

THE ONTOLOGY OF RIGHTS

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Among the many aspects of the history and concept of rights—natural and positive, moral and legal, universal and specific, individual and institutional—it should be possible to reflect upon the general concept and to indicate the grounds in reality for the notion itself. The present reflection is too general and metaphysical to address the host of special theoretical and demanding practical issues that bear their own characteristics, both in the particular and the concrete.¹ While such a general reflection does not directly determine the application of the concept, or how in actual situations it is to be applied, reflection should disclose both a basis and a centering focus for such applications.

The effort to uncover the roots of the concept of making a claim by right may serve to focus more particular discussions and to avoid a discussion simply in terms of collective power or arbitrary choice, thus construing rights as either exclusively private will or exclusively social construction.² If we seek to ground our expectations and understandings in the reality of our situations, it seems that rights themselves must find their original and ultimate ground in the deeper texture of being itself. Not all rights are natural rights, of course, and even natural rights have secondary social and cultural components that differ from one group to another. This does not make such rights any less real, nor permit us to dismiss them as somehow not inherent in the very roots of being itself.

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1. These issues are different; the particular is subordinate to the general or universal, as case is to law, while the concrete embodies both the particular and the universal.

2. In like manner, some anthropologists have recently construed the relation of “paternity” as a social construction. There is no doubt that the broad concept and reality of paternity includes variable cultural and social aspects. It would surely be arbitrary, however, to ignore or dismiss the fact that the concept of paternity includes biological and genetic factors as well.

To begin such a general reflection, some initial distinctions and corrections are called for if we are to avoid a *cul-de-sac*. It is possible to conceive of rights after the model of property possession: "I have my rights!" If we understand them exclusively in terms of individual possession, however, we isolate the claim from obligation, and confer an unlimited status upon it. Oddly enough, the gentle Spinoza seems to have endorsed such a view of rights, inasmuch as he defines a right as the capacity to enforce one's will as far as one's power permits: for the wise man wisely, for the foolish man foolishly.³ On the other hand, if we understand rights to be in the keeping of, and conferred by, society, we convert rights into obligations and even into commands.

These two extreme misconceptions may result in a wavering between anarchy and despotism, between a radical individualism and an oppressive collectivism. Although these extremes are seldom voiced in such bald terms, they are not absent in modified form from public discussions—prompted by the fear of tyranny, on the one hand, and libertinism, on the other.

Such understandings of rights envisage them as claims by one party against another: by the individual against society or by the collective against the individual. The negative and conflictual relation is thus conceived as an external one between a wholly autonomous individual and a separate collective—be it the state, a political regime, the law, or some other authoritative institution—demanding a choice for one side or the other. This inevitably leaves the issue unresolved because there is no common ground, no participated identity, for the resolution of potential, if not inevitable, conflict. We are left with rebellion, on the one hand, or repression, on the other; or, at best, with an uneasy and precariously calculated so-called "moderate" compromise somewhere between the extremes, to the left, the right, or the center.

3. See BENEDICT DE SPINOZA, *Theologico-Political Treatise*, in 1 THE CHIEF WORKS OF BENEDICT DE SPINOZA 1, 200-01 (R. H. M. Elwes trans., Dover Publ'ns 1951) ("[E]very individual has sovereign right to do all that he can; in other words, the rights of an individual extend to the utmost limits of his power as it has been conditioned. Now it is the sovereign law and right of nature that each individual should endeavour to preserve itself as it is, without regard to anything but itself; therefore this sovereign law and right belongs to every individual, namely, to exist and act according to its natural conditions. . . . [A]s the wise man has sovereign right to do all that reason dictates, . . . so also the ignorant and foolish man has sovereign right to do all that desire dictates . . ."); cf. THOMAS HOBBS, *LEVIATHAN* 66 (Clarendon Press 1909) (1651) ("The Right Of Nature . . . is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature . . .") (original spelling).

Given the history of the twentieth century, this compromise is understandable. If in the nineteenth century we had an excess of individual rapacity, in the twentieth we have certainly had enough of collective repression, in the form of various totalitarian regimes. In the most recent phase, we have heard the inevitable reaction, when post-modern thinker François Lyotard cried: "Let us wage a war on totality,"⁴ and Jacques Derrida elevated *différance* to the supreme value, even creating the neologism "différance" to designate it.⁵

It seems better to recognize that rights imply positive relations more than exclusive possessions; indeed, rights are in their essential character relational. Now, if they are relational, we need to ask about the nature of that relation. Suppose, then, that we explore the relation as involving both the individual and the group in a more positive fashion. This is to recognize that every right implies an obligation: indeed, even entails reciprocity.⁶ But in clarifying the nature of that reciprocity, we need to press further in order to confirm the character of the two terms of the relation.

If we understand the relation as internal to both parties, then we will understand that both the individual and the group participate in the relation as part of their own identity, i.e., as internally constitutive and not simply as an externally conditioned relation. But this requires us to inquire into the nature of the two parties and the foundation in them for the possibility of such a participation and mutual identification. We need to ask: Who, after all, are these two participants? In moving the analysis forward, it seems to me fruitful to redefine the terms of the relation and to distinguish the individual from the person⁷ and the collective from the community. That is, it would seem more fruitful to set the terms of the relation as between

4. 10 JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 82 (Geoff Bennington & Brian Massumi trans., Univ. of Minn. Press 1984) (1979).

5. See generally JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., Press corr. ed. 1997) (1967). For a greater discussion of "différance," see JACQUES DERRIDA, *MARGINS OF PHILOSOPHY* 1-28 (Alan Bass trans., Univ. of Chicago Press 1982). See generally Kenneth L. Schmitz, *Postmodernism and the Catholic Tradition*, 73 *AM. CATH. PHIL. Q.* 233 (1999); Thomas R. Flynn, *Postmodernism and the Catholic Tradition (A Reply to Kenneth L. Schmitz)*, 73 *AM. CATH. PHIL. Q.* 261 (1999).

6. The German *Recht*, as in *Rechtslehre* (jurisprudence), retains something of this relational character, since it incorporates both right and law. The Latin *jus* (from a Sanskrit word meaning "to join," often translated in Church documents as "right") is also relational, as are its derivatives *justitia*, *jus civile*, and *jus gentium*.

7. See generally JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* (John J. Fitzgerald trans., 1947) (distinguishing between the individual as part of society and the person as transcending society).

person and community, rather than between individual and collective.

But then we must ask: What in the person and the community positively grounds the relational character of rights and obligations? Here we are thrust into a new dimension of energies that—I fear I must say it—are not simply transactions of physical power. Given the way in which the study of physical nature and the development of technological power has dominated the past four or five centuries in the West and provided the most influential model for rational investigation and discourse, it is not easy to find our way into a dimension that is governed by laws other than the laws of physical energy and motion; it is difficult to acknowledge the laws of the spirit as distinct from the laws of motion and matter. In calling this dimension “spirit,” I am in danger of creating the impression that I refer exclusively to religion. But there is a natural domain of the spirit as well, and it is to this that I now refer.

We have every right to ask: Is there any experienced evidence of such a spiritual domain? If it is not simply identifiable with religion, is it identifiable with morality? It is certainly open to religion, and it includes moral concerns; but it is not restricted to the religious or the moral, since it includes other forms of creativity and freedom, as in science, art, technology, economics, social action, and political organization. It is difficult to find an apt name for this domain, but it expresses itself in many ways: in law and decision making, i.e., in the actualization of responsive and responsible freedom; in artistic creativity and technical innovation; in manifestations of deep human concern; and in friendship and love as well as in unprecedented deformities of cruelty and recklessness. It is the distinctively human: the *humanum*.⁸

It is not easy to find a foothold for entry into such a domain. The most promising is to begin with our quest for knowledge. The German philosopher Hegel remarked that what is distinctive about the human mind is its ability—and here he resorts to metaphor—to

8. Terence, a Roman poet and playwright, once said: “Homo sum: humani nil a me alienum puto,” meaning “I am a man: nothing human is alien to me.” JOHN BARTLETT, FAMILIAR QUOTATIONS 85 & n.13 (Justin Kaplan ed., 16th ed. 1992). I speak of “human” rights, in the universal sense; see, for example, *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

“go out to” an object, identify with it, and return to itself without undergoing a physical change in itself or the object.⁹

Of course, in this “going out to” and “returning from” the object, there are physical changes in the apparatus of vision and the chemistry of the brain; but in their role as “carriers” they do not define or determine the essential character of the activity of knowing. Indeed, by their very nature they cannot, because even when they move through space and set up reverberations and waves of energy, they are confined to a spatio-temporal location in the way that knowledge is not. For to know something is not the same as to ingest it or to absorb it, or simply to receive it as one receives an electric shock or a pat on the back.

These “carriers” are necessary for the realization of human knowledge insofar as a human knower is a physical being; but something else is at work as well within the human composite. Without the carriers, sensory knowing does not occur—the blind do not see; the deaf do not hear. But these carriers are not integral parts of the relation of the knower’s identification with the object. By not integral, I mean that they do not determine the intrinsic character of the knowing relation; something more, something different is required. That is, the carriers serve as sign-vehicles and indicators of the object, but they do not establish the distinctive character by which we know it.¹⁰ However much it goes against the contemporary presumption in favor of material forces, we need to concede that there is another dimension of human reality at work here, a dimension situated within the human complex with its material forces and energies, but also a dimension that is not identical to them.

9. Without embracing the central notion of the Hegelian Absolute System, I find the following description of knowing suggestive. “True scientific knowledge, on the contrary, demands abandonment to the very life of the object, or, which means the same thing, claims to have before it the inner necessity controlling the object, and to express this only. Steeping itself in its object . . . being sunk into the material in hand, and following the course that such material takes, true knowledge returns back into itself, yet not before the content in its fullness is taken into itself . . . this thinking is not an activity which treats the content as something alien and external; it is not reflection into self away from the content.” G. W. F. HEGEL, *Preface* to THE PHENOMENOLOGY OF MIND 112-13 (J. B. Baillie trans., George Allen & Unwin Ltd. 2d ed. 1949) (1807).

10. For a further elaboration of the distinctive character of spiritual activity, see Kenneth L. Schmitz, *The First Principle of Personal Becoming*, 47 REV. METAPHYSICS 757, 768-70 (1994) (“The spiritual factor in the human person lives by its own law . . . [T]he movement of spirit [is] *communication without loss*. . . [The movement of consciousness] is not a natural movement in the sense of a physical transaction; it is the movement of the human spirit.”).

Now, this identification with the object need not be total. I may know very little about the object, but if what I “bring back” with me as my knowledge is not something of the “real thing,” then I have no knowledge of it. If that is the case, then knowledge of rights and of any other relation is simply impossible. At best, I will have merely assembled the materials of what I claim to know, rather than the object itself; as though I were to claim to have a house, when I only have a pile of lumber.

The above language seems to fit best with our knowledge of things, such as trees, and rocks, and solid substantial things. But it holds as well for relations that are embedded in things, holds for the smile on the face of a friend, and for even more elusive, ideal relations, such as rights, which are founded in substantial realities.

One might say that I only know the thing as it appears to me, and it is certainly true that at this direct and immediate level of knowledge it must appear to me. It must appear to me in some fashion, if I am to have first-order knowledge of it. Since I am part of or party to such a relation, I must be involved in it. But the requirement is that *it* appear to *me* (however incompletely) and not simply that *I* appear to *it*, or that brain waves occur in the cranium, or that some bodily function takes place somewhere else; I need to encounter the house and not simply the lumber.

The skeptic may still argue that we are mistaken in our claim to know anything at all, and that we live in a cloud of illusion, but his claim runs counter to conviction based in experience; more importantly, it runs counter to our instinctive behavior. If someone shouts, “Look out!” I duck and then check to see whether the warning was fraudulent or real. Anyone who has faced imminent death refutes the skeptic. These same conditions are operative whenever we claim to know anything.

This is not to say that I only know such directly confronted objects, since there are many things that I claim to know on the testimony of others, whom I consider to be valid witnesses. But somewhere along the chain, we rest our knowledge claims upon such witnesses and such encounters.

The introduction of a new dimension, a new set of relationships other than brain-waves, need not reintroduce the unfortunate dualism of mind and body, if we ground the distinction in the integrity of the

person. I say distinction and not separation,¹¹ for it is the whole unitary person who enters into the community as constituting and contributing to its membership, since the unity and integrity of the person *as a being* overrides the complexity of his aspects or parts, and in particular overrides any separation between mind and body.¹² We need to acknowledge the distinction-filled and complex, yet unitary, ontology of the human person. Indeed, there is plenty of evidence regarding the unified coordination of the many factors, elements, and levels, that enter into the constitution and experience of the individual person. This composite structure, taken in its totality, is what differentiates us from other animals on the level of species, and is what seals our distinctness from other persons in the concrete order of singular existence.

Indeed, Pope John Paul II, in his earlier incarnation as a philosopher, has made much of the task of the human person as precisely the call to integrate the various dynamisms—such as our physical processes, our emotional life, our subconscious drives, and our intellectual awareness—into the wholeness of the life to which we are called. He underscores this as the work of each person's freedom. In his discussion of sexuality in *Love and Responsibility*, after acknowledging the natural character of the sexual urge and the promptings of affection between a man and a woman, he calls for these to be brought under what he terms "the personalistic norm,"¹³ that is, under the free and responsible activity of the person as a whole, a responsibility that resonates with the broader and deeper rhythms of our participation in the dynamisms of our own being

11. The prevalent nominalistic tendency in much of modern thought tends to conflate the difference between distinction and separation, converting the former into the latter. Yet, the complex and composite nature of the human person, as well as of other things, discloses real differences that are not separations. This is true of even the simplest distinction, such as between the surface and the quantity of a rock; a distinction that is neither a mental distinction made for our convenience, nor a separation in the way in which the rock may yield separable elements under chemical analysis. The very possibility of recognizing distinctions that are real, yet not physical, separations is the primary condition for a realist metaphysics, such as that which governs the present analysis. See generally Kenneth L. Schmitz, *Analysis by Principles and Analysis by Elements*, in 4 PAPERS IN MEDIAEVAL STUDIES: GRACEFUL REASON: ESSAYS IN ANCIENT AND MEDIAEVAL PHILOSOPHY 315 (Lloyd P. Gerson ed., 1983).

12. The Thomistic formula: *Omne ens est unum* (Every being is one) expresses the singular unity of every existential supposit, or subject of being. See, e.g., THOMAS AQUINAS, *De Veritate I* [*On Truth*] Question 1, Article 1, in 3 QUAESTIONES DISPUTATAE (1942).

13. See KAROL WOJTYLA, *LOVE AND RESPONSIBILITY* 40-44 (H. T. Willetts trans., Ignatius Press 1993) (1960) (subchapter entitled *The Commandment to Love, and the Personalistic Norm*).

within the broader and deeper context of the community of beings.¹⁴ Indeed, he continues, this is to be said of all our actions in which we have the task of integrating the physical, empirical, intellectual, and value dimensions of our personal being. It might be said that we are our own “work in progress.”¹⁵

It is, then, with the emergence of personality and the capacity for responsible freedom that the concept of rights emerges from the more general ontological context of the good of existence.¹⁶ This concept is then appropriately addressed as “value.” Natural law is thereby situated within the ontological constitution of the person and within the community of beings. This gives to rights their deepest and broadest grounds in the texture of being itself, since the person is an integer within the human and cosmic community of beings.

If rights may be considered in terms of person and community rather than of individual and collective, we still need to examine the grounds in both person and community whereby each may lay claims upon one another. The reciprocal right-of-claim begins with the manner in which the human person comes into being. A person comes into being as a member of a group—a family, tribe, nation, or political society—even if, as seems not unlikely, he or she may at least at some stage eventually come out of a dish.

Not only does the person come into being *out of*, but also *in and within* a group, to which he or she belongs in fact and by right as a member. The relation, from the beginning, is not merely an external one, but is rather constitutive and internally rooted in the very being and identity of the person. That is, it is not only a relation of origin, but also of make-up or identity. For the origin provides an abiding context in which we continue the being we have received. More

14. See KAROL WOJTYLA, *THE ACTING PERSON* 261-99 (Andrzej Potocki trans., D. Reidel Publ'g Co. 1979) (1969) (part IV entitled *Participation*).

15. For a discussion of integration, including its bodily and mental aspects, see *id.* at 189-258 (part III entitled *The Integration of the Person in the Action*). For a bilingual (Polish and Italian) edition of *Osoba i Czyn* (the Polish text of the third revised edition of *The Acting Person*), see KAROL WOJTYLA, *PERSONA E ATTO* 444-609 (Giovanni Reale & Tadeusz Stycze eds., Rusconi Libri 1999).

16. In *Philosophy of Right*, Hegel remarks on the connection between personality and rights: “Hence the imperative of right is: ‘Be a person and respect others as persons.’” G. W. F. HEGEL, *PHILOSOPHY OF RIGHT* 37 (T. M. Knox trans., Clarendon Press 1958) (1821). He elaborates: “To have no interest except in one’s formal right may be pure obstinacy, often a fitting accompaniment of a cold heart and restricted sympathies. It is uncultured people who insist most on their rights, while noble minds look on other aspects of the thing. . . . [I]t is not absolutely necessary that one should insist on one’s rights, because that is only one aspect of the whole situation.” *Id.* at 235.

accurately, we are distinct both from other members and from the group as such, but not by external difference alone. It is obvious that as individuals, we are spatially, i.e., materially and physically separate, from one another; but that does not undermine the accompanying internal character of the non-spatial relations intrinsic to the whole person—relations that bind each of us to the several groups in which we participate.

These non-spatial relations are rooted in the formal aspects of the person: in family membership, as children, siblings, and parents (unless one is to deny the *reality* of one's brothers, sisters, father, or mother!), and in other relations, such as our culture and society; all of these form part of our identity. If we consider materiality as the source of local separation, we are entitled to acknowledge these other formally distinct relations as non-material or "immaterial," however strange the term may strike us.¹⁷

In saying that each person has constitutive ties to the other members and to the group as such, I mean that the ties are part of the person's constitution or make-up. Most obviously, this includes not only the genetic make-up, but also the inception into the family, whatever form it may take in different cultures; and then later the induction into a specific language and culture with its values and institutions. But these ties are so intimate, so much a part of personal identity, that they may truly be said to be constitutive of the being and identity of the person.¹⁸ Can we not infer, then, that from the beginning, the context of emergence is such that there are mutual claims brought into play, bearing upon both the person and the group?

17. In accepting this usage, we need to distinguish the immaterial from the spiritual, inasmuch as the spiritual forms a certain type of immateriality, namely, a type that is capable of existence and activity transcending material conditions. In this sense, the human person is not simply spiritual, nor simply material, but a composite of both, and the immateriality of form is the medium that seals the unity of the two dimensions of the person. See THOMAS AQUINAS, *SUMMA THEOLOGICA*, Part I, Question 75, Articles 2, 6 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911) [hereinafter *SUMMA THEOLOGICA*]; see also Kenneth L. Schmitz, *Immateriality Past and Present*, in 52 *IMMATERIALITY: PROCEEDINGS OF THE AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION* 1 (George F. McLean, O.M.I. ed., 1978).

18. Here it is important to insist upon the whole person, in his or her entirety, in order to avoid reducing the person to simply the substantial unity of the existent supposit. The supposit (*ens per se*: a substantive being) instantiates the central and supporting existence of the person in the concrete order (*suppositum entis*: the substantive subject of being), but it by no means exhausts the full being and identity of the person, which includes the various accidental characteristics—of differing stability, interiority, and importance—throughout which the supposit maintains the core identity of the person.

Such an understanding of the mutual interrelation of person and community acknowledges a tension-filled expansion of the understanding of both unity and difference. We cannot retain the simple opposition of the one and the many, as though the individual is one and the many are simply many individual ones. First of all, the singular person is already and internally a composite of many parts, aspects, dimensions, and powers, all sealed by the concrete—if ever-changing—unity of his or her personal identity. And the community is not simply a collection of many isolated or externally related ones. Traditional philosophers give to these terms, “one” and “many,” analogous meanings as they are found in different contexts—analogueous but not equivocal or unrelated.¹⁹ That is, in all their diversity, they share in the unity that constitutes a community.²⁰ For the person is, in some real sense, many, i.e., complex, and the community is, in some real sense, one, as the very term “comm-unity” implies.

Thus, for example, theology tells of the “mystical body” of Christ,²¹ calling the multitude of the faithful to the participated dignity of the one Christ Himself—a participation received through the sacrament of baptism that forms an intimate unity of fellowship (*ecclesia*). Similarly, in a quite different context and a more restricted sense, business law speaks of “corporate personality.” To the latter are assigned certain rights and obligations in the commercial and financial field, after the manner of personal rights.²²

If we follow the present labyrinthine reflection upon the general meaning of rights, we come at last to a final point of analysis. For

19. I have in mind the long tradition of philosophical writers on analogy, taking its origin from Aristotle, and receiving extended development in the thought of St. Thomas Aquinas and his interpreters. For one example from an abundance of scholarly literature, see ETIENNE GILSON, *THE CHRISTIAN PHILOSOPHY OF ST. THOMAS AQUINAS* 105, 457 nn.29-34 (L. K. Shook, C.S.B. trans., 1956).

20. For a contemporary discussion that accommodates both the modern recognition of subjectivity with the traditional foundation of the person in the community of beings, see WOJTYLA, *supra* note 14, at 261-99 (part IV, chapter 7 entitled *Intersubjectivity by Participation*). See also Karol Wojtyla, *The Person: Subject and Community*, 33 *REV. METAPHYSICS* 273 (1979); KAROL WOJTYLA, *PERSON AND COMMUNITY: SELECTED ESSAYS* (Theresa Sandok, O.S.M. trans., 1993).

21. See Pope Pius XII, *Mystici Corporis* [*Encyclical Letter on the Mystical Body of Christ*] (St. Paul ed. 1943), giving expression to the teaching of St. Paul (1 *Corinthians* 12:12 and *Ephesians* 1:18-23), a teaching reiterated by the Second Vatican Council in *Lumen Gentium* [*Dogmatic Constitution on the Church*] ¶ 7 (1964), reprinted in *THE SIXTEEN DOCUMENTS OF VATICAN II* 107, 113-15 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1967).

22. For a thoughtful criticism of the attribution of personality to corporate entities, see the remarks of Professor Charles Rice in this issue. Charles E. Rice, *Rights and the Need for Objective Moral Limits*, 3 *AVE MARIA L. REV.* 259 (2005).

what is implied in the mutual and intrinsic relation of person and community, understood as a relation of being, is the rejection of the distinction between fact and value, i.e., between a purportedly value-neutral objective domain and a subjectively constructed value-sphere. The distinction is widely held but is open to question, and to deny it does not diminish the importance of the spirit of objectivity, which—far from being disinterested in values—takes a serious interest in their truth-value.

For the interrelation of person and community is ingrained in their shared being, so that the good secured by rights is already anticipated in the very coming-to-be and being of both person and community. Being is not simply a matter of fact, but is pregnant with values. The traditional doctrine of the transcendental properties of being speak to this.²³ For in recognizing the difference between the true and the good, to which we respond in knowledge and freedom, the transcendentals are distinct in conception (*secundum rationem*) but one in reality with being (*idem in re*). What holds the true and the good together is acknowledged as being (*ens*) and as unity (*unum*), but also as relation (*aliquid*). So that the very concept of rights implicating the good is rooted in being and not simply in human subjectivity.

What, then, is the ultimate site of rights? There seem to be three contenders. First, there are those who find the ultimate ground and justification for rights in an implicit contract, an agreement of wills. Underlying this contractual agreement (the social contract) is a certain understanding of freedom as grounded in human decision. This is played out in popular form in the counsel heard during election campaigns: “It does not matter how you vote, as long as you do vote.” Or again: “Just do it!” One finds such a view in Thomas Hobbes’s contractual understanding of the founding agreement that raises human society above the warring state of nature.²⁴ This view is so plastic, however, that it would seem to permit—in principle—the

23. See AQUINAS, *supra* note 12, Question 1, Article 1.

24. See HOBBS, *supra* note 3, at 87-90. The contractual notion of values has been differently conceived, but the common thread is the elective agency of the individual in the establishment of social conventions. In modern times some form of contractualism has been held by Hobbes, Locke, Rousseau, Wolff, Kant, and more recently by John Rawls. Values are arrived at by some form of consensus (even if by practical reason in Kant), rather than by inscription, as in natural law theories. For a general treatment in the context of the history of philosophical thought and with pertinent references, see generally IV FREDERICK COPLESTON, S.J., A HISTORY OF PHILOSOPHY (Edmund F. Sutcliffe, S.J. gen. ed., The Newman Press 1960); V FREDERICK COPLESTON, S.J., A HISTORY OF PHILOSOPHY (Edmund F. Sutcliffe, S.J. gen. ed., The Newman Press 1959).

determination of justified rights' claims to be determined by the perceived requirements of society at any given time, to be decided by those in power, whether parents deciding the fate of a defective infant, or the state deciding the fate of a particular group.

A second site locates the source and justification of rights at a deeper level, in the specific nature of being human. Natural law is often expressed in these terms, where the basis for rights-claims is rooted in the universal and specific character that we share with all other human beings. This has the advantage over the contractual view because it stabilizes the basis for such claims and generalizes them to all members of the human species. In grounding rights in a natural base, it is possible to set limits to contractual alterations and to provide an intelligible and objective norm for the determination of rights-claims. Without explicitly endorsing any metaphysical claims to a shared essential nature, the *Universal Declaration of Human Rights* rests ultimately on this norm.²⁵ For the most part, such a standard works well enough, insofar as it provides a trans-social objective norm for the determination of rights-claims.

A third site probes more deeply still, and seems to me still stronger. It finds grounds for value in the concrete human person within the very texture of being itself. This is a radical move, since—while it situates the human species within the transcendental character of being and its properties—it requires a more sweeping understanding of the embedment of the good in the universal texture of being itself. It is here that the traditional doctrine of the transcendental properties of being comes into play and bears a certain fruit in the practical order.

For in such a view, being is not simply a fact, but rather the context from which a number of values take their rise. There is, first of all, the value of actuality itself, since all specific essentials and all relations are embedded in actual being. St. Thomas Aquinas

25. I situate this second site within the debates on the *Universal Declaration of Human Rights* of the United Nations, insofar as it appeals to a formal and abstract consideration of rights, fully coherent with the third site but avoiding an explicit commitment to metaphysical grounding. Jacques Maritain attends to this directive power of human nature. See generally JACQUES MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* (Doris C. Anson trans., 1943). At the same time, Maritain's thought probes more deeply into what I refer to below as the third site, i.e., human nature grounded in the existential texture of being itself. See generally JACQUES MARITAIN, *EXISTENCE AND THE EXISTENT* (Lewis Galantière trans., 1948).

understood this principle as the root of all other principles, telling us that all which comes before the mind presents itself as being.²⁶

Now, for Aquinas, the term “being” (*ens*) stands for actually existing being and all that is related in any way to such actuality, since even images of non-existent things stand before the mind as participating in some minimal way in their actual presence to the mind. Each of these presences, however, possesses some kind of form and identity; hence are things (*res*: “reities” if there is such a word) and unities (*unum*). Yet insofar as they are all being, they form part of the community of beings and stand in relation to one another (*aliquid* understood as relation). With the emergence of intelligence and freedom within this community, new relations are instituted: relations of truth or intelligibility (*verum*), of the good or “value” (*bonum*), and even of natural and man-made beauty (*pulchrum*), i.e., of clarity, harmony and proportion.²⁷ These transcendental terms unfold the texture of being which is the original and ultimate ground of rights.

Such a radical and sweeping view of existential reality provides the broadest context and deepest basis for the concept of rights, since it does not rest legitimacy upon particular willed agreements (contractual theory), nor even upon the restricted sense in which they rest upon human nature (some understandings of natural law) situated within an indifferent universe. The complete intelligibility and rationality of rights is complicit within the very structure of being as we encounter it in affirmative ways. This permits the further specification and determination of *human* rights within an intelligible community of being, and—where appropriate—further determination through variant cultural situations and even through contractual

26. See AQUINAS, *supra* note 12, Question 1, Article 1 (“Now that which the intellect first conceives as inherently its most intelligible object, and to which it reduces all conceptions, is being (*ens*), as Avicenna says in the beginning of his *Metaphysics* (Tract I, bk. 2, c. 1).”). Aquinas further tells us that being as existential is most actual and most intimate within all things: “Existence is the most perfect [i.e. complete] of all things, for it is compared to all things as that by which they are made actual; for nothing has actuality except so far as it exists. Hence existence is that which actuates all things, even their forms.” *SUMMA THEOLOGICA*, *supra* note 17, Part I, Question 4, Article 1. Aquinas also states: “Being is innermost [*magis intimum*] in each thing and most fundamentally inherent [*inesse*] in all things since it is formal in respect of everything found in a thing.” *Id.* Part I, Question 8, Article 1. By “formal” he does not mean “natural” but “actual,” elsewhere saying that actuality is most formal (*formalissime*), i.e., trans-formal.

27. See AQUINAS, *supra* note 12, Question 1, Article 1, Reply to the Third Objection; see also THOMAS AQUINAS, IN LIBRUM BEATI DIONYSII DE DIVINIS NOMINIBUS ESPOSITIO [COMMENTARY ON THE DIVINE NAMES BY DIONYSIUS] (Ceslas Pera ed., 1950).

agreements where these are appropriate. But it does not leave rights to the potentially arbitrary wills of participants or even to the narrow demands of immediately perceived human goods (human nature), but situates rights within the broader and deeper context of the community of beings, calling us to recognize rights sanctioned by the intelligibility and the value of being itself. So authentic rights are concordant not simply with the agreement of human wills, nor do they rest upon human nature alone, but they are more deeply in tune with a universe that is not indifferent to human persons and their aspirations.