

“NEW RIGHTS” IN PUBLIC INTERNATIONAL FAMILY LAW? WHAT INTERNATIONAL LAW ACTUALLY SAYS

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INTRODUCTION

Recent debates within the United Nations system have involved issues relating to the controversial topic of “new human rights,” an expression which carries a hidden meaning generally attempting to exclude discussions about the ethical, moral, and natural law considerations concerning abortion, human sexuality, marriage, and the family.¹ The terms “sexual orientation” and “gender identity,” and their implicit “new human rights” (e.g., same-sex marriage) have been the subject matter of much debate.² The two concepts “sexual

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1. See, e.g., Abelardo Lobato Casado, *New Human Rights*, in *LEXICON: AMBIGUOUS AND DEBATABLE TERMS REGARDING FAMILY LIFE AND ETHICAL QUESTIONS* 649, 649–64 (2006) (discussing the term “New Human Rights”). He contends that the expression carries a hidden meaning commonly including subjects that “many want to exclude from all ethical consideration,” for example, issues pertaining to the initial and final stages of life. *Id.* at 650. Further examples include the nature and meaning of human sexuality, marriage, and the family. He argues that one must discern whether a right is an authentic right as opposed to a false right. See *id.* at 661–64. The authentic “[h]uman rights belong to man as such, that is to say, to man as a rational animal,” which, in turn, implies three things: “the dignity of the personal self, a foundation in the moral law . . . and the condition of humans as living in community.” *Id.* at 661–62.

2. See, e.g., Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797 (2008). In which the author states that

[p]robably the most telling demonstration of the international schism on the question of sexual minority human rights is the fate of the joint Brazil/European Union 2003 draft resolution in the U.N. Commission on Human Rights. The resolution, entitled “Human Rights and Sexual Orientation,” was the first draft Human Rights

orientation” and “gender identity” are, by their very nature, interior and subjective self-determinations, subject to revision like any other desire or inclination. Most countries recognize the difference between feelings, desires, or inclinations, on the one hand, and behaviours or actions, on the other hand. In particular, the Holy See, a sovereign subject of international law,³ and Permanent Observer to the United Nations contends that: “[A] state should never punish a person, or deprive a person of the enjoyment of any human right, based just on the person’s feelings and thoughts, including sexual thoughts and feelings. But states can, and must, regulate behaviours, including various sexual behaviours.”⁴ The Holy See has a sacred and legal

Commission resolution to call on “all States to promote and protect the human rights of all persons regardless of their sexual orientation.” After a brief but intense debate on the draft, Pakistan, on behalf of the Organization of the Islamic Conference, proposed a motion of no action, which was barely rejected (twenty-two votes in favor, twenty-four against, six abstentions). The Commission then voted on a motion to postpone the resolution until the next (sixtieth) session, which succeeded with a vote of twenty-four to seventeen, with ten abstentions. During this sixtieth session, Brazil refrained from reintroducing the motion due to ongoing negotiations, and the Commission decided by consensus to defer a vote on the resolution until the sixty-first session. Brazil declined to reintroduce the motion at the sixty-first session for lack of support in the Commission.

Id. at 810–11 (footnotes omitted). See also Permanent Reps. of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands, and Norway to the U.N., Letter dated Dec. 18, 2008 from the Permanent Reps. of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands, and Norway to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/63/635 (Dec. 22, 2008); The Holy See, Statement of the Holy See Delegation at the 63rd Session of the General Assembly of the United Nations on the Declaration on Human Rights, Sexual Orientation and Gender Identity (Dec. 18, 2008), http://www.vatican.va/roman_curia/secretariat_state/2008/documents/rc_seg-st_20081218_statement-sexual-orientation_en.html; Piero A. Tozzi, *UN General Assembly Receives Dueling Declarations on “Sexual Orientation”*, LIFESITENEWS.COM (Dec. 19, 2008, 12:15 PM), <http://www.lifesitenews.com/news/archive/ldn/1981/21/8121902> (stating that the French-led European Union statement “called upon member states to include ‘sexual orientation’ and ‘gender identity’ as protected non-discrimination categories”). However, a second statement was presented by member states from sub-Saharan Africa, Oceania, and the Islamic World warning “against the attempt to create ‘new rights’ or ‘new standards’ by ‘misinterpreting’ the non-discrimination clauses of long-established human rights instruments.” *Id.* The Holy See stated in its statement that the French document went well beyond recognition or definition in international law and the intent of the declaration, resulting in legal ambiguity and uncertainty. The Holy See, *supra*.

3. For a comprehensive explanation of the nature and status of the Holy See in international law, see Robert John Araujo, *The Holy See*, 1 AVE MARIA INT’L L. J. (forthcoming 2012), <http://www.avemarialaw.edu/ilj/>. See also Robert John Araujo, *The International Personality and Sovereignty of the Holy See*, 50 CATH. U. L. REV. 291 (2001).

4. Silvano M. Tomasi, Statement by H.E. Archbishop Silvano M. Tomasi, Permanent Representative of the Holy See to the United Nations and Other International Organizations in Geneva at the 16th Session of the Human Rights Council—Item 8— General Debate (Mar. 22, 2011), http://www.holyseemissiongeneva.org/index.php?option=com_content&view=article&id=6245:16th-session-of-the-human-rights-council-item-8-general-debate&catid=57:

duty to protect children,⁵ and given the actions, including crimes of sexual abuse of children, by some clergy, religious, and laity, the Holy See among other things, reminds the world that "there is a consensus between societies that certain kinds of sexual behaviours must be forbidden by law. Paedophilia and incest are two examples."⁶

Nonetheless, in the face of growing concerns about the sexual exploitation⁷ and sexualisation of children,⁸ some lobbying groups are

humanrights&Itemid=82.

5. Cf. Pope Benedict XVI, *Interview During the Flight to Australia* (July 12, 2008), available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/july/documents/hf_ben-xvi_spe_20080712_interview_en.html ("[T]o be a priest, is incompatible with this behaviour There are things which are always bad, and paedophilia is always bad."); Pope Benedict XVI, *Homily of his Holiness Benedict XVI: Washington Nationals Stadium* (Apr. 17, 2008), available at http://www.vatican.va/holy_father/benedict_xvi/homilies/2008/documents/hf_ben-xvi_hom_20080417_washington-stadium_en.html ("No words of mine could describe the pain and harm inflicted by such abuse."); Pope Benedict XVI, *Address to the Bishops of the United States of America* (Apr. 16, 2008), available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080416_bishops-usa_en.html ("Many of you have spoken to me of the enormous pain that your communities have suffered when clerics have betrayed their priestly obligations and duties by such gravely immoral behavior."); Pope Benedict XVI, *Interview During the Flight to the United States of America* (Apr. 15, 2008), available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080415_intervista-usa_en.html ("We will absolutely exclude paedophiles from the sacred ministry; it is absolutely incompatible, and whoever is really guilty of being a paedophile cannot be a priest."); Pope Benedict XVI, *Address to the Bishops of Ireland on their Ad Limina Visit* (Oct. 28, 2006), available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/october/documents/hf_ben-xvi_spe_20061028_ad-limina-ireland_en.html ("In the exercise of your pastoral ministry, you have had to respond in recent years to many heart-rending cases of sexual abuse of minors. These are all the more tragic when the abuser is a cleric."); Pope John Paul II, *Homily at 17th World Youth Day* (July 28, 2002), available at http://www.vatican.va/holy_father/john_paul_ii/homilies/2002/documents/hf_jp-ii_hom_20020728_xvii-wyd_en.html ("The harm done by some priests and religious to the young and vulnerable fills us all with a deep sense of sadness and shame."); Pope John Paul II, *Address to the Cardinals of the United States* (Apr. 23, 2002), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/april/documents/hf_jp-ii_spe_20020423_usa-cardinals_en.html ("The abuse which has caused this crisis is by every standard wrong and rightly considered a crime by society; it is also an appalling sin in the eyes of God."). For additional information, see also *Abuse of Minors: The Church's Response*, THE HOLY SEE, http://www.vatican.va/resources/index_en.htm (last visited Feb. 8, 2012).

6. Tomasi, *supra* note 4.

7. See, e.g., G.A. Res. 54/263, at 7-13, U.N. Doc. A/RES/54/263 (Mar. 16, 2001) (recognizing international concern of sexual exploitation of children and setting forth measures for signatories to combat exploitation of children).

8. See AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS 2 (2010), available at <http://www.apa.org/pi/women/programs/girls/report-full.pdf>; STANDING COMM. ON ENV'T, COMMC'NS & THE ARTS, SEXUALISATION OF CHILDREN IN THE CONTEMPORARY MEDIA (2008), available at http://www.aph.gov.au/senate/committee/eca_ctte/sexualisation_of_children/report/report.pdf (Senate Committee of the Commonwealth of Australia).

vigorously working to sanitize paedophilia.⁹ These initiatives refer to the disorder of paedophilia as “adult-child” or “adult-minor” sex.¹⁰ They challenge the assumption that sex between adults and children is always damaging to the child, and/or defend man-boy sexual contacts and adult-juvenile sex in general.¹¹ They find support from thousands of websites presently promoting the acceptance and normalization of child sexual abuse, for example, from political parties founded on the platform of legalizing child-adult sexual activity,¹² and academic gatherings convened to challenge the current diagnosis of paedophilia as a mental disorder.¹³ Consequently, one might well query whether, in the near future, paedophilia might be regarded as a “sexual orientation.”¹⁴

In an effort to make their case internationally, those who promote “new human rights” rely upon non-binding documents (e.g., General Comments of United Nations Treaty Bodies, Reports of United Nations Special Rapporteurs, decisions of regional and national courts, and even principles drafted by individuals).¹⁵ The reason

9. See JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 20–44 (2002); Mary de Young, *The World According to NAMBLA: Accounting for Deviance*, 16 J. SOC. & SOC. WELFARE 111, 124 (1989); Steve Brown, *Fears Grow Over Academic Efforts to Normalize Pedophilia*, CNSNEWS.COM (July 7, 2008), <http://cnsnews.com/node/5673>; Suheyra Fonseca Misirli Verhoeven, *The Child Love Movement: Um Olhar Crítico Sobre O Ativismo Pedófilo*, CONPEDI (2007), http://www.conpedi.org.br/manaus/arquivos/anais/campos/suheyra_fonseca_verhoeven.pdf.

10. See, e.g., JUDITH A. REISMAN, KINSEY: CRIMES & CONSEQUENCES 215 (2d ed. 2000) [hereinafter REISMAN, CRIMES & CONSEQUENCES]; JUDITH A. REISMAN ET AL., KINSEY, SEX AND FRAUD 207 (1990) [hereinafter REISMAN ET AL., SEX AND FRAUD]. Much of the research on child sexuality in the Western world has been greatly influenced by the work of Alfred Kinsey, who attempted to put child abusers in a benign light.

11. REISMAN ET AL., SEX AND FRAUD, *supra* note 10, at 206–07.

12. See, e.g., *Court Refuses to Ban Dutch Pedophile Party—Europe—International Herald Tribune*, N.Y. TIMES (July 17, 2006), <http://www.nytimes.com/2006/07/17/world/europe/17iht-dutch.2222178.html>. It was eventually dissolved by the group itself.

13. See, e.g., *2011 Symposium: Pedophilia, Minor-Attracted Persons, and the DSM*, B4U-ACT (Aug. 17, 2011), <http://www.b4uact.org/science/symp/2011/>; see also Lawrence Morahan, *Psychiatric Association Debates Reclassifying Pedophilia*, CNSNEWS.COM (July 7, 2008), <http://www.cnsnews.com/news/article/psychiatric-association-debates-reclassifying-pedophilia>; Joseph Nicolosi & Dale O’Leary, *On the Pedophilia Issue: What the APA Should Have Known*, NARTH, <http://www.narth.com/docs/whatapa.html> (last visited Jan. 11, 2012); Linda Ames Nicolosi, *The APA’s and the Pedophilia Controversy*, NARTH, <http://www.narth.com/docs/pedcrisis.html> (last visited Jan. 11, 2012).

14. It necessarily follows that were such categories to be recognized in international law as “human rights,” then they would be promoted as part of international human rights education, especially for children, which in turn, would promote a cultural shift in attitudes legitimizing such homosexual acts, and suppressing all moral criticism in their regard.

15. See, e.g., INT’L COMM’N OF JURISTS, SEXUAL ORIENTATION, GENDER IDENTITY AND INTERNATIONAL HUMAN RIGHTS LAW: PRACTITIONERS GUIDE NO. 4 (2009); UNIV. OF

for this approach is obvious. There are no binding treaties, which acknowledge such rights.

The purpose of this Article is to review the written texts of important international human rights documents in the area of public international family law, including the rights of the family, parents, and children. This Article fleshes out the legal-anthropological "golden thread" that runs through international human rights law within the system of the United Nations. It provides a "good faith" interpretation in light of the "ordinary meaning" of the words in the written text taking into consideration a certain common-sense understanding of humanity and society.¹⁶ More descriptive than analytical in nature, this Article will consider what is contained in the International Bill of Human Rights and the Convention on the Rights of the Child ("CRC"). The Article contends that the 1948 Universal Declaration of Human Rights ("UDHR"),¹⁷ the foundational text for the modern human rights movement, and the two 1966 Covenants—the International Covenant on Civil and Political Rights ("ICCPR")¹⁸ and

NOTTINGHAM HUMAN RIGHTS LAW CTR., JURISPRUDENTIAL ANNOTATIONS TO THE YOGYAKARTA PRINCIPLES (2007), available at <http://www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudential-annotations.pdf>.

16. See Vienna Convention on the Law of Treaties art. 31–32, May 23, 1969, 1155 U.N.T.S. 331. It is noteworthy that article 31 requires state parties to render a "good faith" interpretation "in accordance with the ordinary meaning" of the terms in their "context and in . . . light of [the treaty's] object and purpose." *Id.* at 340. Articles 31(2)(a) and (b) of the same, provide that said context comprises the text including the preamble and annexes and any agreement made relating to the Treaty by all parties and any instrument made by one party, which undoubtedly includes reservations or interpretative declarations of state parties. *Id.* Article 32 of the Vienna Convention on the Law of Treaties ("VCLT") provides recourse to supplementary means of interpretation to confirm or to determine a meaning when the general rule articulated in article 31 of the VCLT "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable." *Id.* Obviously, every state party will interpret treaties in light of their Reservations and Interpretative Declarations; although, treaty bodies, Special Rapporteurs, etc., are not bound by these rules of interpretation, which in turn, opens the door to disingenuous and self-serving or ideologically-based interpretations.

17. Universal Declaration on Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948). The UDHR differs from the two Covenants and CRC because it was originally intended to be a statement of good intentions and not a document intended to impose legal obligations between state parties. *Id.* pmb. ¶ 8. However, during the interim period between its adoption by the United Nations General Assembly and the coming into force of the two 1966 Covenants in 1976, the UDHR had taken on a legal significance that was not anticipated. Scholars have argued that many of its provisions (if not the declaration as a whole) have, at a minimum, become binding principles of customary international law. See, e.g., Peter Bailey, *The Creation of the Universal Declaration of Human Rights*, UNIVERSAL RIGHTS NETWORK, <http://www.universalrights.net/main/creation.htm> (last visited Jan. 12, 2012). Since the UDHR has been incorporated by reference into the preamble of subsequent treaties, it must be taken into consideration.

18. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)¹⁹ (together, the “International Bill of Human Rights”)—remain the linchpin for understanding documents such as the 1989 Convention on the Rights of the Child.²⁰ This Article argues that these documents, when considered as an integral whole, reveal an interconnectedness between the nature and meaning of the human person, his or her human dignity, as well as the rights of the family, parents, and children. It is beyond the scope of this Article to consider the drafting history of key documents and their working papers, such as the UDHR, since such an appeal to supplementary sources of interpretation is unnecessary for the purposes of this Article and has been studied elsewhere.²¹

The Article is divided into six parts. Part I discusses the human person and his or her dignity. Part II studies the special protection given the family, based on marriage. Part III explores the rights and duties of parents. Part IV considers the rights and duties of the child as they relate to the family and parents. Part V responds to certain objections to the interpretation provided herein; given the brevity of this Article, it does not seek to raise and address every possible counter-argument. Part VI discusses implications for lawmaking.

I. THE HUMAN PERSON AND HIS OR HER DIGNITY

The UDHR acknowledges the human person, male and female, in noting the “equal rights of men and women.”²² The UDHR prohibits discrimination on the grounds of sex,²³ as does the ICCPR,²⁴ which also recognizes “the equal right of men and women” to the enjoyment of all civil and political rights.²⁵ The ICESCR continues along these lines prohibiting discrimination on the basis of sex,²⁶ as does the CRC.²⁷

19. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR].

20. Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess. Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989).

21. See, e.g., Jane Adolphe, *Il Diritto Naturale e La Dichiarazione Universale dei Diritti dell’Uomo*, in RISCOPRIRE LE RADICI E I VALORI COMUNI DELLA CIVILTÀ OCCIDENTALE: IL CONCETTO DI LEGGE IN TOMMASO D’AQUINO (Fulvio Di Blasi ed., 2007); Jane Adolphe, *The Holy See and the Universal Declaration of Human Rights: Working Towards a Legal Anthropology of Human Rights and the Family*, 4 AVE MARIA L. REV. 343 (2006).

22. G.A. Res. 217 (III) A, *supra* note 17, pmbl. ¶ 5.

23. *Id.* art. 2.

24. ICCPR, *supra* note 18, art. 2.

25. *Id.* art. 3.

26. ICESCR, *supra* note 19, art. 2.

27. G.A. Res. 44/25, *supra* note 20, art. 2.

The UDHR recognizes "the inherent dignity and . . . equal and inalienable rights of all members of the human family."²⁸ This preamble paragraph is echoed in the ICCPR²⁹ and the ICESCR,³⁰ and a different preamble paragraph clearly asserts that "rights derive from the inherent dignity of the human person."³¹ The UDHR also recognizes that rights are co-relative with duties; a principle that is strongly reaffirmed in the ICCPR and ICESCR (e.g., the individual has duties "to other individuals and to the community").³² In brief, the three documents do not grant rights but merely acknowledge rights; recognize that rights are co-relative with duties; and ground rights and duties in inherent human dignity.

An important issue raised, concerns the meaning of the phrase "*rights derive from the inherent dignity of the human person*," found in the two Covenants.³³ The answer to this query is partly found in article 1 of the UDHR: "*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*"³⁴ One might argue that each human being, by the mere fact of being human, is a person, that is, by nature "*free . . . endowed with reason and conscience*" and relational.³⁵ Following this line of reasoning, each human being or human person, in relation with self and others, is personally responsible to seek the truth, and respond to the interior call to do good. Arguably, the term *inherent dignity* refers to the "unique excellence of personhood," the innate value of the person as "'someone' and not merely 'something' . . . an absoluteness not found in other beings."³⁶ This "gives rise to specific moral requirements,"³⁷ that is, certain things ought not to be done to any human person (e.g., slavery, torture) and certain other things ought to be done for every human person (e.g., recognition as a person before the law).³⁸ This last point, in turn, implies that a human person also *acquires dignity*

28. G.A. Res. 217 (III) A, *supra* note 17, pmbl. ¶ 1.

29. ICCPR, *supra* note 18, pmbl. ¶ 1.

30. ICESCR, *supra* note 19, pmbl. ¶ 1.

31. *Id.* pmbl. ¶ 2; ICCPR, *supra* note 18, pmbl. ¶ 2.

32. G.A. Res. 217 (III) A, *supra* note 17, arts. 1, 29; *see also* ICCPR, *supra* note 18, pmbl. ¶ 5; ICESCR, *supra* note 19, pmbl. ¶ 5.

33. ICCPR, *supra* note 18, pmbl. ¶ 2 (emphasis added); ICESCR, *supra* note 19, pmbl. ¶ 2 (emphasis added).

34. G.A. Res. 217 (III) A, *supra* note 17, art. 1 (emphasis added).

35. *Id.* (emphasis added).

36. Thomas D. Williams, *What is Thomistic Personalism?*, 7 ALPHA OMEGA 163, 190 (2004).

37. *Id.*

38. *See* MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 13 (1998).

when he or she acts in accordance with right reason; that is, in doing those things he or she ought to do and refraining from other things he or she ought not to do (e.g., Tom has inherent dignity as a human person, which must be respected, but not his act of rape, which is wrong and criminal).

Before turning to the next section of this paper, a word should be said about the term “born” in article 1 of the UDHR: “*All human beings are born free and equal in dignity and rights.*”³⁹ Since human persons are “not [physically] born into equal circumstances,” the term “born” arguably refers to a “moral birth”—a “deeper moral quality,” which no human person, political body, or social body could possibly grant.⁴⁰ This understanding is consistent with the overall text, which includes references to “inherent” and “inalienable” in the preamble.⁴¹

II. PROTECTION OF THE FAMILY, BASED ON MARRIAGE

Consideration of the human being as a person with inherent dignity called to acquire dignity through right action is deeply united with the value and dignity of the family. Article 16 of the UDHR recognizes that the family is “*the natural and fundamental group unit of society and is entitled to protection by society and the State.*”⁴² This statement implies that the “natural” family predates the state and is a subject of rights and duties before the state. It is the natural environment where children (new citizens) come to life, and, in the first instance, are taught to give to the other what is his or her due in justice (to respect authentic rights), but go beyond this, in charity, to give to the other what is theirs (to “*act towards one another in a spirit of brotherhood*”).⁴³ The pertinent principles are unraveled in article 16 of the UDHR in logical sequence, and similar wording is found in the ICCPR⁴⁴ and the ICESCR.⁴⁵

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

39. G.A. Res. 217 (III) A, *supra* note 17, art. 1 (emphasis added).

40. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT 291–92 (1999).

41. G.A. Res. 217 (III) A, *supra* note 17, pmb. ¶ 1.

42. *Id.* art. 16 (emphasis added).

43. *Id.* art. 1 (emphasis added).

44. *See* ICCPR, *supra* note 18, art. 10.

45. *See* ICESCR, *supra* note 19, art. 23.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.⁴⁶

Article 16 of the UDHR affirms that human persons, male and female, are complementary in their sexual dimensions in recognizing the family as "the natural and fundamental group unit of society."⁴⁷ Marriage is brought about through the free and full consent of a man and a woman, of lawful age, traditionally manifested in public because of the unique human and social significance that transcends the couple. Marriage, then, is not founded upon having sexual intercourse, or living together, or upon mere instinct and sentiment, but rather on something more profoundly related to what it means to be human—a free act of intelligence and will, of a man and of a woman.

Upon deeper reflection about the nature and meaning of the family, based on marriage, one might reasonably argue that the object of the spouses' consent is the mutual and reciprocal exchange of each other as persons in their respective masculinity and femininity. This consent, in turn, creates a bond in justice, by which the spouses have a duty to love, a love that is conjugal precisely because it is the result of a commitment by a man as man and a woman as woman. In other words, a man and a woman *bind* themselves together with the "I do," but they totally *give* themselves to each other when they unite with the openness to produce a "new you and me"—a new being that is not just "yours or mine," but "ours." In this way, one might argue that the child comes to life from love of parents (conjugal love) and develops through a loving education, all for love of the other (brotherly love).

It follows that the intimate union of marriage is for the good of the spouses (mutual giving of the two persons, male and female), the good of children (procreation plus education), and the good of society (bringing forth responsible and educated citizens). These ends, in turn, are related to the *enduring* partnership of the spouses because the object of man's and woman's consent is the donation of their masculine and feminine being, namely the gift of self, which implies a permanent donation. Otherwise, the person would be on loan, a rather dehumanizing reality. Another reason for the lasting bond is grounded in integral human procreation, that is, procreation plus

46. G.A. Res. 217 (III) A, *supra* note 17, art. 16.

47. *Id.*

education of a child. The three goods are also tied to *fidelity* between the spouses because the same total gift of self cannot be made to more than one person at the same time. Moreover, exclusivity permits love to flourish, the mark of a healthy husband-wife relationship, which in turn, is linked to the well-being of children and their relationships with others in society.

Despite difficulties, limitations, and deviations stemming from human weaknesses, the International Bill of Human Rights, as discussed above, realistically reflects the truth that a man and a woman have a profound inclination to be joined in marriage, a reality that fully transcends historical and cultural differences. In brief, what is specifically human is not reduced to the completely autonomous will of the person; a position that rejects a connection between human nature and human rights in viewing the natural as mere datum to be technologically manipulated.

III. PARENTAL RIGHTS AND DUTIES

As discussed above, the natural family is deeply united with the rights and duties of parents. Indeed, following a discussion of the right to marry and found a family, article 26 of the UDHR states: "*Parents have a prior right to choose the kind of education that shall be given to their children.*"⁴⁸ The reference to "prior right" acknowledges the subsidiary role of the state; since parents give life to the child, they have the primary and inalienable duty and right to educate their child, and in conformity with their moral and religious convictions. Those who are called to collaborate with parents (e.g., teachers, school administrators, state authorities) do so in a delegated manner, and therefore in close collaboration with parents.

According to the two 1966 Covenants (ICCPR and ICESCR), parents have the right to choose schools or even home schooling in order to educate their child, in keeping with their moral and religious convictions.⁴⁹ This implies the right to ensure that their child is not compelled to attend classes (e.g., sex-education courses) which are not in agreement with their own moral and religious convictions; and the right to ensure that a compulsory system of education is not imposed by the State from which all moral and religious formation is excluded. In the end, recognition of the *parents' prior right* to choose their child's education reaffirms the principle of integral human

48. *Id.* art. 26 (emphasis added).

49. See ICCPR, *supra* note 18, art. 18; ICESCR, *supra* note 19, art. 13.

procreation, which is, in essence, an exercise of responsible procreation of fatherhood and motherhood, where one accepts to love, nurture, educate, guide, and accompany the child throughout his or her entire developmental process.

IV. CHILD'S RIGHTS AND DUTIES

Parental rights are necessarily united with the rights of children. In specific regard to the rights of the child, all that has been previously discussed as regards inherent and acquired human dignity pertains to all children, born and unborn. Although rights of the pre-natal child spark much debate in international fora, pregnancy is recognized as a special relationship between a mother and child. For example, states are prohibited from carrying out the death penalty on pregnant women.⁵⁰ By necessary implication, the reason for this prohibition is "precisely because she is carrying in her womb an innocent human being";⁵¹ there is not just one life at stake, but two. Moreover, the UDHR recognizes that "[m]otherhood and childhood are entitled to special care and assistance,"⁵² and the ICESCR acknowledges that "[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth."⁵³ Furthermore, the ICESCR recognizes that all children have the right to enjoyment of the highest attainable standard of physical and mental health, and state parties are to work especially hard to reduce stillbirth-rate and infant mortality as well as promote "healthy development of the child."⁵⁴

The CRC, which binds 193 states, affirms the "inherent right to life" of the child,⁵⁵ who requires legal protections "before as well as after birth,"⁵⁶ and is broadly defined as "every human being below the age of eighteen."⁵⁷ Like the International Bill of Human Rights, state parties are required to respect and ensure the child's rights without discrimination of any kind including "sex" and "birth."⁵⁸ The "inherent right to life" is protected as well as the child's "survival

50. ICCPR, *supra* note 18, art. 6.

51. 1 JUDE IBEGBU, RIGHTS OF THE UNBORN CHILD IN INTERNATIONAL LAW 119 (2000).

52. G.A. Res. 217 (III) A, *supra* note 17, art. 25 (emphasis added).

53. ICESCR, *supra* note 19, art. 10 (emphasis added).

54. *Id.* art. 12.

55. G.A. Res. 44/25, *supra* note 20, art. 6.

56. *Id.* pmb. ¶ 9 (emphasis added).

57. *Id.* art. 1.

58. *Id.* art. 2.

and development" to the maximum extent possible,⁵⁹ and States are obliged to provide the "*highest attainable standard of health. . . . prenatal and post-natal.*"⁶⁰

That children's rights are intimately related to the family and their parents is obvious from key provisions, and a plethora of references to the family and/or parents found in eighteen of fifty-four articles. For example, the CRC acknowledges that "*the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.*"⁶¹ As previously discussed, the natural family is singled out for special protection in the International Bill of Human Rights, which is incorporated into preamble paragraph 3 of the CRC through reference to the UDHR.⁶² However, preamble paragraph 3 of the CRC must be reconciled with slightly different wording in preamble paragraph 5 of the CRC: "*the family. . . the fundamental group of society and the natural environment for. . . children.*"⁶³ In this regard, one might contend that it is simply a matter of emphasis: family form is being emphasized in the UDHR while family form plus family environment is being emphasized in the CRC. In other words, society and the State must protect the natural family *per se* and also provide particular assistance in times of difficulty, distress, and tragic circumstances (e.g., widows, widowers, separated and divorced spouses, and orphans of living and dead parents).

In addition, the CRC, in formulating the *best-interests-of-the-child* principle, obliges States to take "*into account the rights and duties of his or her parents.*"⁶⁴ Moreover, articles 18 through 20 acknowledge the fundamental role of parents and implicitly endorse the principle of subsidiarity, which guides the role of the state *vis-a-vis* the family and parents.⁶⁵ For example, both parents have "*common responsibilities*" and the "*primary responsibility*" for the "*upbringing and development of the child,*"⁶⁶ and state parties are to render "*appropriate assistance to parents.*"⁶⁷ Therefore, protection of children's

59. *Id.* art. 6 (emphasis added).

60. *Id.* art. 24 (emphasis added).

61. *Id.* pmb. ¶ 6 (emphasis added).

62. *Id.* pmb. ¶ 3.

63. *Id.* pmb. ¶ 5 (emphasis added).

64. *Id.* art. 3 (emphasis added).

65. *Id.* arts. 18–20.

66. *Id.* art. 18 (emphasis added).

67. *Id.* (emphasis added).

rights cannot become fully effective unless the family and its rights are fully promoted, protected, and respected "so that it can fully assume its responsibilities within the community."⁶⁸ Indeed, parents, in the first instance, have the duty to protect their child from all forms of abuse, neglect, and violence.

The CRC acknowledges that a child's development and education begins in the home in preamble paragraphs 5 through 7 and that an adequate standard of living is required for the "child's physical, mental, spiritual, moral and social development."⁶⁹ Outside the home, education is to be integral, inclusive of the whole range of human values, including "respect for the child's parents."⁷⁰ In addition, state parties are to recognize parental rights and duties to provide direction and guidance to their child, especially with respect to the responsible exercise of the rights to freedom of thought, conscience, and religion.⁷¹

V. SOME OBJECTIONS AND RESPONSES

A "moral-relativist" challenge to this perspective of marriage, as well as the rights and duties of parents and children, might deny a universal human nature and/or foundational principles of right and wrong.⁷² Whereas a "selective-moral-relativist" position might admit that every human person has a right to be free from torture, genocide, and racial discrimination but deny any foundational principles about one's sex or sexual relations.⁷³ An "amoral or neutral" position might argue that at the heart of human rights is the non-discrimination principle;⁷⁴ in other words, States are obliged to show equal concern and respect for all possible sexual preferences.

In response to the "moral-relativist" position, to deny a common human nature and/or right and wrong is to reject human reasoning since it moves from the known to the not yet known.⁷⁵ Furthermore, the International Bill of Human Rights is arguably founded on the essential characteristics of a universal human nature, which reaffirms the difference between human persons and other living creatures. It presupposes "foundational principles of right and wrong," that which

68. *Id.* pmb. ¶ 5 (emphasis added).

69. *Id.* art. 27 (emphasis added).

70. *Id.* art. 29.

71. *Id.* art. 14; *see also id.* arts. 3, 5.

72. J. BUDZISZEWSKI, NATURAL LAW FOR LAWYERS 14 (2006).

73. *Id.*

74. *See id.*

75. *See id.*

is right for every man and at some level known to every man, and that which is wrong for every man and at some level known to every man.⁷⁶ These basic principles, and others, are objective, accessible to right reason, and may be “taken either by themselves . . . or together with their more obvious corollaries.”⁷⁷ Corollaries to foundational principles may have remote implications “recognized by only those few who have the requisite experience, acuteness, and discernment.”⁷⁸ Other truths might be “*obvious ‘in themselves’*” but not “*obvious ‘to us’*” (e.g., the self-destructiveness of cocaine addiction is obvious in itself, but may not be obvious to the cocaine addict).⁷⁹ Indeed, one might well argue that “[a]s clarity of judgment aids probity of life, so probity of life aids clarity of judgment.”⁸⁰ For believers, divine revelation is available to assist in illuminating the truths about the inherent dignity of the human person, and his or her rights.⁸¹

In response to the “selective-moral-relativist” position, it is enough to note that reservations on one’s sex and sexual relations are rather capacious ambiguities which mushroom into doubts about a whole range of issues—bringing into question the very foundation of human rights (e.g., the nature and meaning of the human person, human dignity, human sexuality, marriage, family, parenthood, childhood, and the role of the state).⁸² This position then melts into the first objection.

In response to the “amoral or neutral” position, one need only ask whether there is a way to have equal concern and respect for the torturer and the torture victim.⁸³ Either the torturer torments the person because this is right or good, or the person is not tortured by the torturer because this is right or good. States condemn the acts of the torturer, and protect the other’s right not to be tortured because the acts of the two individuals do not “deserve equal concern and respect.”⁸⁴ A similar dilemma is evident in discussions pertaining to the pre-natal child’s right to life versus the mother’s “new human right” to abortion. Frequently, the issue is framed as whether the

76. *Id.* at 21.

77. *Id.*

78. *Id.*

79. *Id.* (emphasis added).

80. *Id.*

81. See Pope John Paul II, *Fides et Ratio* [Encyclical Letter on the Relationship Between Faith and Reason] ¶ 76 (1998).

82. BUDZISZEWSKI, *supra* note 72, at 14.

83. See, e.g., *id.* at 15.

84. *Id.* at 16.

unborn child is even a human being (and/or human person); and so the argument goes, because both views on the point deserve equal respect and concern, the mother should be free to abort.⁸⁵ In the end, the so-called neutrality position does not award equal concern and respect to both views on whether the unborn child is a human being, but rather "covertly supposes the truth of one of them [the 'fetus' in the mother's womb is not a human being and/or a human person] but spares itself the trouble of demonstration."⁸⁶

Similarly, as regards "sexual orientation" and "gender identity," it is difficult to imagine how these "new human rights" could be reconciled with one's freedom to express the conviction, for example, that homosexual acts are sinful (based on one's religious beliefs), or otherwise immoral (based on right reason or common sense). Indeed, it is reasonably foreseeable that freedom of religion and religious expression would be drastically restricted and limited in legitimately transmitting religious and moral heritages which cannot accept these sexual practices even as they respect the inherent dignity of persons who engage in them.⁸⁷ Despite the fact that freedom of religion, thought, and conscience finds fundamental protection in many international legal instruments, the application of the two "new human rights" could nevertheless render other recognized and protected rights obsolete, and even criminal (e.g., hate speech). Indeed, in countries where such categories have been created, individuals have been prosecuted and/or investigated for violating anti-discrimination clauses or hate speech laws, including: (a) religious ministers who have preached that homosexual behavior is

85. *Id.*

86. *Id.* at 17.

87. See Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World* (2004), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html; Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* ¶ 4 (2003), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html; Congregation for the Doctrine of the Faith, *Some Considerations Concerning the Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons* ¶ 3 (1992), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html; Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons* ¶ 3 (1986), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html; Congregation for the Doctrine of the Faith, *Declaration on Certain Questions Concerning Sexual Ethics* § VIII (1975), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19751229_persona-humana_en.html.

unacceptable according to their religious precepts; (b) state marriage commissioners licensed to perform marriages who have refused to perform a ceremony between two persons of the same sex in accordance with the religious beliefs of the said commissioners; (c) a religious men's service group who refused to rent a hall for the "wedding" reception of two women, in accordance with the group's religious beliefs; (d) a professional printer who refused to print material for a group advocating rights pursuant to "sexual orientation" and "gender identity," because of his religious convictions; (e) a religious minister who wrote a letter to the editor of a newspaper questioning the promotion of homosexuality by governments and public schools, and who gave religious arguments based on the Bible; and (f) city mayors who have refused to declare parade days because of concerns for public morals and public order.⁸⁸

Still more troubling is the verbal and physical abuse suffered by persons with homosexual tendencies who have been attacked for seeking the assistance of support groups and/or psychological or psychiatric treatment; even as they respect the inherent dignity of persons who engage in homosexual behaviours, many others have endured despicable treatment when they have openly opposed supporting sexual behaviour between people of the same sex, including many of those who have publically renounced homosexual acts.⁸⁹

The Permanent Observer Mission of the Holy See to the United Nations summarizes the aforementioned concerns regarding the freedom of religion and the "new human rights" in stating: "When they express their moral beliefs or beliefs about human nature, which may also be expressions of religious convictions, or state opinions about scientific claims, they are stigmatised, and worse—they are vilified, and prosecuted."⁹⁰ Needless to say, these attacks contradict

88. See Chris Kempling, Address at the United Nations Commission on Human Rights Delegate Briefing: Religious Freedom in Canada (Mar. 4, 2005), available at <http://www.catholiceducation.org/articles/persecution/pch0080.html>.

89. See Mike White, *Former Gay Rights Leader Becomes a Christian*, YAHOO! VOICES (Jul. 10, 2007), <http://voices.yahoo.com/former-gay-rights-leader-becomes-christian-428973.html>. Telling the story of a homosexual man who converted to Christianity and left the homosexual lifestyle behind, the author states that

[s]ome on the Internet have criticized Glatze for announcing he has become a Christian and renounced the magazine he published. . . . Michael Glatze says he made the right decision to become a Christian and turn his back on the gay lifestyle—despite the fact that some gays would call him a 'racist,' 'insensitive,' 'evil,' and 'discriminatory.'

Id.

90. Tomasi, *supra* note 4.

fundamental rights protected in international law, including those related to security of the person, the principle of non-discrimination, freedom of religion, and freedom of expression.

VI. IMPLICATIONS FOR LAWMAKING

There are seven important corollaries to the anthropological foundational principles herein discussed, which have also been fleshed out by the Holy See, and they are worth repeating here.

Laws should not prevail over justice. Human rights are not the exclusive result of legislative enactments or normative decisions taken by the various agencies of those in power. When presented purely in terms of legality, these rights risk becoming weak propositions divorced from the ethical and rational dimension which is their foundation and their goal. The International Bill of Human Rights "has reinforced the conviction that respect for human rights is principally rooted in unchanging justice, on which the binding force of international proclamations is also based."⁹¹ These binding documents acknowledge that rights and their corresponding duties follow naturally from human interaction, "the fruit of a commonly held sense of justice built primarily upon solidarity among the members of society,"⁹² together with respective limits necessary for the sake of a just social order.⁹³ Authentic international human rights, then, must be respected as an expression of justice because they are inherent to the human person.

Laws cannot ignore biological realities. Sexual identity, male or female, of the human species to which a person pertains is a scientific question of their biological sex, which is a universal differential verifiable in objective reality. This fact, however, must not be

91. Pope Benedict XVI, Address to the General Assembly of the United Nations (Apr. 18, 2008), in *U.N.: Sign of Unity, Instrument of Service to the Human Family*, L'OSSERVATORE ROMANO (English Ed.), Apr. 23, 2008, at 12.

92. *Id.* The Pope continued:

This intuition was expressed as early as the fifth century by Augustine of Hippo, one of the masters of our intellectual heritage. He taught that the saying: *Do not do to others what you would not want done to you* "cannot in any way vary according to the different understandings that have arisen in the world."

Id. (emphasis added).

93. *See id.*; Pope John Paul II, Message to H.E. Mr. Didier Operti Badán, President of the 53rd Session of the U.N. General Assembly, to Mark the 50th Anniversary of the Universal Declaration of Human Rights (Nov. 30, 1998), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/1998/november/documents/hf_jp-ii_spe_19981130_50th-onu_en.html.

obscured by “world views which assert that sexual identity can be adapted indefinitely to suit new and different purposes.”⁹⁴

Laws cannot deny their bedrock, the human person and his universal and objective human nature. The UDHR is understood as the outcome of a “convergence of different religious and cultural traditions, all of them motivated by the common desire to place” a universal and objective notion of the human person at the “heart of institutions, laws and the workings of society, and to consider the human person essential for the world of culture, religion and science.”⁹⁵ It has “enabled different cultures, juridical expressions and institutional models to converge” around a fundamental understanding of the characteristics of the human person, a “nucleus of values, and hence of rights.”⁹⁶ These rights recognized and expounded in the UDHR “apply to everyone by virtue of the common origin of the person They are based on the natural law inscribed on human hearts and present in different cultures and civilizations.”⁹⁷

Laws depend upon certainty. No terms should be adopted that are intrinsically ill-suited to legislative definition as criteria for non-discrimination or hate speech. This would offend the principle of legality.

Laws purporting to prohibit unjust discrimination cannot unjustly discriminate. It is quite clear that such “new human rights” call into question the International Bill of Human Rights and the CRC, which clearly define the nature of marriage and the family, and protect freedom of religion and religious expression of parents. However, such freedoms would be drastically restricted and limited in legitimately transmitting religious and moral heritages which cannot accept these sexual practices even as they respect the inherent dignity of persons who engage in them.⁹⁸

Laws must respect the principle of subsidiarity. Taking into account the evolving nature and varying content of the concepts of “sexual orientation” and “gender identity,” their acceptance into the lexicon of international human rights law would take the debate and discussions on such sensitive topics to international institutions at the expense of the common good of local community, where

94. Fourth World Conference on Women, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, ¶ 12, U.N. Doc. A/CONF.177/20/Rev.1 (1996) (showing The Holy See’s position).

95. Pope Benedict XVI, *supra* note 91.

96. *Id.*

97. *Id.*

98. *See supra* note 87 and accompanying text.

concerns regarding the rights of the natural family, parents, and religious freedom are best addressed.

Laws must further the common good. In the context of international relations, it is also necessary to recognize the superior role played by rules and structures that are intrinsically ordered to "promote the common good, and therefore to safeguard human freedom."⁹⁹ Such regulations do not limit, but on the contrary, promote authentic freedom "when they prohibit behaviour and actions which work against the common good, curb its effective exercise and hence compromise the dignity of every human person."¹⁰⁰ There is a correlation between rights and duties, in the name of freedom, by which "every person is called to assume responsibility for his or her choices, made as a consequence of entering into relations with others."¹⁰¹

CONCLUSION

In specific regard to "new human rights" in public international family law, it is difficult to understand the full breadth of the human rights at stake. Why some sexual desires are acceptable, and presumably, others are not (e.g., paedophilia, incest). How such interior dispositions constitute a human right, when the content of which can vary so substantially, depending as they do upon the mental state of a particular person.

These concerns need to be addressed in light of the legal anthropology embedded in the International Bill of Human Rights together with the CRC. These documents found human rights in the inherent dignity of each human person, male and female, by nature endowed with reason and conscience, called to live in a spirit of brotherhood. Rights flow from the dignity of the person and must be defined in relation to the human person as defined in article 1 of the UDHR, wherein one finds the essential characteristics of the human person. The UDHR affirms that the bedrock of rights is family and community, rather than the individual. "Human rights are based on natural law—what is right by virtue of the natural order—which is the expression of humanity's wisdom. These rights presuppose the juridical faculty to require respect for natural law."¹⁰² Subsequent

99. Pope Benedict XVI, *supra* note 91.

100. *Id.*

101. *Id.*

102. Pontifical Council for the Family, *The Family and Life Fifty Years After the Universal Declaration of Human Rights* (Aug. 5, 1999), reprinted in COMPENDIUM OF CHURCH TEACHING ON FAMILY AND LIFE ISSUES FROM VATICAN II TO THE PRESENT 1058 (2004).

initiatives that have attempted to depart from the special protection given to the natural family, for example, have encountered persistent objections from member states, mostly in the form of reservations, and so far defeating the growth of a contrary custom. In contrast to relativistic and nihilist positions, the UDHR affirms or proclaims a vision of man that “recognizes and codifies . . . universal rights that do not depend on any culture, religion, or political, social or economic context because they are related to human nature and express its fundamental values.”¹⁰³ For this reason, it has been described as “one of the most valuable and significant documents in the history of law.”¹⁰⁴

103. *Id.* at 1059.

104. *Id.* at 1127 (footnote omitted).