue No.3.

When it comes to notions of human rights, the dichotomy between secular and religious realms gives rise to a problematic competition between rights. Boden observes that the very language of human rights creates an impasse: "A theoretical locking of horns produces a discursive battle of competing valid claims, one to gender equality and the other to spiritual authenticity and autonomy.[23] However, feminists often acknowledge the utility of the concept of secular transnational modernity in human rights in condemning cultural practices that discriminate against women:

> The human rights regime articulates a particular cultural system, one rooted in a secular transnational modernity. This view is contested by alternative ones such as religious nationalism. CEDAW, like the rest of the human rights regime, assumes that culture, custom, or religion should not condone violations of human rights. The committee members of CEDAW often present a united front against recalcitrant or evasive government representatives. They uniformly condemn injurious cultural practices that discriminate against women, a position clearly articulated in the text of the convention. This universalizing approach is structured by the convention itself. The committee's mandate is to apply it to all countries equally. Countries that ratify it assume the burden of conforming to its requirements, regardless of their specific cultural attributes. This is the mission that the committee adopts. *Thus, the committee is not explicitly promoting transnational modernity but is pressing governments to conform to the terms of a convention that embodies many of the ideals of that modernity.*[24] (Emphasis added)

Critiques of the universality of rights (including feminist ones) take issue with secular modernity as the liberal ideological rationale and driving force of Western colonization and note how human rights discourse (including women's human rights) is embedded within this broader discourse. Indeed, cultural relativist critiques draw attention to the androcentric underpinnings of

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[23] Boden, *supra* note 3 and 10 at 4.

[24] Sally Engle Merry, "Constructing a Global Law: Violence against Women and the Human Rights System," (2003), American Bar Association at 945-946.

invoking universal secular rights.[25] In response to cultural relativist arguments against universal human rights, however, others like Susan C. Breau insist that the dichotomy between rights and culture is false:

> Those who argue that human rights are solely derived from the Enlightenment and thus do not respect other cultural contexts, do not recognize the diverse philosophical and spiritual underpinnings of human rights. It is not an either or proposition; both human rights and culture can co-exist and thrive.[26]

Breau does not completely do away with cultural relativism but rather seeks a place for it as a principle which applies to the analysis both of human rights, and of different cultures. In this she follows Tibi Bassam who argues for a cultural pluralist position rather than a cultural relativist position.[27]

Indeed, even as the cultural relativist critique proves useful in ensuring the openness of human rights to diverse cultural elements and traditions, it is also used to undercut the moral legitimacy and universal applicability of human rights.[28] Karima Bennoune decries how "in the

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[25] Isabelle V. Barker, "Disenchanted Rights: The Persistence of Secularism and Geopolitical Inequalities in Articulations of Women's Human Rights," (2002) *Critical Sense* at 105.

[26] Susan Breau, "Human Rights and Cultural Relativism: The False Dichotomy," *Religion Human Rights and International Law*, Javaid Rehman & Susan Breau, eds, (Boston: Martinus Nijhoff, 2007) at 137

[27] Tibi Bassam, *Islam and the Cultural Accommodation of Social Change* (Boulder, San Francisco & Oxford: Westview Press, 1990) [translated by Clare Krojzl], at 193. "Secularization is a by-product of a process of functional differentiation in a religious system – a process in the course of which religion is reduced to a part-system within society as a whole."

[28] Breau, *Supra* note 26 at 137; See also Susan Moller Okin, "Feminism, Women's Human Rights and Cultural Differences," in *Decentering the Center, Philosophy for a Multi-cultural, Postcolonial, and Feminist World,* Uma Narayan and Sandra Harding, eds. (Bloomington and Indianapolis: Indiana University Press, 2000) at 36-37. Susan Moller Okin reacts against cultural relativist critiques in stronger terms, warning against what she calls the tendency of cultural relativist claims against women's rights to "exaggerate to the point of absurdity." While acknowledging that these critiques from within feminism have had a positive effect in addressing racist, class-prejudiced and heterosexist elements of second-wave feminism, she also finds that the antiessentialist critique goes too far when it asserts that "no generalizations could or should be made about women, gender, mothering and many other topics some feminists still consider important to discuss." Okin's critique is also partly based on her own observation that the timing of these antiessentialist critiques hampered organizing efforts around Women's Human Rights, prior to the 1993 Vienna conference.

capitulation to relativism in response to universalist theory, fair and unfair, and the current polarized global environment, similar voices in human rights law theorizing have grown timid." She claims that an emphasis on freedom of religion has overshadowed the importance of freedom from religion, particularly in legal scholarship.[29] Boden, however, who describes herself as a "partisan of religion," points out that religion and patriarchy do not have to be partners, and notes that patriarchy is just as prevalent in secularism, if perhaps more cloaked. When the debate on either side is reduced to one of rights versus religion or religiously based culture, culture tends to be understood as "fixed, static, bounded, and adhered to by rote."[30] According to Sally Engle Merry, the (mis)understanding of culture as fixed[31] informs the position both of those demanding the subordination of religious values to human rights norms[32] and of "political and religious leaders who defend oppressive practices in the name of culture." In its place, Merry puts forward an understanding of culture as "a process of continually creating new meanings and practices that are products of power relationships and open to contestation among members of the group and by outsiders."[33] Douzinas suggests a similar open-ended approach to human rights: "Human rights can never reach a state of definite acceptance or final triumph because the logic of rights cannot be constrained to any particular field of type of subject."[34]

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[29] Karima Bennoune, "Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law, " (2006-2007) 45 *Colum.J.Transnat'l L.* 367 at 374.

[30] Merry, S*upra* note 24 at 947.

[31] *Ibid.*

[32] Boden, *Supra* note 3, 10, 23, at 8.

[33] Sally Engel Merry, "Human Rights Law and the demonization of culture (and anthropology along the way)," (2003) *PoLAR: Politicial and Legal Anthropology Review*, 26: 55-76.

[34] Costas Douzinas, "Rights and Legal Humanism," Chapter 9, *The End of Human Rights*, (Oxford and Portland Oregon: Hart Publishing, 2000) at 261.

Indeed, the lines between culture, religion, and human rights also overlap, as An-Naim points out: "Since political and economic models constantly evolve and adapt to changing conditions everywhere, the precise nature of corresponding human rights formulations is also likely to change over time and from one place to another.[35]" Thus rights are hardly disparate categories, but are open-ended (and contested) just as religion and cultures are. Rather than choose unilaterally between cultural relativism and universal human rights, we should acknowledge that here it is important that universality and contestation co-exist.[36] This approach also takes heed of Martha Nussbaum's call to "balance the recognition of religion's importance in the human search for meaning (including women's search) against a critical scrutiny of religion when it threatens valuable areas of human functioning."[37]

III
Towards Alternative Accounts of the Secular in Philippine Legal History

One problem with taking the narrative of colonialism as the definitive account of how secular modernity emerged in the Philippines is that it can gloss over the existence of resistance to colonialism. Secularist ideas of the state figured prominently in the movements against Spanish colonization: the unity between state and church was challenged, for example, in the

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[35] Abdullah A. An-Na'im, "The Legal Protection of Human Rights in Africa: How to do More with Less," *Human Rights: Concepts, Contexts and Contingencies*, A. Sarat and T.R. Kearns, Eds. (2001) at 114; See also Abdullah A. An-Na'im, "The Interdependence of Religion, Secularism and Human Rights, Prospects for Islamic Studies, *Common Knowledge*, Vol. 11, No. 11, Symposium: Talking Peace with Gods, (Duke University Press, 2005) "Religion, secularism and human rights are not autonomous concepts or paradigms; they exist in constant interaction with each other and with political, economic, constitutional, and governmental processes and institutions, both locally and globally."

[36] Jennifer Nedelsky, Lecture notes, *Can there be a Universal Human Rights and other Debates*, Faculty of Law, University of Toronto, Winter, 2008

[37] Martha Nussbaum, *Women and Human Development, The Capabilities Approach*, (Cambridge University Press, 2000) at 9.

works of Dr. Jose Rizal, who was a major influence on the revolutionary movements against Spain.[38]

Conventional histories hesitate to call the resistance against either Spanish or American colonization a full-scale war, considering that there was no Filipino nation to speak of. David Silbey, however, points out that what may have started out as a fragmented response later "took on the character of a revolutionary war." Unlike previous historians, he considers the unifying effect of the war on the formation of the Filipino nation.[39] The transfer from one colonial power to another (Spain to the Unites States) was in reality a brutal and bloody event. A full-scale war against the American occupation took place in 1898 and by the time it ended, the death toll was over 200,000 Filipino soldiers and civilians.[40] Even after the Americans declared the war officially over in 1902, there were still major campaigns against local revolutionaries, for example in Leyte and Samar from 1905-1907 and war against the Moros in Mindanao lasted through 1913. In 2003, when it recalled the roots of the principle of the separation of church and state, the Philippine Supreme Court [41]echoed the narrative of secular modernity through Western colonization. According to the Supreme Court, secularism was "transported to Philippine soil" by means of American colonization following Spanish colonization. The Court's account

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[38] Lost Eden, *Noli me Tangere*, Jose Rizal (Indiana University Press, 1961) [English translation by Leon Ma. Guerrero] Secularism already made its way into public life through the works of Dr. Jose Rizal. He was executed by the Spanish government on December 30, 1898 because of his writings for which he was found guilty of treason. He was also labelled a heretic by the Catholic Church. Rizal spoke against friar abuses and advocated secularism in *Noli me Tangere* (July 1886) and its sequel which was dedicated to the three martyred priests executed by the Spanish government after being linked to rebellion *El Filibusterismo* in 1891.

[39] David J. Silbey, *A War of Frontier and Empire, The Philippine American War, 1899-1902*, (New York: Hill and Wang, 2007) at 207-208.

[40] Richard Pierre Claude, Human Rights Education: The Case of the Philippines, (November 1991) *Hum Rts Quarterly*, Vol.13, No.4 at 463 Historians like Renato Constantino have also pointed out how this detail of the Filipino-American War had for a long time been omitted from the textbooks and accounts of Philippine history.

[41] *Estrada v Escritor*, A.M. No. P-02-1651. August 4, 2003. An earlier Supreme Court acknowledged the Malolos Constitution in the case of Gregorio Aglipay v Juan Ruiz, G.R. No. 45459. March 13, 1937

considers the Treaty of Paris signed by the United States and Spain on December 10, 1898 to be the operative act that introduced secularism to the Philippines. Alternative accounts by historians[42] show, however, that at the end of the revolutionary war against Spain, an even earlier declaration[43] by the revolutionary forces at Biak na Bato on November 15, 1897 adopted articles on the constitution of the Philippine state which already incorporated the principles of religious liberty.[44] The declaration served as the provisional constitution of the first Republic for two years prior to the Malolos Constitution.

American secular policy did not consider the Catholic Church to be a threat; in fact, the American version of "secularism" did not challenge the dominance of the Catholic establishment in the Philippines. From its inception, American colonial policy under President McKinley, a Methodist, looked on Christianity as a means to "civilize" the natives.[45] Despite being short-lived, the first Philippine Republic established through the 1898 Malolos Constitution articulated a version of secularism integrating religious pluralism when it declared: "The State recognizes the liberty and equality of all religions (*de todos los cultos*) in the same manner as the separation

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[42]Teodoro A. Agoncillo, Oscar M. Alfonso and Milagros Guerrero, *History of the Filipino People* , (University of Michigan, 1960) According to Agoncillo and other historians, the declaration was copied from the Cuban Revolutionary Constitution of 1875 adopted by constituent assembly at Jimaguayu.

[43] *Silbey* not italics s*upra* note 40 at 24. Alternative accounts of the circumstances surrounding this treaty exist. Silbey quotes Filipino historian, Renato Constantino in who describes Emilio Aguinaldo's role in betraying the Philippine revolution by striking a deal with Spain to end the rebellion in exchange for safe passage to Hong Kong and a sum of money for himself and his men. While the original demand included reforms, Constantino notes that the final one was a victory mainly for Spain because its terms were literally that of surrender by ending the rebellion.

[44] Article XXII. Religious liberty, the right of association, the freedom of education, the freedom of the press, as well as freedom in the exercise of all classes of professions, arts, trades and industries are established.

[45] T.J.S.George, *Revolt in Mindanao, The Rise of Islam in Philippine Politics* (Kuala Lumpur: Oxford University Press 1980) at 54.Historian T.J.S. George notes how hypocritical this was in the face of the fact that the population had already endured more than three centuries of wholesale conversion. America's Christian bias was also reflected in the treatment of Mindanao, where for hundreds of years Islam had already flourished and taken root. With their distrust of the Moro population, the Americans started appointing only Filipino Christian civil servants in 1902.

of the Church and State."[46] In 1900 President McKinley's *Instructions to the Second Philippine Commission* [47]declared the separation of church and state to be "real, entire and absolute" in the Philippines.

A critique of the conventional account of secularism's introduction to the Philippines alerts us to two concepts or traditions of secularism. The first, a direct result of the revolt against Spanish rule, under which church and state were identical and faiths other than Catholicism did not enjoy the same benefits or protection given to Catholicism,[48] emphasized the principle of "equality between religions."[49] The second concept of secularism, which arose as a consequence of American colonialism (with its underlying Christian bias), focused on the formal "break" between church and state through the process of delineating which matters were "secular" and which "ecclesiastical." [50] Contrasting the existence of two traditions of secularism in Philippine

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[46] Malolos Constitution, (1898) online <http://elibrary.supremecourt.gov.ph/>

[47] General Order No. 68 (1900)

[48] *US v Balacorta* G.R. No. 8722. September 10, 1913. An example of Roman Catholicism's privileged position during Spanish rule can be gleaned from the discussion in this case where the court noted that the class of "Crimes Against the State Religion" (Roman Catholicism under Spanish rule) in the penal code became inoperative with the change of sovereignty and with the adoption of the principle of "separation of church and state" under the Philippine Bill of 1902.

[49] *Supra* note 48.

[50] *Raul Rogerio Gonzales v Roman Catholic Archbishop of Manila,* G.R. No. 27619. February 4, 1928. While US sovereignty appears to have disrupted the virtual monopoly of faith enjoyed by Catholicism, the case of *Gonzalez v Roman Catholic Archbishop of Manila* arguably reveals the favoured status that the Catholic hierarchy enjoyed. In this case, the Archbishop of Manila faced losing substantial real property and earnings, and a demand for an accounting of the property's earnings left in trust by a very wealthy patron. Under the terms of the trust, the Archbishop was obliged [among other things] to appoint a qualified descendant of the testator to the chaplaincy established by the trust. A descendant of the testator sought appointment to the chaplaincy as well as an accounting of the property and its earnings after the chaplaincy had been vacant since 1910. The Archbishop's refusal to appoint the petitioner to the chaplaincy rested on changes in Canon law had taken effect in 1918 and which qualified only clerics to the office. Not surprisingly, the court was very accommodating to the position of the Archbishop, using "non-impairment of property rights" as its rationale and delineating between "civil" matters and "ecclesiastical" matters. Ironically, as a trust, the property held by the Catholic Church was conditioned on the will of the testator who founded it. In this case, she required the appointment of a descendant to the chaplaincy, the conditions for which Canon law had subsequently altered. The sole dissenting Justice, Johns , separated the issue of qualification to the chaplaincy (an ecclesiastical matter) from the civil law question regarding the conditional title held by the Catholic ,but insisted that at the very least the Church should render an accounting of the property's income.

history allows for a more nuanced application of the critique of secular modernity. Likewise, given the two approaches, it is submitted that the first one, which emphasizes pluralism and equality between faiths, is the concept which ought to guide any practical interpretation and application of the principles of freedom of religion, non-establishment and the separation of church and state. Absent such a concept, separation and non-establishment, whether in the context of a state which accommodates religion or not, falls into the danger of reducing the issue of secularism to the sole question of whether or not to expunge religion and religious symbols from the public sphere.[51]

IV
Secular and Religious along the Public and Private

Liberal politics and law are generally represented as secular and belonging to the public domain, generally equated with the state, while non-state institutions such as religions and the family are considered private.[52] While the notions of secularism predate classical liberal ideology of the public and private spheres,[53] the invocation of secularism as the separation of church and state, and the characterization of human rights as secular are quite consistent with, or closely overlaps with the public and private division. For instance, the public/ private distinction and the principle of secularism as separation) both lead to the deployment of rights claims asserting a withdrawal from authority and regulation, cordoning off a sphere beyond the reach of the state:

> Often religion is said to belong to what is most private in the lives of individuals and communities. It is literally a sacred area, where

[51] Carolina S Ruiz-Austria, "The Church, State and Women's Bodies in the Context of Religious Fundamentalism in the Philippines," (2004) *Reproductive Health Matters*, Vol. 12, No. 24 at 101-102.

[52] Margaret Thornton, "The Public/Private Dichotomy: Gendered and Discriminatory," *Journal of Law and Society*, Vol.18, No.4, (Winter, 1991) at 448 ; See also M.J. Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Rev.* at 449

[53] *Ibid* at 1423, 1428.

> governmental and other regulations must not tread. Equally private and therefore unregulable, are the home and family.[54]

But while both approaches to rights claims prescribe non-interference by the state, in substance their prescriptions usually fall on differing sides of the debate on sexuality and sexual morality, depending on who (or which group) is claiming exemption from state regulation.

When religious institutions and communities claim immunity from state intervention, they generally do not do so in disavowal of sexual codes of conduct. More often than not, religious institutions and communities impose their own (often stricter) rules of sexual behaviour in asserting non-conformity to the standard of equality between women and men. Likewise, the differing norms imposed on women and men usually entail more stringent rules for women. Meanwhile, when a claim to privacy is invoked in the context of individual sexual liberty and in cases of deviation from the "norm," the argument against state regulation either depicts the private as a sphere altogether devoid of morality or as one with its own morals separate and distinct from those of the public sphere. Within this separate and distinct sphere, it is often asserted that "private immoral conduct ought to be tolerated in so far as it remains private and does not cause damage to society as a whole."[55]

Feminists have challenged the liberal division between public and private in a variety of ways. For instance, one strategy used in addressing violence against women has been to bring what has been considered private to public scrutiny.[56] In contrast, when it comes to sexual rights and reproductive freedom and to women's access to safe abortion in particular, feminist

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[54] Boden, *Supra* note 3, 10, 23, 32 at 105.

[55] Paul Johnson, "Ordinary Folk and Cottaging: Law, Morality and Public Sex," (2007) *Journal of Law and Society*, Vol.34, No.4, at 528; See also H.L.A. Hart, "Law, Liberty and Morality," (London, 1965), See also: H.L.A. Hart, *Law Liberty and Morality*, (London, 1963) and *The Morality of the Criminal Law* (London, 1965).

[56] Charlotte Bunch, Women's Rights as Human Rights: Toward a Re-Vision of *Human Rights, Human Rights Quarterly,* Vol.12, No.4 (November, 1990) at 486-498.

strategies oscillate between demands for privacy and for social protection. Roslind Petchesky acknowledges the conflicting conservative and radical elements in such claims, noting that "[r]eproductive freedom is social and individual at the same time. It operates at the core of social life as well as within and upon women's individual bodies.[57]

In considering the ways in which the public and private split affects the substance and shape of rights claims, it is worth noting that feminists also regard the borders separating the two spheres as movable and often porous. Margaret Thornton portrays the public/private division as a "malleable political mechanism which can be effectively utilized to safeguard dominant interests under the guise of seeming neutrality and naturalness."[58] In the case of abortion, Petchesky notes how the assertion of privacy leaves women's moral decision-making a mystery and leads to the minimization of government involvement , which translates in turn as indifference or even outright state opposition to abortion in the form of restrictions. According to her, the language of liberal privacy lacks a concept of either social rights or societal responsibility[59] But the state's grant of legality for abortion, the recognition of privacy and the lack of social protection merely reflect the gendered order of the public and private spheres. As Kathy Rudy warns, reframing our understanding of the issue of abortion is not a matter of moving between private and public, but rather of challenging the gendered bifurcation:

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[57] Petchesky, *Supra* note 4-5, at 6.

[58] Thornton, *Supra* note 54 at 450-51; See also Johnson, *Supra* note 57 A good example of the movable boundaries of public and private is Johnson's discussion on public sex and in particular homosexual sex , which was singled out in the United Kingdom's 2003 Sexual Offences Act of 2003. Pointing out how public lavatories (male lavatories in particular) which offer a high degree of privacy for individual bodies, simultaneously afford bodies brought together in sexual configurations, making them problematic in heterosexual public life, he notes how the law expands policing and surveillance practices by deviating from complaints and witness-initiated policing vis-à-vis public sex. At 520-543). See also Dobbelaere, *Supra* note 21 at 5 Clearly the dichotomy "private-public" is not a structural aspect of society, but rather a legitimizing conceptualization of the world, an ideological pair used in conflicts by participants.

[59] Petchesky, *Supra* note 4-5 and 57 at 7-9.

> Women as a result of the way reproduction is structured are often encumbered with the humiliating positivity of pregnancy, which is to say that as a result of pregnancy, they are less than perfect citizens in a liberal society. In liberal society, when a woman forgoes abortion and chooses pregnancy, the state assumes that this person alone will take responsibility for this choice and for the child, with little support from the society at large.[60]

Rudy further takes issue with reducing the feminist position of choice solely to the legal right of abortion and notes how the focus on individual autonomy tends to rely heavily on the state for the enforcement of rights and compliance with legal standards. [61]

V
Philippine Law and Policy on Abortion

The issue of abortion in the Philippines is one area in which the state's standards of public morality clearly eclipse religiously based sexual morality. Philippine penal law on abortion is among the harshest in the world,[62] even when compared to other Catholic countries in Latin America.[63] A survey of the world's most restrictive abortion laws also reveals that the Philippines belongs to a class of countries lacking an explicit exception to save a woman's life.[64]

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[60] Rudy, *supra* note 12 at 99.

[61] Marlene Gerber Fried, "Transforming the Reproductive Rights Movement: The Post Webster Agenda," *From Abortion to Freedom: Transforming a Movement,* (Boston, MA: South End Press, 1990) at 1-25. ("Counting on the police to keep the clinics open, counting on the courts to preserve abortion rights, counting on the medical establishment to provide abortion services, makes us complicit with an oppressive system, a system which should be challenged, not relied upon.")

[62] *Revised Penal Code of the Philippines*, Act 3815, 1930, Book II, Title VIII, c 1, s 2, Art.257-259 The Act penalizes any person who performs intentional abortion upon a pregnant woman [including the woman who performs it on herself], as well as the woman who consents to its performance. The maximum penalty for abortion , if violence is used, is twenty years. Meanwhile, the maximum penalty for abortion using drugs or beverage (without violence) is twelve years when done without the woman's consent and six years with consent. Unintentional abortion through violence upon the pregnant woman is also penalized with a maximum penalty of six years. However, if the abortion is performed in order to "conceal dishonour," the penalty for the woman as well as for her parents who consented to the abortion is lowered to six months and one day to a maximum of four years.

[63] "Colombian Court Legalizes Some Abortions," *New York Times* (12 May 2006), available at: < www.nytimes.com/2006/05/12/world/americas/12colombia.html>

[64] The World's Abortion Laws, Center for Reproductive Rights, New York City, New York, (May 2007), available at < http://www.reproductiverights.org/pub_fac_abortion_laws.html>.

Despite the continuing threat of penal sanctions based on the centuries-old prohibition, approximately 473,000 clandestine abortions take place in the Philippines on annually.[65]

The moral prohibition against abortion as "sin" was introduced to the Philippines at the time of Spanish colonization in 1521 through the process of Catholic conversion,[66] but the statutory prohibition found in Philippine penal law today derives from the Spanish *Kodigo Penal* of 1897.[67] The Roman Catholic Church had no categorical position that personhood begins at conception until Pope Pius IX's *Apostolicae sedis* in 1869, which proclaimed, that the termination of pregnancy at any stage was homicide and a ground for excommunication.[68] Before this, termination was permitted prior to ensoulment or "hominization" which was believed to be at 40 days for males and at between 80-90 days for females.[69]

The provision on abortion falls under "The Destruction of Life" in the Philippine penal code. Before the Roman Catholic encyclical against modern contraception was issued in 1968, the focus of Catholic sexual morality was illicit sex and mainly reflected in the law under a woman's "concealment of dishonour," a mitigating circumstance which lowered the penalty for

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[65] Unintended Pregnancy and Induced Abortion in the Philippines: Causes and Consequences, Allan Guttmacher Institute (AGI), 2006, available at: < http://www.guttmacher.org/pubs/journals/3114005.html>

[66] Carolyn Brewer, *Holy Confrontation: Religion, Gender and Sexuality in the Philippines, 1521-1685* Manila: Institute of Women's Studies, St. Scholastica's College, 2001) Brewer's examination of the Bolinao manuscript, the only existing document on the Inquisition in the Philippines, provides a stark contrast to conventional accounts of Philippine Christianization through Spanish colonization and Catholic conversion (by clerics). She underscores how the violent process of conversion was resisted, and how such resistance was often led by women.

[67] Carolina Ruiz Austria, "Sex, Sexuality and the Law: The Construction of the Filipino Women's Sexuality and Gender Roles in the Philippine Legal System," *Womenlead Journal on Law and Culture* , Vol. 1, No. 1. July-December 2001, p. 30-31.

[68] Pope Pius IX, *Acta Apostolicae Sedis*, (1869) at 22:539-92.

[69] Laury Oaks, "Irish Trans/national Politics and Locating Fetuses," *Chapter 10, Fetal Subjects, Feminist Positions*, Ed. Lynn M. Morgan and Meredith W. Michaels, (University of Pennsylvania Press, 1999).

abortion.[70] When Roman Catholic teaching on contraception began to conflate it with abortion, it further emphasized Catholic sexual morality in relation to abortion. The official position of the church reiterated a stand against all modern contraceptive use, even in the context of family planning within a marriage.[71]

While penal law on abortion has never been amended, subsequent laws passed in relation to the government's population program contain key phrases excluding abortion. The Population Act outlining the state's commitment to "make available all acceptable methods of contraception to all Filipino citizens desirous of spacing, limiting or preventing pregnancies" had the phrase "except abortion" added to it in an amendment.[72] This reference to abortion in a policy outlining acceptable methods of contraception reflects the conflation of contraception with abortion, as do 1974 amendments to the Revised Administrative Code , which categorized a list of "non mailable" matter:

> (c) Articles, instruments, drugs and substances designed, intended, or *adopted for preventing conception or producing abortion,* for any indecent or immoral use, or which are advertised or described in a manner calculated to lead another to use of apply them *for preventing conception or producing abortion,* or for any indecent or immoral purpose.[73] (Emphasis added)

The same law went even further, prohibiting the transmission of messages by telegraph, cable or wireless telegraphy, or delivered to their destinations by any officer or employee of the Bureau of Posts when they contained the following:

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[70] *Supra* note 62.

[71] Pope Paul VI, *Humanae Vitae*, 25 July 1968

[72] Presidential Decree No. 79, December 8, 1972. The amended version reads: "make available all acceptable methods of contraception *except abortion* to all Filipino citizens desirous of spacing, limiting or preventing pregnancies." (Emphasis added)

[73] Republic Act 4623, 1974

> (d) Written or printed message or communication advertising or describing directly or indirectly, information where, how, for whom or by what means any *articles, instrument, drug or substance designed, intended or adapted for preventing conception, or producing abortion* may be obtained or made, or where or by whom any act or operation of any kind for the purpose of procuring or producing an abortion, will be done or performed, or who or by what means *conception may be prevented or abortion produced*: Provided, however, that this prohibition does not apply to scientific informations [sic] concerning articles, instruments, drugs and substances designed, intended, or adapted for preventing conception.(Emphasis added)

A host of other enactments are replete with references to abortion, often with no object or purpose other than to reinforce it as "immoral." A case in point is a provision in the Social Amelioration Program for sugar plantation workers enacted in 1991.[74] The law, which provides health benefits for sugar plantation workers, requires women claiming hospital benefits in cases of miscarriage or abortion to present a medical certificate proving that their "miscarriage or abortion was unintentional." Similarly, the *Magna Carta* of Public Health Workers[75] excludes "induced abortions" from its list of hospital benefits. General laws on social security benefits (public and private) do not include any such restrictions in awards, claims or benefits with respect to abortion.[76]

Equating contraception with abortion is a position which has gained popularity alongside the use of the rhetoric of the "unborn." The Philippines adopted a new Constitution in 1987 following a non-violent uprising which led to the end of a twenty-year military dictatorship. The new Constitution incorporated a number of human rights principles, but one of the most hotly

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[74] Republic Act No. 6982, May 1, 1991

[75] Republic Act No.7305, March 26, 1992

[76] Republic Act 1161 as amended by Republic Act 8282 (1997) Social Security Act and Presidential Decree 1146 as amended by Republic Act 8291 (1997), Government Service Insurance System

contested provisions in the new Constitution is what is now known as the "protection of the unborn" clause:

> The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous institution. It shall equally protect the life of the mother and the unborn from conception.[77]

According to the International Reproductive Rights Research Action Group (IRRAG), women's groups, in a display of unity, deliberately steered clear of controversial issues such as divorce and abortion in making their suggestions to the 1986 Constitutional Commission on provisions for women's human rights. On the other hand, Pro-Life Philippines lobbied for the provision on the unborn, initially wording it as the "right to life of the fertilized ovum." IRRAG recalls how women's groups were not yet prepared to take a stand on abortion and how in the end individual women came forward with a petition:

> Individual women conducted a petition campaign, asking the commission to eliminate the "right to life of the unborn" on the grounds that women's voices had been effectively silenced by the hostile cultural and social environment and that such a provision would discriminate against women who lack the education and resources to access safe medical services. [78]

On the surface, the provision bears a striking resemblance to the Eighth Amendment of the Irish Constitution, undertaken through referendum in 1983 which states:

> The State *acknowledges the right to life of the unborn and, with due regard to the equal right of the mother*, guarantees in its laws

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[77] Section 12, Article II, State Policies and Principles, 1987 Philippine Constitution.

[78] Mercedes L. Fabros, Aileen Paguntalan, et.al., "From Sanas to Dapat: Negotiating Entitlement in Reproductive Decision Making in the Philippines," *Negotiating Reproductive Rights, Women's Perspectives Across Countries*, Rosalind Petchesky and Karen Judd, Eds., International Reproductive Rights Research Action Group (IRRAG), (New York: Zed Books, 1998) at 228.

> to respect, and, as far as practicable, by its laws to defend and vindicate that right.[79] (Emphasis added)

Sophie Cacciaguidi-Fahy notes that "in the early days of the Irish state, the unborn occupied an unspoken implicit legal space coupled to the mother." She adds that the Eighth Amendment "created a unique legal space, a constitutional womb for the unborn, constructing it as a separate legal entity." [80] The resemblance between the two provisions, however, ends where the Philippine Constitutional Commission debates begin. Despite the attempts of the conservative lobby, the deliberations on the provision "equally protecting the life of the mother and the unborn" do not support the construction of the unborn as a separate legal identity, nor endow it with legal personality.[81]

Bishop Teodoro Bacani and Father Joaquin Bernas led the Catholic lobby in the Commission, initially using the term "fertilized ovum."[82] Commissioner Suarez then raised the issue of whether "the provision would mean the elevation of the fertilized ovum to the category of a person with constitutional rights," but Commissioner Bernas, a Jesuit priest and a lawyer, replied in the negative. A lengthy debate followed at this point, with references to Philippine Civil Law in which birth determines "legal personality." [83]

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[79] Article 40.3.3, Eighth Amendment Irish Constitution (1983)

[80] Sophie Cacciaguidi-Fahy, "Creating Legal Space for the Unborn," (2006) *International Journal for the Semiotics of Law*, Springer, 19: 275-292.

[81] Fabros, *supra* note 78 at 228 IRRAG takes a different view, saying that: While the provision was reformulated to read: "The State shall equally protect the mother and the unborn from conception," the victory belonged more to the Church than to the women." This observation was based on firsthand accounts of the deliberations but focuses only on the adoption of the provision itself. While the provision's political impact is significant, it bears noting that the Pro-Life lobby never got what they aimed for, which was the adoption of a categorical ban on contraception and abortion.

[82] July 17, 1986, Record of the Constitutional Commission, Vol.1, p. 690 & 693

[83] *New Civil Code of the Philippines*, Act 886, 1949, Book I, c 2, Art.40-41 (1950) "Birth determines civil personality. The foetus is considered born if it is alive at the time it is completely delivered from the mother's

A resolution was proposed to adopt "embryo" replacing "fertilized ovum" but this was also defeated.[84] Rev. Rigos emphasized the "sharp differences" between the opinions of religious authorities on the question of when life begins, and warned the Commission about putting a note of finality to the debate through a categorical definition of the beginning of life.[85] Several days of deliberations followed reflecting a lack of consensus on the interpretation of the provision, when Commissioner Romulo proposed an amendment to remove the provision from the Bill of Rights. Romulo's proposed amendment called the Commission's attention to the exclusively "Catholic" character of the notion being debated:

> Madam President, I have an amendment on Section 1, line 10, which is both by way of substitution and transposition. I propose to delete the sentence "The right to life extends to the fertilized ovum," and in lieu thereof place a new sentence: The State shall protect human life from the moment of conception." I suggest that this be adopted and transferred either to the Article on the Declaration of Principles or to that on Human Resources.
>
> The reasons for my amendment are as follows: First, I do not believe this original sentence belongs to the Article on the Bill of Rights. It is not only jarring but also contradictory to the main purpose of a bill of rights. *The Bill of Rights is supposed to protect the individual from the state and the minority from the majority. This original proposal impinges on the right of the minorities who do not believe in this Catholic concept.* Thus, I think it is less objectionable and will accomplish the same purpose, if we transpose it to another article in the way that I have suggested.[86] (Emphasis added)

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womb. However, if the foetus has an intra-uterine life of less than seven months, it is not deemed born if it dies within twenty-four hours after its complete delivery from the maternal womb."

[84] July 1986, Resolution No. 175, Record of the Constitutional Commission, Vol. 1

[85] July 17, 1986, Records of the Constitutional Commission, Vol.1, p.695.

[86] July 18, 1986 Record of the Constitutional Commission, Volume One p. 721-722

With a vote of 30-0, the Romulo amendment was unanimously adopted and; the provision was removed from the Bill of Rights and placed under the declaration of state principles. Later, the word "moment" was finally dropped from "moment of conception." This amendment proves that the framers of the Constitution recognized the serious disagreements on the acceptability of both contraception and abortion across religious (and non-religious) beliefs, thus framing the interpretation of the provision within the terms of religious freedom. Overall, the deliberations of the Commission reflect intent not to fix a precise moment of conception, or to define it as fertilization. Because the question of defining "conception" varies greatly across both theological and medical constructs, the debates over the interpretation of the constitutional provision transcended the abortion/contraception divide and in this instance demonstrated a resistance to the Catholic position against modern contraception which equates contraception with abortion.

A separate provision on responsible parenthood offers further proof that the Commission not only acknowledged the conflict between Catholic teaching against modern contraception and existing government policy on modern family planning methods, but never bought into the abortion/contraception conflation underlying the official Catholic position:

> The State shall defend:
>
> (1) The right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood.[87]

As early as 1971, the Population Act already couched the family planning program policy in similar terms:

[87] Section 3, Article XV, The Family, 1987 Philippine Constitution

> The Congress of the Philippines hereby declares that for the purpose of furthering the national development, increasing the share of each Filipino in the fruits of economic progress and meeting the grave social and economic challenge of a high rate of population growth, *a national program of family planning which respects the religious beliefs of the individuals involved shall be undertaken.*[88] (Emphasis added)

When it realized that it had failed to establish "foetal personhood" in the Constitution, the Catholic Church immediately put pressure on then President Corazon C. Aquino to issue an Executive Order preventing the use of government funds for anything other than Natural Family Planning (NFP). In response, women's groups mobilized demanding transparency and public hearings. In the end, Aquino never issued such a policy. [89] This, however, did not prevent lawmakers on the side of the conservative lobby from filing bills to ban contraception. Senator Francisco Tatad was the first to file such a measure before the newly reconstituted Congress in 1987. Senator Leticia Shahani, a known supporter of women's human rights and former official of the UN Commission on the Status of Women (CSW), recounted that Senator Tatad was asked by the other Senators whether he knew that his draft ban on contraceptives was tantamount to criminalizing the job of the Secretary of the Department of Health. According to Shahani, Tatad simply answered "Yes."[90] Similar draft bills were filed before the 13th Philippine Congress.[91]

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[88] Republic Act No. 6365, August 17, 1971.

[89] Fabros, *supra* note 80 and 83 at 228. See also: It took the conservative Catholic lobby thirteen years until before they were able to convince a President to take a position privileging Natural Family Planning (NFP) over modern contraceptives. Since 2001, Gloria Macapagal Arroyo has not outlawed contraceptives but her administration has consistently barred both the allocation of and spending on modern contraceptives, in the face of the USAID phase out of donated contraceptives.

[90] Carolina Ruiz Austria, "When Freedom Fails: An Analysis of Free Speech and Women's Right to Safe Abortion in the Philippines," Monograph, Issue Vol. 1, *Freely Speaking* , No. 4 (Manila: Womenlead Foundation, Inc., 2005) at 2.

[91] House Bill 5028 (2006) by Rep. Hermilando I. Mandanas purported to recognize the right of "conscientious objection" but ended up defining it solely in the context of Catholic health professionals and institutions, in their refusal to take part in the provision of reproductive rights services e.g. contraception, post abortion care and even therapeutic abortions.

A legal battle over the interpretation of the provision on the unborn featured in a 2002 administrative case in the Philippines, but it never reached the Supreme Court.[92] In 1999, the Department of Health Secretary approved the registration of Levonorgestrel 750 mcg in the Philippines under the brand name Postinor and endorsed its provision in cases of rape and sexual abuse through women's protection units. The Emergency Contraceptive Pill (ECP), also known as the "morning after pill, is similar to regular hormonal birth control pills except for its dosage. Like the pill, its mechanism of action is to delay ovulation and inhibit fertilization. The Department of Health reversed its position after a Catholic organization, Abayfamilya, claimed that the drug was an abortifacient. Abayfamilya's petition put forward an interpretation of the Constitutional provision on the unborn as a categorical ban on abortion and went as far as to equate contraception with abortion.

Instead of making an evaluation as to the efficacy and safety of ECP in accordance with its mandate, the Bureau of Food and Drugs issued a recommendation to the Department of Health adopting the legal interpretation of the Constitutional provision put forth by Abayfamilya. The DOH in turn revoked the registration issued to Eurogenerics and banned Postinor.[93] Worth noting is that this reversal came in the wake of a change of administration, following the assumption by then Vice President Gloria Macapagal Arroyo of the Presidency.

After re-opening the case, the Reproductive Health Advocacy Network (RHAN), represented by lawyers of the Womenlead Foundation, Inc., argued that the Constitutional Commission had never fixed the definition of the beginning of life in the Constitution, and it also presented evidence of EC's mechanism of action to prevent fertilization, clarifying that it does

[92] Womenlead Position Paper, 2002.

[93] Department of Health Memorandum Circular No. 18, December 7, 2001.

not work against an already existing pregnancy. Medical and Legal Experts also testified before the Committee, pointing out the lack of consensus around the issue of when life begins, in both medical science and ethics. Likewise, medical experts gave evidence in support of the position that Levonorgestrel 750 mcg ECP works as a contraceptive. On October 2004, the Committee of Experts convened by the Department of Health voted to re-register Levonorgestrel 750 mcg, declaring it to be perfectly safe and legal under Philippine law.

The DOH has since then refused to act on the final recommendation, claiming that the original corporate applicant for registration had already backed out. While the case has not yet been brought to the Supreme Court, the legal rhetoric of "the unborn" from the same provision is frequently invoked by the Pro-Life movement as a basis for banning contraception, a position which finds strong political backing from the Macapagal-Arroyo administration,[94] although not necessarily under the Philippine Constitution let alone from International Human Rights standards. A recent ruling by the Supreme Court of Chile adopted the narrow Catholic position conflating abortion with contraception.[95] On April 4, 2008, the Chilean court issued a decision banning the sale and distribution of emergency contraceptive pills in public health institutions, ruling that it was an "abortifacient." Earlier, President Michelle Bachellet authorized the Ministry of Health to distribute ECP to women and teenagers.

The curious result of the conflation of contraception with abortion by the Catholic Church is that arguments for and against emergency contraceptive pills have showcased, on both

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[94] President Gloria Macapagal Arroyo declared March 25, 2004 as the "National Day of the Unborn," which coincided with the Catholic Feast Day of the Annunciation in that year.

[95] Most recently, the Constitutional Court of Chile made a ruling which rejected the World Health Organization's (WHO) classification of Emergency Contraception as contraceptives and ruled that it is an abortifacient. Available online < http://www.rhrealitycheck.org>; See also: Center for Reproductive Rights, available online http://www.reproductiverights.org/pr_08_0414ChilePublic.html.

sides, evidence of the mechanism of action of ECP as well as similar hormonal contraceptives. While the "evidence" used by some Catholic conservatives against hormonal contraceptives has been demonstrated to have questionable scientific value,[96] the focus on the question of when life begins serves ironically to throw open the entire question of abortion and reproductive decision-making as a matter of conscience. As a matter of conscience, what then would be an appropriate role for the courts in supporting and promoting an unencumbered exercise of women's reproductive decision-making? Without need of denying the influence of religious based values and secular objectives on the provision to equally protect the life of the mother and the unborn, the challenge for the courts, is to remain attentive to the tenets of pluralism underlying the principles of freedom of religion, non-establishment and separation, as well as women's human rights under the Constitution. The tradition of plurality and equality between faiths finds strong support from both an historical and a Constitutional perspective.

VI
Catholic Teaching on Abortion: Development, Difference and Dissent

Philippine penal law and the Constitutional provision on the unborn were consequences of the political position taken by the Catholic Church hierarchy, albeit within different historical periods. Yet moral views on issues such as sexuality, procreation, contraception and abortion are hardly uniform within Catholic moral theology. Beverly Wildung Harrison advises that current day debates around abortion need to be understood in the context of cultural shifts. She observes that "there is a relative disinterest in the question of abortion overall in Christian history." She adds that Christian theologians often wrote about abortion not in relation to Church policy but in

[96] Womenlead, *supra* note 94 The Petition by *Abayfamilya* cited authorities on embryology dating back to the 1800s as evidence.

accordance with political authority. Hence the strongest condemnations of abortion by theologians coincided with imperial state policies inveighing against women and sexuality outside procreation.[97] For instance, Pope Sixtus V (1585-1590) issued a Papal Bull "*Effraenatam*" which prescribed not only excommunication but also the death penalty for abortion.[98] As previously mentioned the Philippine penal provision and policy on abortion was patterned after the *Siete Partidas* of Spain and introduced at a time when church and state authority overlapped. In this case, the ecclesiastical punishment was simply reflected in the penal sanction.[99]

VII
Origins and History of the Prohibition in Catholic Thought

In Judeo-Christian history condemnations of abortion were generally associated with similar condemnations of infanticide. The attitudes stood in stark contrast to the Roman world, where both abortion and infanticide were widely practised. For Christian theologians the concept of hominization or the animation of the foetus was relevant to the legal classification of penances for those who committed abortion [100] St. Augustine's theory of delayed ensoulment, which is based on Aristotle's concept, is one of the most prominent sources of Church practice in this regard. Pope Gregory XIV later created limitations on the Sentence of excommunication for abortion. He later rescinded Pope Sixtus' absolute and introduced restrictions on the sentence of excommunication for offenders. By 1869, Pope Pius IX came out with the *Apostolicae sedis*,

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[97] Harrison and Cloyes, *supra* note 6 at 218.

[98] Pope Sixtus V, *Effraenatam*, 29 November 1588.

[99] See Part V above for more on this topic.

[100] Connery, *supra* note 13 at 306.

which drops the distinction between conception and animation. He also reinstated the absolute prohibition on abortion and the penalty of excommunication. The penalty for the sin of abortion, however, is disciplinary and is separate from church teaching. In distinguishing between the ecclesiastical penalty and Catholic teaching, ethicists and theologians refer to the difference between the expression of the moral value (whether through Church law or social policy), and reflection on the morality of specific acts. [101] In this sense, the moral value articulated in the norm is treated as a guiding principle which invites obedience rather than mandates a fixed rule with uniform application.

Differences and Dissent after Vatican II

The Second Vatican Council[102] is often associated with reforms in the Catholic Church. For many Catholics, (both lay and clergy), Vatican II made it theologically possible to legitimize collegiality, ecumenism, religious freedom, decentralization, equality and democracy. [103] Pope Paul VI came out with the *Humanae Vitae*[104] in 1968,proclaiming Church teaching on contraception unchanged and unchangeable. The encyclical was as a departure from the changes made possible by Vatican II. Prominent Catholic theologians maintained a right to dissent on issues not declared as infallible teaching by the Pope which included birth control.[105] Within

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[101] Harrison and Cloyes, *Supra* at note 6, 97 at 227.

[102] Pope John XXIII initiated Vatican II which began on October 11, 1962.

[103] Dobbelaere, *Supra* at 229.

[104] Pope Paul VI, *Humanae Vitae*, July 25, 1968. "The Church...in urging men to the observance of the precepts of the natural law, which it interprets by its constant doctrine, teaches that each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life."

[105] "Truth and Consequence: A Look Behind the Vatican's Ban on Contraception," Catholics for Free Choice (2008) No sooner was *Humanae Vitae* released than it was met with an unprecedented torrent of dissent from inside the church, most of it asserting that Catholics were free to follow their consciences on the issue of birth control. Many of the world's most noted theologians—including Bernard Häring, Karl Rahner, Hans

Catholicism, critiques of Church teaching on sexual morality, birth control and divorce are generally founded on questioning (1) the natural law assumptions of Catholic teaching in the areas of sexuality and reproduction, which is grounded on a particular form of classic metaphysics, and (2) whether church teaching should be approached as absolute norms without the possibility of exceptions.[106]

In recent Church history, Pope John Paul II articulated the concept of "sex complimentarity" in Catholic social teaching to speak about the fundamental equality of women and men.[107] While some argue that he made it possible to move away from the more hierarchical conception of "sex polarity" which pervaded both early Church teaching and history, some feminist theologians who otherwise welcomed the development, noted that the classicist view of natural law theory continues to reduce discussions on morality to the biological and the physical.[108] The idea of equality based on "sex complimentarity" overemphasizes the biological at the expense of considering moral reasoning and relationships. Likewise, the growing tendency to approach Church teaching on sexuality and reproduction in absolute terms and the manner of applying it as rigid and inflexible rules continues to be questioned and debated. On one significant level, the debates surrounding the issues of sexuality, procreation, birth control and abortion in the Catholic tradition Calls into question the authority of the Catholic Church hierarchy.

Küng, Edward Schillebeeckx, and Richard McCormick—dissented from the encyclical. The theological facilities of Fordham University, St. Peter's College, Marquette University, Boston College and the Pope John XXIII National Seminary issued public statements of dissent, as did 20 of the most prominent theologians in Europe.

[106] Bridget Burke Ravizza, "Human Rights Language and the Liberation of Women," (Dissertation, PhD in Theology, Department of Theology, Boston College, December 1999) at 52.

[107] Pope John Paul II, *Mullieris Dignitatem*,(An Apostolic Letter to Women) 15 August 1998

[108] Ravizza,*supra* note 106 at 55 (Ravizza cites Lisa Sowle Cahill, Charles Curran and Beverly Harrison)

With its clear Catholic origins, interpreting the Philippine penal provision consistently with the principles of pluralism and the demands of "secular space" presents a challenge to the courts.

VIII
Secular Spaces: Strategies for the Court

Turning to litigation and law-based strategies is not always considered a strong card for bringing about social change when it comes to women's rights. Luisa Cabal, Monica Roa and Lilian Sepulveda-Olivia note how public interest litigation continues to be underutilized by women's rights groups despite the availability of litigation as a means of addressing the gap between human rights standards at the international and domestic (constitutional) levels[109] They add that public interest litigation offers many opportunities to complement the efforts of social movements in consciousness-raising. Without denying the importance served by public interest and human rights litigation, however, it is worth noting that human rights have built-in limits as well as discursive potential in articulating the resistance of movements and the goals of social transformation. Balakrishnan Rajagopal observes that "extra-institutional forms of mobilization constitute important arenas of resistance that remain beyond the cognitive boundaries of international law's sole, approved discourse of resistance, viz., human rights." [110]

This is true in the case of abortion, where the dichotomies embedded in rights notions and law set limits to the array of possible arguments. A case in point is the legal claim of privacy which couches an exception to state intervention that is asocial and exclusionary. While it is

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[109] Luisa Cabal, Monica Roa and Lilian Sepulveda Olivia, "What Role can International Litigation Play in the Promotion and Advancement of Reproductive Rights in Latin America?", *Health and Human Rights: An International Journal*, Vol.7, No.1, (Boston: Harvard School of Public Health, 2004) at 51.

[110] Balakrishnan Rajagopal, "International Law from Below," *Development, Social Movements and Third World Resistance* (Cambridge, U.K.: Cambridge University Press, 2003) at 235.

premised on the inherent moral capacity of the woman, the inward pull of possessive individualism reflects an ideal of self-determination devoid of social context, affective ties or a history of desire.[111] By contrast, an exception couched within the terms of the right to free religious expression, usually claimed by a religious community or institution, frames the exception as directly originating directly from their divergent moral conviction and community practice.

In his *Abortion Rights as Religious Freedom*, Peter Wenz flips the argument and claims a defense of the right to abortion as religious freedom. He argues that beliefs about the personhood or humanity of foetuses twenty weeks or younger are religious, and he maintains that abortion-related legislation that reflects a conception of when life begins, violates the anti-establishment clause.[112] Criticizing Roe v Wade as "fatally flawed", Wenz maintains that the right of the woman is poorly grounded in the U.S. Constitution and that the majority's interpretation of privacy to include abortion is a problematic expansion of the concept. Wenz all too willingly forgoes women's rights as an important facet of the discussion on abortion. In taking issue with the court's ruling that the termination of pregnancy is a matter of privacy, he takes the liberal public/private dichotomy for granted and overlooks the gendered assumptions built into each sphere. Thus, in questioning how the regulation of abortion can properly be considered detrimental to self-determination, he compares it to polygamy and cancer treatment, which he argues are just as central to self determination, yet are regulated. He goes even further in comparing forced pregnancy to the peacetime draft: "pregnancy is shorter in duration and usually

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[111] Margaret A. Farley, "A Feminist Version of Respect for Persons," Feminist Ethics and the Catholic Moral Tradition," *Readings in Moral Theology* No. 9, Charles E. Curran, Margaret A. Farley and Richard A. McCormick, S.J., Eds. (New York: Paulist Press,1996) at 169

[112] Peter S. Wenz, *Abortion Rights as Religious Freedom*, (Philadelphia: Temple University Press, 1992) at 161.

less all consuming in effect than is the military duty of draftees."[113] Needless to say, the comparisons hardly do justice to pregnancy and the entire gamut of psychological, emotional, financial, social and political considerations which usually affect women's reproductive decision-making. Unfortunately, the abstracted liberal subject has never ever been a pregnant one. However, Wenz's use of the non-establishment clause to evaluate anti-abortion and anti-contraception legislation presents novel possibilities. Citing *Abington School District v Schempp*,[114] he characterizes secular beliefs (in contrast to religious beliefs) as "interwoven deeply into the fabric of civil polity":

> For example, we generally believe that, all other things being equal, people should not repress the religious side of their nature. Thus we encourage people through public service advertisements to engage in religious worship. More integral to the fabric of our society is belief that religion should be and remain as a matter of voluntary choice. Voluntarism in matters of religion is one of the secular values underlying the Establishment clause (the state should not force a particular religion on people) and the Free Exercise clause (the state should accommodate, where reasonable, practical, people's voluntary religious practices). Religious beliefs per se, however, are not essential parts of the fabric of our society.[115]

Further, Wenz adds that "the secular nature of a belief is relative not only to the society but also to the era in which it is entertained. A belief that is secular in a given society at one time may no longer be so at a later time." Another contextual approach to secularism is put forth by Karima Bennoune, who takes secularism to mean an emphasis on the temporal over the religious in law and an accompanying minimization of the role of religion in the functioning of the state and the legal system:

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[113] *Ibid* at 35-36.

[114] *Abington School District v Schempp* , 374 US 203 (1963).

[115] Wenz, *Supra* note 112 -113 at130-131

> The significance of the temporal for human rights is *not that it is morally superior to the religious but rather that it is contestable.* The temporal allows space for dissent which the "you cannot argue with God" paradigm forecloses.[116] (Emphasis added)

Bennoune points out that the prohibition of religious discrimination does not trump the prohibition on gender discrimination, because neither is subject to limitations and both are of equal importance. She adds that the right to religious expression, however, *is subject to limitations*. Like Merry,[117] she notes how the language of International human rights conventions "requires states to adapt religious practice to end gender discrimination." In doing so, human rights language neither harmonizes freedom of religion and the right to sex equality, nor confronts the consequences of this failure. Indeed, while the contest between secular human rights and religion is pre-framed in the language of international conventions themselves, it need not limit our understanding of rights. Bennoune's pragmatic approach focuses on the actual effects of accepting or denying certain rights claims, and evaluates the likely impact of acts claimed to be religious expression. [118]

In defending the ban on the headscarf upheld by the European Court of Human Rights in the case of *Leyla Sahin v Turkey* [119] and the British House of Lords in *Begum v Headteacher* [120]Bennoune argues that the decisions considered a matrix of factors such as fundamentalists targeting education, Islamaphobia and pressures on individual women to wear veils. In these cases, the defence of secularism was not merely an abstract state interest but took into account

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[116] Bennoune, *Supra* note 29 at 408.

[117] Merry, *Supra* note 24, 30, at 947.

[118] Bennoune, *Supra* note 29, 115 at 397-398.

[119] *Sahin v. Turk*, App. No. 44774/98 (Eur.Ct.H.R. Fourth Section June 29, 2004); Affirmed by the Grand Chamber in *Sahin v Turk* App. No. 44774/98 (Eur.Ct.H.R. November 10, 2005) available at <http://www.echr.coe.int/echr>

[120] *Begum v Headteacher and Governors of Denbeigh High School* 2 All E.R. 487 (H.L.) (Appeal taken from England)

the real impact of the policy on the human rights of the people involved.[121] In the case of *Begum*, other Muslim girls at the school expressed their concern about being pressured into wearing the *jilbab* and the court noted that the school consulted the students about the policy. Meanwhile the case of *Sahin* was from Turkey, where ninety-nine percent of the population is Muslim.

The contextual approach to secularism veers away from portraying conflicts between religion and women's human rights ultimately as a contest of claims where one right is minimized and subordinated to the other. Instead, it focuses on the practical effects of upholding or denying rights claims, considering the particularities of each case and the given historical moment.

The emphasis on the temporality and the relativity of secularism pertains to the contestable character of "secular space" proposed here. But while Bennoune's approach stresses the aspect of separation and the minimization of religion in state and legal systems, Wenz mentions the importance of the secular in holding together "the fabric of society;" in other words, areas of consensus. I submit that both are important facets of secular space. The principle of separation which harks back to the literal break between ecclesiastical and civil authority translates as the main strategy for ensuring non-establishment, but it should not be a division for the sake of division. The underlying principle of pluralism presupposes a meeting place for exchanges, interaction and contestation. In this sense, while secular space overlaps with public space and includes the state, it is not necessarily equivalent to the state or to state-created space, and the porous margin between public and private has to be acknowledged. Here William

[121] Bennoune, S*upra* note 29, 115 and 118 at 422-23.

Connelly's notion of pluralism as "a positive ethos of public engagement"[122] provides a more meaningful vision for social secular spaces in contrast to the "plurality of indifference" that usually results from the public and private division. As Adam Seligman observes:

> This way of denying difference is the very stuff of social life in the modern West and is perhaps better termed indifference than toleration. If I find your religious beliefs foolish and your sexual appetites objectionable but they do not affect me in my relations with you, then your beliefs and practices are or can be taken, at least over the long run, as a matter of indifference to me. Of course, indifference of this kind is less a psychological state or a technique of social etiquette than it is a fundamental aspect of our social order: indifference reflects and supports our legal separation of the public and private spheres. *Defining a realm for privacy is tantamount to defining a realm of principled indifference, where toleration is not at issue. But privatization also meant the secularization of the public sphere—which in turn, required a politics centering on rights rather than on service to the good.*[123] (Emphasis added)

Seligman's example also reminds us of the insidious ways that secularism (couched in terms of modernity) can be used when fused with the ideology of the public and private division,[124] usually in the portrayal of a barbaric, uncivilized "Other."

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[122] William Connolly, *Pluralism*, ed. Samuel A. Chambers and Terell Carver (London, New York: Routledge, 2008) at 48; 64-65. Conolly's ideal of deep expansive pluralism stresses the importance of "relational virtues of hospitality and civic virtue across faiths."

[123] Adam Seligman, Particularist Universalism, A Response to Abdullahi Ahmed An-Naim, Vol. 11, No. 11, *Symposium: Talking Peace with Gods*, (Duke University Press, 2005) at 83. Seligman takes the critique of tolerance further and connects it to Liberal Protestantism. "Accepting this set of principles means accepting a vision of self and society that is not shared across the globe, across human civilizations, or even to some not-inconsiderable extent within modern Western societies themselves. It is easily argued that the privatization of religion, the secularization of the public sphere, the politics of rights, and the principled indifference toward differences are part and parcel of a quite particular religious outlook—that of liberal Protestantism. When popular wisdom says that the problem of religious toleration will be solved, and a universal definition of human rights established, as soon as intractable fundamentalists accept these so reasonable and accessible principles, what the popular wisdom holds is that fundamentalist Christians, Muslims, Jews, Hindus, and Sikhs should convert to the viewpoint of liberal Protestantism.". See also: discussion below (Part IV).

[124] Wendy Brown, *Regulating Aversion, Tolerance in the Age of Identity and Empire*, (New Jersey: Princeton University Press, 2006) Wendy Brown tackles the notion of "tolerance" as the new secular catchphrase. Her book explores the use of tolerance [couched in secular modernity] by the state as a form of governmentality, in order to quell disturbances of the peace but also to relegitimise liberal universalism

When not exclusively pertaining to the state, the idea of secular space reframes the strategic question in relation to separation and non-establishment. Instead of imagining a sphere devoid of religious values, as the state is purported to be, or making a permanent determination as to which values are religious and which are not, the courts can be more critical , for instance by taking into account the likely impact of their judgments. Boden comments:

> Static methods of resolving rights claims will not translate from culture to culture, religion to religion, city to countryside and so on. Legally, conflicts between women's human rights and religion are best resolved (albeit time consuming), on a case by case basis rather than a pre-established hierarchy of claims.[125]

In the case of abortion, a challenge couched within the terms of religious freedom (and non-establishment) may be raised against an interpretation of the Constitutional provision on the unborn and penal law against abortion as an absolute ban without any exceptions. For the Supreme Court, such an approach will be parallel to its decisions on religious accommodation. Close attention to real rights instead of purely abstract ones operates as a judicious check on state power, which can result in the blanket application of a law without exceptions.

(A) Exceptions in favour of Accommodation in Religious Expression: A Framework for Judicial Discretion

One way the accommodation of religious expression exercised by the courts works is as an important check on the coercive power of the state. In this case, judicial discretion exercised in favour of making exceptions prevents the blanket application of a penal or other prohibition which acts a restraint to free religious expression, without any possible exception. The main argument raised against an emphasis on the exercise of state discretion, however, as opposed to positive legal recognition through the legislative process, is the danger of empowering the

[125] Boden, *Supra* notes 3, 10, 23, 32, 54 at 46.

already powerful state. Indeed, leaving the state to determine whether or not a violation or an exception exists is at the core of debates about intention, motive and morality in criminal law. On one side of the debate, the orthodox view holds that motive has no relevance in criminal liability.

Whitley R.P. Kaufman defends the orthodox view by arguing that the determination of whether or not motive has any relevance to criminal liability is an issue best left to the legislature, and not to judicial discretion. On the other hand, the counter-movement argues that the distinction between motive and intention is a fundamental contradiction. Kaufman cites Husak who also defends the orthodox view, adding that "offenses would become horribly complex if all or even most factors relevant to blameworthiness were incorporated into statutes."[126]

In the Philippine context, both judicially created accommodation in favour of religious freedom[127] and expression and an express provision on motive as a mitigating circumstance in the law on abortion (e.g. concealment of dishonour)[128] exist. But while religious accommodation is based on the Constitutional religion clauses, the treatment of abortion in Philippine penal law is derived from the Catholic tradition. In this case, the approach evident in considering "concealment of dishonour" as a mitigating circumstance predates the elevation of abortion as a ground for excommunication[129] and is more in line with earlier Church teaching on delayed hominization.[130]

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[126] Whitley R.P. Kaufman, "Motive, Intention and Morality in the Criminal Law," (2003), 28 *Criminal Justice* 317 at 320.

[127] Further Discussion of accommodation cases will be found in Part VIII below.

[128] See Part V above, for more on this topic.

[129] *Supra* note 68.

[130] Connery, *supra* note 13 at 307. See also: "The History of Abortion in the Catholic Church," *Conscience Magazine*, (1996) In an eighth Century Penitential ascribed by Albers to Bede, women's circumstances are

It is submitted, that in this case the debate on law and morality does not fully capture the character of the judicial discretion exercised by the court in religious accommodation because it stops short of a categorical assessment of whether an act otherwise defined as a crime, or the subject of prohibition, is "right" or "wrong" in the absolute sense. Unlike the debate on criminal law and morality, the strategy of religious accommodation rises above such an either/or proposition, while actually leaving room for moral difference.

(B) The Danger of Absolutist Approaches to Law

The accommodation approach provides a useful framework for defining "secular space" because it neither demands a categorical pronouncement from the courts regarding morality nor depends on the courts to fix the line between the so-called moral and immoral. Instead the courts' task (in outlining an exception) is a protective one and the role it assumes is best fulfilled by considering the specific context and circumstances of each case. On the other hand, critics of religious accommodation note the perils of giving undue influence in favour of religion. Indeed, many of the issues they raise validly point to the dangers of entertaining too many demands for religiously-based exceptions.[131] I do not propose to tackle all of these critiques squarely in this thesis but note that the question of whether the courts will be faced with an unreasonable number of exception claims in the name of religion remains at best a hypothetical one. The answer is likely to vary in each jurisdiction and context.

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acknowledged and had a mitigating effect on the penance. In this period, "illicit intercourse" was considered the greater sin in abortion.

[131] Donald L. Drakeman "The Supreme Court and the Establishment Clause," *Church-State Constitutional Issues: Making Sense of the Establishment Clause* U.K.: Greenwood Press, 1991) at 1-131 In his study of the American non-establishment and accommodation cases, Drakeman argues the need to distinguish pure establishment cases (where the state ends up endorsing religion) from extra space mere accommodation cases in the name of free religious expression, which he views as far less dangerous to the republic. His framework emphasizes the need to treat freedom of religion inseparably with the right not to have government establish religion.

Rather than an actual claim for a religiously-based exception, the strategy proposed here in the case of abortion refers only to accommodation as an example of how the courts, guided by a pluralist notion of secular space, can step in to temper the law's forceful application. In the case of abortion, the resort to legal strategies has been the subject of critiques within feminist theory and practice.

Critiques of "adversarial or coercive political strategies" on either side of the abortion debate pertain to both judicial and legislative approaches. Troy Dostert notes that Elizabeth Mensch and Alan Freeman's "*The Politics of Virtue*" (1995) and Kathy Rudy's "*Beyond Pro-Life and Pro-Choice*" (1996), "seek in different ways to challenge the conventional wisdom on abortion and public discourse."[132] For Mensch and Freeman, the *Roe v Wade* decision pre-empted the vibrant moral debate that was taking place between theologians and ethicists in the 1960s and 1970s. They argue further that the U.S. Supreme Court's reliance on a "privacy right" rationale veered towards absolutism and had the effect of dismissing as legally irrelevant a continuing ethical, theological and political debate on abortion.[133] Instead of invoking "due process" which, Mensch and Freeman argue, could have been sufficient to overturn the extreme Texas statute that criminalized all abortions except in cases to save the mother's life, the majority opinion in *Roe* ended up characterizing first trimester abortions as a purely private option constrained only by medical reasons. Meanwhile, Kathy Rudy echoes the disapproval of adversarial pro-choice/pro-life abortion rhetoric, but unlike Mensch and Freeman remains wary of "legislative compromises." Her main reason for doubting the possibility of a law-based "final solution" to the abortion debate lies in how she characterizes the abortion issue as one of moral

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[132] Troy Dostert, "The Promise of a Post-Secular Politics," *Beyond Political Liberalism, Toward a Post-Secular Ethics of Public Life* (Notre Dame, Indianna: University of Notre Dame, 2006) at 206-207.

[133] Elizabeth Mensch and Alan Freeman, Natural Law and Catholic Tradition, Chapter 2, *The Politics of Virtue: Is Abortion Debatable?,* (Durham & London: Duke University Press, 1993) at 126-127.

difference. Dostert notes that for Rudy, "approaches to abortion that privilege a legislative strategy are to some degree an attempt to circumvent this reality, by assuming that the boundaries separating moral communities are porous or nonexistent." [134]

While they acknowledge that the secular rights rationale of Roe was undeniably empowering in the affirmation of women's capacity to control their own lives and to act as moral agents, Mensch and Freeman point out the moral limitations of *Roe's* "starkly secular" vocabulary. But while they provide a strong critique of *Roe v Wade* for privileging Enlightenment discourse as appropriate, rational, public discourse, and in turn for implicitly labelling other moral traditions private, subjective and irrational, it is not quite clear how turning to legislation would have been any different. One reason for expecting that legislation would have allowed the possibility of compromise favoured by Mensch and Freeman is the fact that sixteen liberalized abortion laws were already passed by States covering over 41 percent of the U.S. population, five years prior to *Roe*. This trend, according to them, would have continued even without the *Roe v Wade* decision. But while the question of whether litigation or legislation can work better ,or allow more public engagement given a particular historical and cultural context , is of strategic importance, it is also important to recognize that absolutist approaches to law can emerge in either case through the rigid application of laws in judgements or fixing meaning through codification or legislation.

According to Lynn Freedman, an absolutist approach to law is evident in the refusal of religious fundamentalists to acknowledge any diversity of belief and practice that exists within their broader communities:

> In this fundamentalist framework, *legal rules are sacralised* and thus made absolute and unchallengeable. The breach of a rule –

[134] Dostert , *Supra* note 132 at 210.

> sometimes even the verbal challenge to a rule-is taken as an offence, not just against the State that promulgates the rule or the community authorities who enforce it, but against the divine will as well. Moreover the absolutist approach to law and to religious authenticity enables fundamentalists to ignore or condemn any diversity of belief and practice that exists within their broader communities.[135] (Emphasis added)

Mensnch and Freeman, point to a similar tendency within feminism in the United States: "Mirroring the religiously rooted absolutist opposition to abortion that arose after *Roe v Wade* was an equally absolutist emergent feminism that made abortion rights its political and moral centrepiece in the 1970s."[136] Nonetheless, while it may be fair to say that advocates on either side of the pro-life and pro-choice debate resort to legal absolutist strategies (turning to law for the ultimate solution), the outright legalization of abortion (despite its implicit liberal basis) still benefits women, rather than endangers them. In contrast, regimes of absolute prohibition not only endanger women's lives, but also do not succeed in preventing or minimizing unsafe abortions. The critique of absolutist positions, when applied to law, highlights a central issue within feminist legal theory. Carol Smart in "*The Power of Law*," noted that:

> The problem of attempting to construct a feminist jurisprudence is that it does not de-center law. On the contrary, it may attempt to change its values and procedures, but it preserves law's place in the hierarchy of discourses that maintains that law has access to the truth and justice. It encourages a "turning to law" for solutions, it fetishizes law rather than deconstructing it.[137]

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[135] Lynn P. Freedman, "The Challenge of Fundamentalisms," (1996), 8 Reproductive Health Matters 55 at 59.

[136] *Mensch and Freeman, supra* note 133 at 129.

[137] Carol Smart, Feminism and the Power of Law, *Sociology of Law and Crime*(London, USA and Canada: Routledge, 1989) at 66.

Smart also postulated that perhaps the lesson is that "the law is not monolithic and that what it is depends on how it is used on its social substance and interface."[138] It is in this light that Mensch and Freeman's critique of absolutism within feminism and on the issue of abortion makes the most sense. While *Roe v Wade* may have legalized abortion and as a consequence made it safer for women, the manner in which this was accomplished (a court decision anchored on the right to "privacy"), most likely contributed to the hardening of the opposition:

> Probably one of the Court's goals in Roe was therapeutic: By leading the way in abortion reform as it had in civil rights, and by lifting the question out of the state-decision making process, it could prevent decisive struggles in state legislatures across the country. Politically, however, the effect of Roe was more inflammatory than therapeutic, as we can see with the advantage of hindsight. Roe triggered an opposition that would become increasingly absolutist in theologically defending the pro-life position.[139]

Thus while religious accommodation provides a potential basis and a rationale for more nuanced interpretations of Philippine penal law on abortion, it is important to keep in mind that "religious freedom" serves a rallying call for fundamentalist extremists as well. Neither interested in pluralism nor respectful of church/state separation implicit in non-establishment, such groups have increasingly turned to law advocacy strategies with a clear political agenda. Freedman points out that:

> The central place that law and religiously justified rules of behaviour have come to play in virtually all fundamentalist projects forces us to acknowledge that fundamentalism is not simply an adherence to the kind of turbulent apocalyptic worldview described earlier. It also entails the commitment to convert that worldview into an active political programme.[140]

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[138] *Ibid.*

[139] *Supra* note 134 and 137 at 127.

[140] Freedman, *supra* note 135 at 60.

As earlier pointed out, the Catholic hierarchy and the Pro-Life movement in the Philippines have not only been actively lobbying in Congress but also filing cases to align state policies with Catholic teaching and even going so far as to conflate contraception and abortion.[141]

It may be argued that framing religious accommodation as a judicious check on the state's coercive power only supports an argument for some exceptions to an absolute ban and represents something of a middle ground for engaging the complex moral issues around abortion. Indeed, the recognition of exceptions to an absolute ban will not necessarily address the issue of the availability of safe abortion procedures. The point, however, here is that by not buying into a legal "final" solution, we avoid falling into the trap of the pre-framed debate on abortion which portrays it as a contest between competing moral views or worse -- between the moral and immoral. In the Philippine context, where the moralized (and sacralised) discourse on abortion predominates, turning the focus onto the actual situations in which women decide to have abortions bodes well in opening up the conversation on abortion.

IX
The Philippine Supreme Court and Catholic Sexual Morality: Protection of the Minority from the Majority

The only Philippine Supreme Court case which deals explicitly with the question of the dominance of Catholic "sexual morality" is the case of *Estrada v Escritor*.[142] In 2000, Soledad Escritor, a court stenographer, was the subject of an administrative complaint for immorality, filed in court, for living with a man other than her legal husband and having a child with him. Both Escritor and her partner were still married to other people when they started living together.

[141] See Part V above for more on this topic.

[142] *Escritor, supra* note 41.

In her defence, Escritor claimed that she and her partner were validly married under the rules of the Jehovah's Witnesses, and that to adjudge a marriage sanctioned by Jehovah's Witnesses as immoral was a violation of her religious freedom. Despite this, the trial court found the respondent liable for immorality and went on to impose Catholic standards of ''morality:''

> *(B)y strict Catholic standards, the live-in relationship of respondent with her mate should fall within the definition of immoral conduct, to wit: "that which is willful, flagrant, or shameless, and which shows a moral indifference to the opinion of the good and respectable members of the community"* (Emphasis added)

Clearly, this case entailed the Supreme Court's understanding of Catholic sexual morality being applied to a non-Catholic woman. The Court remanded the case to the Deputy Court Administrator and required the Solicitor-General to receive additional evidence on the "sincerity and centrality" of the respondent's claimed religious belief and practice. It also required the State to present evidence of its compelling interest in overriding the respondent's religious beliefs and practice as well as to show that the means it adopted in pursuing its interest was the least restrictive of the respondent's religious freedom. Confronted with a case about the standards of sexual morality, the Philippine Supreme Court ended by reiterating the "immorality" of non-marital sex even as it treated Jehovah's Witnesses as ''the (religious) Other'':

> Respondent Escritor does not claim that there is error in the settled jurisprudence that an illicit relation constitutes disgraceful and immoral conduct for which a government employee is held liable. Nor is there an allegation that the norms of morality with respect to illicit relations have shifted towards leniency from the time these precedent cases were decided. *The Court finds that there is no such error or shift, thus we find no reason to deviate from these rulings that such illicit relationship constitutes ''disgraceful and immoral conduct'' punishable under the Civil Service Law.* Respondent having admitted the alleged immoral conduct, she, like the respondents in the above cited cases, could be held administratively liable. However, there is a distinguishing factor

> that sets the case at bar apart from the cited precedents, i.e. as a defense, respondent invokes religious freedom since her religion, the Jehovah's Witnesses, has, after thorough investigation, allowed her conjugal arrangement with Quilapio based on the church's religious beliefs and practices. This distinguishing factor compels the Court to apply the religious clauses to the case at bar. (Emphasis added)

In 2006,[143] the Supreme Court upheld *Escritor's* plea for exemption from the application of administrative law on "sexual immorality," holding that the State had failed to demonstrate "the gravest abuses, endangering paramount interests" which could limit or override the respondent's fundamental right to religious freedom; nor, in the view of the court, had the state exerted any effort to show that the means it sought to achieve its objective was the least intrusive means. Unfortunately, the court still evaded the question of why Catholic standards of sexual morality should be taken as the uniform and general standard in administrative law, even when such standards discriminate against religious minorities, as was the case in *Escritor*. Arguably, any couple in government service living together outside marriage and belonging to a religious or non-religious minority stands to be discriminated against by such a standard.[144] The Supreme Court's ruling steers clear of both the issue of religiously based sexual morality reflected in the standard of a government regulation (and penal law) as well as its demonstrable Catholic bias. The court did not even delve into what the state interest might be in prescribing an exclusively marital union standard for government employees. On the other hand, the decision marks a novel

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[143] *Estrada v Escritor*, A.M. No. P-02-1651, June 22, 2006, remanded from *Escritor* (2003), *supra* note 41 and 142.

[144] It would be interesting to look into the actual cases filed against government employees and to see whether and how gender factored into cases. A parallel rule in the Government Service Insurance System (GSIS),for instance , withholds maternity benefits to women when their child is born out of wedlock. No such rule exists for members of the Social Security System (SSS), which is the insurance system for private employees. In order to address the resulting gender inequality, in 2001, former Civil Service Commission Chairperson, Karina David crafted an administrative order which allows unmarried government employees to access their benefits. Bills to amend the GSIS provision are currently before the 14th Congress.

turn in the line of cases on religious freedom. While this was not the first time that the court had carved out an exception from the application of a general law in favor of accommodating a religious minority, [145] it was the first time it had done so in relation to a general penal law prescribing a standard of sexual morality.[146] By assessing the means adopted by the State in pursuing its interest (whether it is the least restrictive) vis á vis religious freedom, the court actually opened up an avenue for framing exceptions to the dominant standard of sexual morality through the principle of religious freedom. Likewise, in affirming the paramount importance of "religious freedom" in the context of minority religions vis á vis a "politically dominant religion," the court affirmed a pluralist ideal:

> In the interpretation of a document, such as the Bill of Rights, designed to protect the minority from the majority, the question of which perspective is appropriate would seem easy to answer. Moreover, the text, history, structure and values implicated in the interpretation of the clauses, all point toward this perspective. Thus, substantive equality-a reading of religious clauses which leaves both politically dominant and the politically weak religious groups equal in their ability to use the government (law) to assist their own religion or burden others-makes the most sense in the interpretation of the Bill of rights, a document designed to protect minorities and individuals from mobocracy in a democracy (the majority or a coalition of minorities).[147]

The court's inquiry into the "centrality and sincerity" of the Petitioner's practice of her religion, did however, place a lot of importance on the institutional side of religion which tends to privilege "religious authority." In this case, the respondent, Soledad Escritor, and the Supreme

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[145] *Escritor*, *supra* note 144. These cases were cited in *Estrada Escritor* as *American Bible Society v City of Manila*, GR L-9637, 30 April 1957; *Victoriano v Elizalde Rope Workers Union*, G.R. No. L-25246. September 12, 1974; and *Ebralinag v The Division Superintendent of Schools, Cebu*, G.R. No. 95770. December 29, 1995.

[146] *Ibid.* The Supreme Court pointed out that while Philippine law penalizes bigamy, it accommodates the same practice among Moslems, through a legislative act or a permissive accommodation via legislative act. Article 180 of P.D. No. 1083, Code of Muslim Personal Laws of the Philippines, provides that the penal laws relative to the crime of bigamy "shall not apply to a person married...under Muslim law."

[147] *Ibid* at 27.

Court relied mainly on the fact of "official sanction" by the minority religion as the basis for the exception claimed. Likewise, in its final decision affirming Soledad Escritor's claim, the court also attempted to allay dissenting opinions from other Justices who disagreed with the exception, by framing it narrowly to the particular case and the distinct circumstances of Soledad Escritor's conjugal arrangement.[148]

In the case of abortion, the value of *Escritor* does not lie not so much in the possibility of framing exceptions to penal law in the same manner and seeking accommodation for a woman charged with abortion, as it does in the promise of invoking the paramount importance of the same principles of religious freedom and non-establishment in the interpretation of the penal prohibition on abortion. While deliberations of the Constitutional Commission reflect a discussion of an exception "to save the life of the mother," the recognition of such an exception and other parallel examples (e.g. rape, incest, and fatal conditions of the fetus like anencephaly) in the Philippine jurisdiction are only possible only if the absolute Catholic prohibition is not read into the secular prohibition. In affirming the mutuality of the clauses on religious freedom and non-establishment, the court went on to characterize the role of the court as "protecting the minority from the majority." Accommodation here exercised by the court demonstrates an example of the role that it plays in checking the pernicious effects of applying laws without exceptions.

X
Secular Spaces and Unbundling Monopolies of Morality

In its 2003 decision on *Escritor*, the Philippine Supreme Court distinguished between the application of religion clauses in United States Constitutional law and jurisprudence and in the

[148] *Ibid* at 28.

Philippines. The court claimed that unlike the US, which has a tradition of strict neutrality in guarding the secular state, the Philippines and Filipinos are by nature religious. Without mentioning any religion in particular, the court went on to say:

> Recognising the religious nature of the Filipinos and the elevating influence of religion in society, however, the Philippine Constitution's religion clauses prescribe not strict but benevolent neutrality. Benevolent neutrality recognizes that government must pursue its secular goals and interests but at the same time strive to uphold religious liberty to the greatest extent possible within flexible constitutional limits. *Thus, although the morality contemplated by laws is secular, benevolent neutrality could allow for accommodation of morality based on religion, provided it does not offend compelling state interests.* (Emphasis added)

While the majority opinion of the court managed to dodge the deep-rooted Catholic bias of both the penal law on adultery and the government regulation imposing a marital union standard of sexual morality, issues which merit a full and separate discussion, the court's judgment comes very close to Wenz's application of the Non Establishment clause to defend the right to have an abortion. By drawing a distinction between public secular morality and religiously based morality, the court held that "the public morality expressed in the law is necessarily secular for in our constitutional order, the religion clauses prohibit the state from establishing a religion, including the morality it sanctions."[149] In effect, non-establishment and separation prevent a monopoly of morality by a single religious order. Likewise, a secular understanding of the Constitutional provision providing that "the State shall equally protect the

[149] *Escritor, supra* note 144-149 at 105. "Religious morality proceeds from a person's views of his relations to His Creator and to the obligations they impose of reverence to His being and character and obedience to His Will." in accordance with this Court's definition of religion in American Bible Society citing Davis. Religion also dictates how we ought to live, for the nature of religion is not just to know, but often, to act in accordance with man's views of his relations to His Creator. But the Establishment Clause puts a negative bar against establishment of this morality arising from one religion or the other, and implies the affirmative establishment of a civil order for the resolution of public moral disputes. This agreement on a secular mechanism is the price of ending the war of all sects against all; the establishment of a secular public moral order is the social contract produced by religious truce."

life of the mother and the unborn from conception" demands a rigorous interpretation of both religious freedom and non establishment vis á vis the co-existing right of women to gender equality and non-discrimination.

(A) Secular Space as Discursive Spaces in Law

In Chapter VI, I proposed the notion of secular space which need not be completely devoid of religious values but rather a space wherein exchanges, interaction and contestation between beliefs are made possible. The notion is necessarily premised on the accessibility and availability of democratic political and social space, which includes access to legal institutions. In addition, I also refer to the discursive space created by the courts in the context of legal reasoning and the adoption of judgements. I submit that the notion of secular space which also functions as "rhetorical and deliberative space" can move strategies around the law beyond the political contest of "legal legitimacy." While law is indeed relevant in addressing the reproductive and sexual well - being of women, continuing to engage these in the language of rights in the "abstract" (as is the tendency when the main strategy is legalization) actually does very little to account the social realities in which abortions take place. Sophie Cacciaguidi-Fahy aptly points out that "law does not operate in an autonomous space. It shares a complex relationship and many porous borders with culture at large."[150] In her analysis of Ireland's law on abortion (particularly the Constitutional mandate to "protect the unborn"), she notes how a "competing rights" discourse rests on "set hegemonic cultural and gender narratives, which are part of a culture where the language of morality and community is an integral part of its

[150] Cacciaguidy-Fahy, *supra* note 80 at 291. See also Smart, *supra* note 137 at 11-12. For Smart, law sets itself outside the social order, as if through the application of legal method and rigour, it becomes a thing apart which can in turn reflect upon the world from which it is divorced.

traditions." [151] She observes how human rights emerged as a potentially key intervening discourse in the developing discourse on abortion, describing how Irish law was brought into "universal human rights space" and subjected to extra-territorial scrutiny. This happened in a series of cases in which the rights to information, privacy and freedom of information were invoked before the European Court of Human Rights, and the CEDAW Committee systematically assessed the restrictive nature of its Ireland's abortion regime.[152] While its International commitments also bring the Philippines into the "universal human rights space," Cacciaguidi-Fahy refers to in addition; I propose that since the Philippine Constitution already reflects the principles of gender equality, religious freedom, non-establishment and human rights, it is possible to further ground rhetoric of women's sexual and reproductive rights on local practices and institutions. In the following sections, I argue that despite the adoption of a provision on the "unborn," the Constitution makes it impossible to interpret the same policy strictly in line with Catholic teaching.

Through the specific strategies proposed here, the main role I propose for the court in contributing to the creation of secular space derives from its power to interpret the law. In this case, however, rather than invoke this power in the context of defining or fixing meaning, or vesting legitimacy (and morality) on one position to the exclusion of others, I turn to an approach more akin to a mediating function. Such an approach is parallel to the court's rulings on

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[151] *Ibid* at 288-291.

[152] *Ibid.* While the ECHR was very cautious, Cacciaguidy-Fahy notes how later pronouncements by the Irish Human Rights Commission before the CEDAW Committee , recommending that the government adopt unambiguous legislation to specify the legal circumstances when abortion can be carried out in Irish territory, brought the discourse of Irish abortion onto another stage. Attorney General (S.P.U.C.). v. Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd [1988] I.R. 593; [1987] I.R.L.M. 477 (H.C); [1989] I.R.L.M. 19 (S.C). Here, the High Court held that the above were qualified by the fundamental right to life of the foetus; Application no. 26499/02 The case of D v Ireland brought before the ECHR in 2002 by a woman who sought a therapeutic abortion (on the grounds of fetal impairment) was dismissed in 2006 on procedural grounds.

accommodation. Instead of dealing with a contest between abstract claims (and paramount rights), a court which is focused on the practical effects of its judgements is in a better position to make exceptions to the law on abortion. The value of accommodation does not lie in establishing a preference in favour of religion but rather in the protection that it affords to the free exercise of conscience, religiously based or otherwise.

(B) Constitutional Intent behind the Provision on the "unborn"

Under the basic rules of statutory construction, the provision to "equally protect the life of the mother and the unborn from conception" requires an interpretation guided by the intent of the Constitutional Commission, *Ratio legis et anima.* [153] Given the outcome of the deliberations discussed in Section V, the argument here is that the same provision cannot be construed as: (1) a categorical definition of conception as fertilization or a definition of "when life begins;" (2) a ban on contraceptives, and (3) a categorical and absolute ban on any liberalization of laws on abortion. Not only was there definitely a lack of consensus in defining "conception" by the Constitutional Commission , but more importantly there was an unqualified recognition that foreclosing the debate would have profound repercussions on the freedom of religion and the principle of non-establishment. Commissioner Aquino was one of those who opposed the move to settle the issue of when life begins in the Constitution:

> I am alarmed by the way we tend to pre-empt this kind of discussion by invoking the claims of the righteousness of morality. These questions for me are transcendental and we cannot even attempt to address any conclusion on the matter without temerity or without bigotry. Besides, the level of human knowledge on this debate is so severely restricted that *to pre-empt the debate is, I guess, to pre-empt the deliberations and finally the possibility of*

[153] *Francisco, et.al. v Candelaria, et.al.,* G.R. No. 160261. November 10, 2003

> *agreement on the diverse theories on the matter.*[154](Emphasis added)

(C) The Provision on the "unborn" vis á vis Non Establishment, Separation of Church and State and Women's Human Rights

Another rule of basic statutory construction is that the Constitution should be interpreted as a whole, *ut magis valeat quam pereat.*[155] This means that provisions cannot be interpreted in such a way that would render other provisions of the constitution meaningless.

Under the Universal Declaration of Human Rights, the right to freedom of religion and the prohibition of discrimination on the basis of both religion and sex co-exist:[156]

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, *sex*, language, *religion*, political or other opinion, national or social origin, property, birth or other status.[157](Emphasis added)

Under the incorporation clause of the Constitution,[158] International Human Rights Law forms part of the law of the land, and women's right to equality is mandated by a host of treaties to which the Philippines is a party, such as the Civil and Political Rights Covenant,[159] Economic

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[154] September 17, 1986, Records of the Constitutional Commission, Vol.4, Period of Sponsorship and Debate

[155] *Ibid.*

[156] Christin Chinkin, "Women's Human Rights and Religion: How do they Co-Exist?" ," in *Religion Human Rights and International Law*, Javaid Rehman & Susan Breau, Eds, (Boston: Martinus Nijhoff, 2007) at 55.

[157] Art.2, Universal Declaration of Human Rights,

[158] Section 2, Article II, Declaration of State Policies and Principles, 1987 Philippine Constitution ("The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.")

[159] The Philippines ratified the Civil and Political Rights Covenant on October 23, 1986 without reservations. International Convention on Civil and Political Rights, adopted December 6, 1966, 21st Session, UN Doc. A/6316 (entered into force March 23, 1976). Art.3, 26

Social and Cultural Rights Covenant, [160] CEDAW, [161] and the Children's Rights Convention.[162] Women's right to equality is further recognized as state policy under the 1987 Constitution, and stands alongside the provision on the unborn in the same section as the Declaration of state principles: "The state recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men."[163]

(D) A Parallel Argument: The Least Restrictive Means to Promote State Interest

Observing the application of International Human Rights frameworks to abortion law reforms worldwide, Cook and Dickens note the following trends: (1) Reform as a function of respect for women's autonomy and self determination; (2) Reform as a response to demonstrated public health dysfunctions of restrictive laws and health services, and (3) Reform at the level of social justice and equality, or at the political level of rights of citizenship and democracy.[164]

The annual rate of 473,000 clandestine abortions as well as the inordinately high levels of maternal mortality in the Philippines should be sufficient grounds to consider the demonstrated dysfunction of the archaic penal prohibition on abortion. The prohibition has done nothing to prevent abortion and does nothing to promote the avowed state principles of "protecting the life

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[160] The Philippines ratified the Economic, Social and Cultural Rights Covenant on June 7, 1974 without reservations and it entered into force on January 3, 1976. International Convention on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), UN GAOR, Supp.No.16, at 49, UN Doc A/6316 (1996), 999 U.N.T.S.3 (entered into force Jan. 3, 1976).

[161] The Philippines ratified the Convention on the Elimination of All forms of Discrimination Against Women on August 5, 1981 without reservations and it entered into force on September 3, 1981. CEDAW adopted on December 18, 1979, 34th Session, UN Doc.A/34/46 (*entered into* force September 3, 1981) The government ratified the Optional Protocol to CEDAW on November 12, 2003 without reservation, Optional Protocol to CEDAW, October 6, 1999, 54th Session, UN Do A/Res/54/4 (entered into force December 22, 2000)

[162] The Philippines ratified the Children's Rights Convention on August 21, 1990 without reservations and it entered into force on September 2, 1990. Convention on the Rights f the Child, adopted November 20, 1989, 44th Session UN Doc. A/44/49 reprinted in 28 I.L.M. 1448 (entered into force Sept. 2, 1990).

[163] Sec.14, Article II, 1987 Philippine Constitution

[164] Cook & Dickens, *Supra* note 14 at 3.

of the mother and the unborn from conception." In fact, coupled with the Arroyo administration's restrictions on modern family planning methods, which withholds a key component of women's health care, it is poor women who are the most affected. Seventy-two percent of the women who have had abortions cite the economic hardship of raising a child as their reason for choosing to terminate pregnancy.[165]

In Philippine jurisprudence today, there is only an oblique reference to an exception to abortion, one that is found in the case of *Geluz v Court of Appeals* and termed as "medical necessity." In this case, the Supreme Court overruled a claim for damages filed by a man against the doctor who had performed several abortions on his wife, deciding that no right of damages could accrue on behalf of the unborn. In an *obiter dictum* it held: "It is unquestionable that the appellant's act in provoking the abortion of [the] appellee's wife, *without medical necessity to warrant it*, was a criminal and morally reprehensible act that cannot be too severely condemned; and the consent of the woman or that of her husband does not excuse it."[166] (Emphasis added)

The exceptions to penal sanctions on abortion were also deliberated in the 1986 Constitutional Commission but no clear categories were set or adopted by the Commission. This should not, however, bar the courts from recognizing exceptions. Such exceptions would not only benefit women's health and well-being but would run parallel to the Court's rulings on accommodation in favour of the paramount right to religious freedom, as was the case in *Escritor*.

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[165] *Allan Guttmacher Institute*, S*upra* note 67.

[166] *Geluz v Court of Appeals*, G.R. No. L-16439, July 20, 1961

If the provision is interpreted in line with the most conservative interpretations of Catholic teaching on abortion, the prohibition is total. The only acceptable act in terminating a pregnancy in conservative Catholic teaching is restricted to "indirect" acts which result in abortions necessary to "save the life of the mother." Such a narrow exception allows, for instance, only for the removal of the fallopian tubes in case of an ectopic pregnancy, but not medical abortion or other direct means of abortion.[167] I submit that an interpretation which reads a strict and absolute prohibition on abortion into Section 12, Article II would be tantamount to religious establishment and would violate the key Constitutional principles of the separation of church and state.

The case of *Escritor* opens up the possibility of claiming an exception to penal law on abortion based on the freedom of religion. The Supreme Court accommodated and exempted the petitioner from the applicable penal law on adultery, holding that the State had failed to demonstrate "the gravest abuses, endangering paramount interests" which could limit or override the respondent's fundamental right to religious freedom, and that the state had not shown that the means to achieve its legitimate objective was the least intrusive means. In the case of abortion, it could be argued that failing to provide exceptions to the penal law on abortion imposes a religiously based interpretation of the constitutional provision on the unborn as well as on the penal law itself. Furthermore, and an exception citing danger to a woman's life and health could hardly be construed as a grave abuse endangering paramount state interests.

Applying Wenz and Bennoune's contextual approaches to secularism, an additional number of exceptions could be granted by the court for reasons of both social justice and

[167]Connery, *Supra* note 13 and 133 at 56-59 ; See also: Elizabeth Mensch and Alan Freeman, "Natural Law and Catholic Tradition" Chapter 2, *The Politics of Virtue: Is Abortion Debatable?* (Durham & London: Duke University Press, 1993) at 43-44.

women's human rights. One likely model decision for the Philippine court to consider is the case which was filed by Monica Roa in the predominantly Roman Catholic country of Colombia. Case C-355,[168] argued in 2006 before the Constitutional Court of Colombia, involved a petition before the court to review the absolute ban on abortion in Colombia's penal law. Here, the court decided to give lower courts the authority to "refrain from imposing penalties on abortion in cases of "extraordinary conditions of unusual motivation." [169] These cases included abortions in situations arising from rape, foetal impairment, and saving a pregnant woman's life, each of which included both physical and mental health. The act of refraining from imposing penalties here is already similar to the strategy employed by the Philippine Supreme Court in *Escritor*.

In other jurisdictions where states still hesitate to decriminalize abortion altogether, Cook, Erdman and Dickens note that a parallel duty lies alongside the state aim of deterrence (of abortion), namely to inform physicians and patients when an abortion is lawful. In the case of *Tysiac v Poland*,[170] the Polish state was found in violation of women's rights to abortions that were lawful because it failed to create a regulatory framework under which women would know how to access procedures to which they were entitled; how to be involved in the decision-making processes affecting them, and how to obtain independent review of unfavourable decisions.[171] The European Court of Human Rights emphasized that the Convention (on Human Rights) is intended to guarantee rights that are not theoretical or illusory but are practical and effective.

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[168] C-355, Constitutional Court of Colombia, 2006; Summary and English translation of the decision by Women's Link Worldwide available online: <http://www.womenslink.org>

[169] *Ibid.*

[170] Tysiac, *supra* note 11 and 16.

[171] Rebecca J. Cook, Joanna N. Erdman, Bernard M. Dickens, "Achieving Transparency in Implementing Abortion Laws," Ethical and Legal Issues in Reproductive Health, (2007), *International Journal of Gynaecology and Obstetrics*, Vol.99, at 158.

Similarly, in *KL v Peru*,[172] a pregnant seventeen year-old whose foetus was found to be *Anencephalic* was refused medical authorization for an abortion in a public hospital, although the abortion would have been legal under Peruvian law. As a result, she was forced not only to carry the foetus to term, but made to breastfeed the infant, knowing it would soon thereafter die. The young woman was traumatized both by the severe deformities of the infant and by its eventual death. The United Nations Human Rights Committee ruled that the State's conduct amounted to cruel, inhuman and degrading treatment under the Convention on Civil and Political Rights.

In predominantly Roman Catholic Ireland, where an estimated 2,000 women go to Britain to have abortions each year in part because the 1967 UK Abortion Act which liberalized abortion is inapplicable to Northern Ireland, the provincial court of appeals held the Health Ministry accountable for its failure to clarify and publicize women's rights to access abortion services under prevailing law (which granted an exception to save the life or the physical and mental health of the woman). This was the ruling in the case of *Family Planning Association of Northern Ireland v Minister for Health Social Services and Public Safety,*[173] in which the court held that, such a failure violated the ministry's duties. However conservative it was in relation to other tribunals, the court still went so far as to require the Ministry of Health to assess the women's needs for services and to propose means to assure appropriate medical care in Northern Ireland with privacy and dignity.[174] In the case of the Philippines, where it is fairly common to

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[172] *K.L. v. Peru*, Comm. No. 1153/2003: Peru. 22/11/2005, UN Doc. CCPR/C/85/D/1153/2003 (2005)

[173] *Family Planning Association of Northern Ireland v Minister For Health Social Services and Public Safety* (2004) NICA 39 (Court of Appeal).

[174] Cook, Erdman & Dickens, *Supra* note 171 at 160.

encounter abuse[175] by health professionals who administer basic (and legal) emergency post abortion care, Northern Ireland's modest ruling could make a world of difference for Filipino women's health and lives.

For the Philippine state, guaranteeing these women's human right to life and health on paper and in policy is meaningless if women are not given the means to enable them to exercise their rights. International human rights standards require availability of health care for women through public health programs, i.e. accessibility, that is placed within the physical and economic reach of the population, and as well as quality of care.[176]

XI
Approaches to Secularism: Freedom of Religion and Women's Human Rights

Without a doubt, legal abortion in jurisdictions where it is no longer criminalized has saved women's lives, freeing women from the threat of imprisonment and keeping them from having to resort to unsafe abortion practices.[177] However, while couching women's rights claims within liberal law and politics has afforded women some space to have abortions, it has not always guaranteed women access to safe abortions.[178]

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[175] A Case study in 2003 by *Likhaan (Linangan ng Kababaihan)* a women's NGO advocating Reproductive Health reports that women who were suspected of having intentional abortions were not given anaesthetics by health care providers during the administration of post abortion care. Some women also reported to have been forced to wear signs which labelled them as "abortionists" or murderers while they were in the hospital. See also: Christian V. Esguerra, "Dark Stories Born in Delivery Rooms," *Philippine Daily Inquirer*, 29 May 2005. On the other hand, a news feature on one of Manila's most popular public hospitals which is preferred because of the low cost of maternity services, reported that women who were in the hospital because of multiple pregnancies (giving birth often) were also similarly "punished" and berated by health care providers.

[176] *Confronting Legal Impediments to Reproductive Freedom: The Legal Battle to Re-register Emergency Contraception in the Philippines*, Womenlead Foundation, Inc. (2003)

[177] Krista Jacob, *Abortion under Attack: Women on the Challenges Facing Choice,* ed. Krista Jacob (Emeryville, CA: Seal Press, 2006) at 18-19.

[178] Janine Brodie, Shelley A.M. Gavigan, Jane Jenson, *The Politics of Abortion*, (Toronto: Oxford University Press, 1992) at 146.

Embedded in the public/ private distinction, a purely secular notion of human rights focuses on the contest for legal legitimacy in a way that is tantamount to absolutism in legalization.[179] Strategies of expanding the human rights discourse to demand state accountability regarding women's sexual and reproductive health has led to an array of alternatives in addressing what traditional liberty claims for abortion lacked: a social, political and cultural context. One important result of such an engagement has been to challenge the practical effectiveness and appropriateness of penal law in relation to the state's objectives, which include the protection of women's human rights, and to reframe state mandates in relation to rights. Even in contexts where abortion has not been decriminalized, states specifically the courts, including International tribunals--have sought a balance between the objective of deterring abortion and the positive state duty to provide enabling conditions for women's rights exercise. However, conventional notions of secular rights entrenched in the public/ private division of liberal law and politics either depoliticize abortion, when claimed solely as privacy, or minimize women's agency in reproductive decision-making, when the rationale and decision to have an abortion depends too much on expert medical or other public authorities. Brodie, Gavign and Jenson describe the "medicalization of the abortion discourse" as jumping from "the criminal frying pan surely into the health care fire."[180] Reframing abortion from crime to a public health concern inches us some steps forward in the discussion, especially when it comes to the role of the state, but within a traditionally secular rights framework it does not enable a social engagement of the issues.

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[179] *Dostert*, *supra* note 132 and 134 at 206-207.

[180] Brodie, *supra* note 178.

In order to thrive, secular shared spaces not confined to "public/state" forms and institutions require both support and protection from the secular state. For the courts, accommodation (in freedom of religion cases) presents a practical strategy for dealing with competing claims and has been especially useful in promoting the right of the minorities against dominant religions. On the other hand, accommodation has its own limitations. States (courts in particular) are wont to adopt categorical definitions of what religion is or what religious practices entail, simply because this is what the practical adjudication of cases concerning religious freedom may demand. When weighing the interests of minority religions against a state policy or action which supports or benefits a dominant religion, for instance, the courts must lay down standards for acknowledging a specific, divergent religious tradition or practice, in order to accord it protection. The same approach can end up dangerously privileging religious authorities and silencing minorities and competing views within religious traditions. Douzinas Costas succinctly locates where this paradox occurs in the usage of "rights" as law or legal claims. Costas states that

> Human rights law is caught in yet another paradox: as law, it acts an agent of stabilisation of identity and rationalisation of state power; as human rights it introduces into the state and into (legal) personality the openness of social and cultural indeterminacy. [181]

Promoting respect between religions (and non-religion) should also be attentive to the danger of unduly privileging dominant voices in the dialogue and debate between and within religious traditions and non-religious traditions. Thus for the courts, and for legal advocates (in the case of public interest litigation), framing the debate in legal and human rights terms is a constant challenge of balancing strategic concerns and practical remedies. Indeed, legal remedies provide

[181] Douzinas *Supra* note 34 at 261; See also Wenz, *supra* note 112-113 at 152-153.

practical solutions for particular cases and disputes, but encoding rights claims into legal form also serves a symbolic function (which is even more pronounced in public interest litigation); that is, to endow a claim with the status of legitimacy. Advocates engaging human rights discourse to include sexual and reproductive rights make the same observation about International Human Rights documents:

> The first is that the language of reproductive health, gender and sexuality - language that until recently was used almost exclusively in the academic milieu and within social movements - has undergone a process of legitimisation. One illustration of this is the fact that this language has been included in the programmes of action of the International Conference on Population and Development (Cairo 1994), the Fourth World Conference on Women (Beijing 1995) and the World Summit for Social Development (Copenhagen 1995). This process has been uneven, however. While the words themselves have become common in international texts and analyses, the extent of assimilation of their meanings by national political bodies and in people's minds varies widely across countries.[182]

On the other hand, reducing disagreements regarding abortion to the sole issue of legal legitimacy, as is the usual case when the contest is between secular rights and religious beliefs, hallows out the power and potential of human rights to facilitate more productive conversations, and it precludes the possibility of engaging religiously based sexual morality in terms of either human rights' or religion.

Elizabeth Mensch and Alan Freeman note how moral debates on abortion were pre-empted, if not totally circumvented, in the seventies when the discussion of abortion was reduced to legal terms.[183] Mensch and Freeman note that by the 1990s we were already accustomed to the

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[182] Correa, *Supra* note 8.

[183] Mensch , *Supra* note 133 and 136 at 126-152.

deep cultural clash typified, if not identified, by the abortion issue. "The pro-choice defenders speak the voice of secular liberalism while their pro-life opponents speak that of religious conservatism."[184] While Mensch and Freeman make reference to the American context, the "pro-choice" and "pro-life" dichotomy has come to be a familiar if not the dominant way to frame the abortion debate.

In the Philippines, however, the dichotomy hardly resonates in the particular stories of women who have had abortions, often overcoming religious restrictions, the threat of penal sanctions and grave risks to health and life. Citing the case studies conducted by *Likhaan* (a women's NGO working on reproductive health), Tan illustrates how "pro-life/pro-choice" fails to capture the decision-making process the women described. The women in the study who decided to have abortions described their decision-making and how they considered economic factors, the needs of their other children, abandonment by a partner or spouse , and finishing school, among other factors. Likewise, the personification of the foetus is common among Filipino women who have undergone abortion: they often refer to it as *anak* (child) or baby, unlike medical or legal terminology which draw the issues of legality and or viability on the existence of a foetus . [185] The challenge Tan outlines is one which draws attention to the gap between the rhetoric of advocacy (pro-choice/pro-life) and the actual circumstances and concerns raised by Filipino women who have abortions. Liberalism's possessive individual, unlike the pregnant woman, is disembodied and disembedded. Continuing to describe the decision to have an abortion as "choice" in abstract terms portrays pro-choice as "anti-child" or "anti-baby." Indeed , while the notion of women as "rights bearers" remains important in the context of

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[184] *Ibid.*

[185] *Tan Supra* note 15 at 157.

claiming rights externally and demanding protection from the state, women's exercise of reproductive decision-making, is in fact a complex process and one that often takes place in consideration of their relationships and a set of particular others.[186]

In recognizing the complexities of the abortion issue as one of moral, ethical and even theological significance, the question of how much we are depending on law (and legal language) to resolve all possible conflicts arises. Asking such a question does not deny the tactical and instrumental uses of law-based claims, but it cautions against foreclosing other strategies. Hackett and Sullivan note the discursive potential of religion vis á vis law, human rights and culture:

> [R]eligion as a critical category of analysis in the intersections of law, human rights and culture, forces a rethinking of the preferred dualistic paradigms of collectivity, universality and particularity, embodiment and materiality. Because religion occupies a position on both sides, as well as being implicated in the creation of these oppositional categories, it can occasion new ways of thinking and acting in the perennial struggles for human dignity and freedom.[187]

Beyond the traditional boundaries of the "public square," alternative interpretations in theology and ethics within religious traditions can also offer such discursive spaces. However, Boden notes that in the wake of overlapping claims for privacy and religious freedom, dissent and competing interpretations within religious traditions are "doubly beyond the reach of state

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[186] Seyla Benhabib, "The Generalized and Concrete Other," *Feminism as Critique,* Seyla Benhabib and Drucilla Corell, eds. (Minneapolis: University of Minnesota Press, 2007) at 77-95. Seyla Benhabib's conceptions of the self-other relations as the standpoint of the "generalized" and "concrete" other, argues for the integration of justice and care. She points out that the concrete other has been left out in moral theory and continues women's oppression through privatizing their lot and excluding a central sphere of their activities.

[187] Rosalind I.J. Hackett and Winnifred Fallers Sullivan, A Curvature of Social Space, (March 2005) *Culture and Religion,* Vol.6, No. 1, at 10 Quoting Agamben (1998), Hackett and Sullivan point out how, at times, religion can also provide the only extra-state location from which to critique the problem of human rights.

protection", and that dissenters on the side of religion who do not want to abandon the controversy between rights and their religion are automatically excluded from the conversation.[188] While I agree with Boden's observation about neglecting diversity within religious traditions, I would add that the privileged space which emerges out of this kind of double claim to privacy and religious freedom is not solely a function of secular and liberal rights, but is mutually constituted by the religious institution making the claim and the states which play a role in reifying religious authorities. The composition of the courts and the views of presiding judges and justices also factor in as politics. Indeed, the courts ought to be alerted to the existence of competing theological views among and within religious traditions, but in the long run the expression of alternative views in the open space of public and social engagement is also a "risk" that advocates within specific traditions will have to take in order to be acknowledged. Indeed, Troy Dostert reminds us of the difficulty that faces us in setting up the terms for engaging moral difference:

> What we must be committed to, in the end, is the hard work and courage needed for engaging our moral differences rather than avoiding them. We will not thereby arrive at a politics devoid of moral disagreement. But we will be better prepared for coming to terms with them when they arise. [189]

XII
Conclusion

Resorting to the language of legal rights (privacy) to frame the complex issue of women's reproductive decision-making in abortion neither guarantees state services to ensure safer abortions for women who decide to have them, nor support in continuing a pregnancy under

[188] Boden, *Supra* note 3, 10, 23, 30, 32, 54 and 125 at 105.

[189] Dostert, *Supra* note 134, 136 and 180 at 213.

difficult conditions. As Margaret A. Farley notes, while a liberal rights claim for autonomy secures women's freedom of choice and self-determination, the same claim "comes up empty when abstracted from social histories and concrete specific bonds."[190] Likewise, a framework of secular rights invoked in opposition to a strictly separate religious realm creates a dichotomy which portrays women's rights and religion in perpetual disagreement. This division tends to misrepresent the separation of church and state in law as an end rather than as a means to promote conscience, religious freedom, non-establishment and a pluralist ideal. Moreover it limits the possible interrogation of both religion and culture in shared secular spaces and from within a given tradition.

In the Philippines, where abortion continues to be debated within the terms of mortal sin and criminality, framing abortion strictly as choice (or a right to privacy) stands in stark contrast to the experiences of women who articulate a claim for autonomy that is situated[191] in their relationships with others. The language of universal human rights remains instrumental in advancing women's claims, and legal rights continue to be strategic in securing protection as well as the enabling conditions for the exercise of rights. Yet the language of human rights proves most potent when rooted in the experience of those who invoke them.[192] For the courts, a pragmatic approach described here as a temporal and contextual approach to secularism draw attention to the concrete situations in which rights are invoked. Religious accommodation cases

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[190] Farley , *Supra* note 114 at 164.

[191] *Ibid* at 178.

[192] Abdullah A. An-Na'im, "The Legal Protection of Human Rights in Africa: How to do More with Less," *Human Rights: Concepts, Contexts and Contingencies*, A. Sarat and T.R. Kearns, Eds. Ann Arbor, University of Michigan Press: 2001) An-Na'im has suggested than on one level, focusing on the local [than the international arena] also means an emphasis on the root causes of human rights violations, instead of a reliance on state administered protection. An-Na'im questions the practice of handing down human rights agendas from the top (international to local) and calls for the empowerment of local human rights organizations and movements more attuned to the local context.

provide the best example of the court's role in curbing the forceful application of laws without exceptions, without needing to settle issues of morality with finality. In the case of abortion, an interpretation of the Philippine penal prohibition strictly in line with Catholic canon law is tantamount to establishment and contrary to the constitutional principles on religious freedom.

A notion of secular space as plural space which is neither exclusively public or private, nor confined to state created spaces, allows a better understanding and an interpretation of rights as norms, instead of mere competing legal interests. Central to this engagement of rights, however, is the recognition of the limitations posed by a notion of rights as legal rights.[193] The main challenge outlined here for the court (and the advocates who endorse law-based strategies in advancing women's claims) is to steer clear of absolutist approaches to law that serve only to reinforce the acrimonious debate on abortion. While liberalizing restrictive abortion laws which endanger women's lives remains urgent, it does not justify the adoption of formulaic methods in legal advocacy. The danger of a narrow focus on legal legitimacy is that it unnecessarily confines the struggle for women's reproductive autonomy and moral decision-making to the inadequate arsenal of the law.

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[193] Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*, (New York, The Free Press: 1991) Glendon's critique points out how the language of "legal rights" has overtaken the discourse of rights in the American context. She describes how the stark vocabulary of civil rights in politics fails to articulate important norms valued by society at large like responsibility. Glendon's critique of first world feminist positions taken at the World Women's Conference in Beijing in 1995 are also discussed by *Ravizza, supra* at note 109 and 111 at 21-57. See also *Abortion and Divorce in Western Law: American Failures, European Challenges,* (Cambridge, Massachusetts and London, Harvard University Press: 1987).

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