

THE CATHOLIC NEO-SCHOLASTIC CONTRIBUTION TO HUMAN RIGHTS: THE NATURAL LAW FOUNDATION

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It is a great honor to contribute to the inaugural issue of the *Ave Maria Law Review* and to present this essay that accompanies the address delivered by His Eminence Cardinal George. I have chosen as my topic the subject of human rights and the Catholic contribution to this important development in domestic and international law.

Several years ago, there was an international celebration of the fiftieth anniversary of the Universal Declaration of Human Rights.¹ There is no question that the Universal Declaration provides the foundation for the major international human rights instruments of the past half-century. Many Americans may think with some amusement or intrigue that it took the rest of the world another two centuries to address the subject of human rights that seem integral to American legal institutions. Indeed, the view that international human rights emerged from the American Revolution and the works of political philosophers such as Locke and Rousseau is characteristic of the international law texts we rely upon today in the American legal academy.

However, conceptions of liberty, equality, and—at least for the French—fraternity, conceptions integral to human rights, are not solely the work of English and French Enlightenment thinking. These issues have deep roots that go back in time to earlier thinkers, especially those from the Catholic Neo-Scholastic tradition. I shall briefly address three individuals who lived during the years of the European exploration of the New World and made significant contributions to the establishment of human rights. They are Francis

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1. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter UDHR].

de Vitoria, a Dominican, and Francis Suárez and Robert Bellarmine, two Jesuits and contemporaries. As commentators of legal and political institutions of the sixteenth and early seventeenth centuries, they all relied on the Scholastic tradition and the natural law² principles upon which it was based.³ The Neo-Scholastics provided a solid foundation for much of the Catholic Church's long involvement with the international order that is based on natural law and the establishment and preservation of the international community. In this tradition, the Second Vatican Council concluded in 1965 that the solidarity of mankind necessitates "a revival of greater international cooperation."⁴ The Council continued by stating that while most "peoples have become autonomous, they are far from being free of every form of undue dependence, and far from escaping all danger of serious internal difficulties."⁵ The work of the Neo-Scholastics helped to provide a foundation for this view and other ecclesial contributions in the international arena.

What the natural law is and what constitutes it are matters that must be addressed at the outset of this brief essay.⁶ In the Catholic

2. For an extremely helpful explanation of the role of natural law in international law, see James V. Schall, S.J., *Natural Law and the Law of Nations: Some Theoretical Considerations*, 15 FORDHAM INT'L L.J. 997 (1991-1992). In particular, this author states:

[T]he law of nations itself was a necessary derivative from natural law. It was based on the principle that human beings throughout time and space were the same in their essential structure, in that they each possessed reason, and that reason could be formulated, communicated, understood, and debated wherever men sought understanding. The theories and actions of anyone, even rulers, could and should be tested by reason. This testing would result in an agreed upon law if the reasonable solution could be found. It would result in violence, disagreement, and even war if it could not.

Id. at 1017.

3. J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 26 (Sir Humphrey Waldock ed., 6th ed. 1963). See also John P. Doyle, *Francisco Suárez: On Preaching the Gospel to People Like the American Indians*, 15 FORDHAM INT'L L.J. 879 (1991-1992); Ramon Hernandez, O.P., *The Internationalization of Francisco de Vitoria and Domingo de Soto*, 15 FORDHAM INT'L L.J. 1031 (1991-1992); see generally JAMES BROWN SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS* (1934); JAMES BROWN SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW: LECTURES ON FRANCISCO DE VITORIA (1480-1546) AND FRANCISCO SUÁREZ (1548-1617)* (1928).

4. Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church and the Modern World*] ¶ 85 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 513, 606 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1967) [hereinafter *Gaudium et Spes*].

5. *Id.*

6. Robert John Araujo, S.J., *International Law Clients: The Wisdom of Natural Law*, 28 FORDHAM URB. L.J. 1751, 1753-56 (2001) (offering a substantially similar introduction to the natural law).

tradition, natural law is not a body of substantive law in itself but a means by which the human mind formulates legal principles that can then be applied to govern a specific jurisdiction. Professor Charles Rice has correctly acknowledged that natural law is a “guide to individual conduct” and “serves as a standard for the laws enacted by the state.”⁷ The celebrated canonist Gratian, who compiled his collection of canon law principles during the twelfth century, noted in the *Decretum* that “Natural law is common to all nations because it exists everywhere through natural instinct, not because of any enactment.”⁸ In his commentary (the “Ordinary Gloss”), Gratian explained that the natural quality of law means “an instinct of nature proceeding from reason.”⁹ In the *Summa Theologica*, Thomas Aquinas identified natural law as those precepts that are “appointed by reason.”¹⁰ The first principle of the practical reason is: “[G]ood is to be done and pursued, and evil is to be avoided.”¹¹ Aquinas noted in his discussion of the natural law that “other matters of law are ordained to the moral common good.”¹² In a fundamental way, the notion of the common good that is essential to a proper understanding of human rights entails a sense of reciprocity in which

7. CHARLES E. RICE, FIFTY QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT 33 (rev. ed. 1999).

8. GRATIAN: THE TREATISE ON LAWS (DECRETUM DD. 1-20) WITH THE ORDINARY GLOSS 6 (Augustine Thompson, O.P. & James Gordley trans., 1993) (1140). He then went on to define “civil law” as that which “each people and each commonwealth establishes as its own law for divine or human reasons.” *Id.* at 7. The law of nations was given the explanation that “almost all nations make use of it,” and it “deals with the occupation of habitations, with building, fortification, war, captivity, servitude, postliminy [the law under which something lost as a result of captivity is restored to the original owner from whom the item was taken], treaties, armistices, truces, the obligation of not harming ambassadors, and the prohibition of marriage with aliens.” *Id.*

9. *Id.* at 6.

10. THOMAS AQUINAS, SUMMA THEOLOGICA, Part I-II, Question 94, Article 1 (Fathers of English Dominican Province trans., Christian Classics 1981) (1911); see also *id.* at Question 94, Article 2 (arguing that practical reason is a self-evident principle).

11. *Id.* at Question 94, Article 2. As Ralph McNerny has stated:

Natural law is a dictate of reason. Precepts of natural law are rational directives aiming at the good for man. The human good, man’s ultimate end, is complex, but the unifying thread is the distinctive mark of the human, i.e., reason; so too law is a work of reason. Man does not simply have an instinct for self-preservation. He recognizes self-preservation as a good and devises ways and means to secure it in shifting circumstances.

Ralph McNerny, *The Principles of Natural Law*, 25 AM. J. JURIS. 1, 5 (1980).

12. SUMMA THEOLOGICA, *supra* note 10, Part I-II, Question 94, Article 3; see also *id.* at Question 95 (discussing human law).

the Silver Rule,¹³ “Do to no one what you yourself dislike,” and the Golden Rule,¹⁴ “Do to others whatever you would have them do to you,” have a role. Aquinas also examined the common good. For him, the object of justice is to keep people together in a society in which they share relationships with one another. As he said, “justice is concerned only about our dealings with others.”¹⁵ Aquinas further refined the notion of justice as being the mutuality or reciprocity shared among the members of society and essential to the dignity of each person when he argued that “the virtue of a good citizen is general justice, whereby each person is directed to the common good.”¹⁶

While legal theorists may express some disagreement about where moral considerations are to be regarded in natural law theory, there is little dispute about the role that reason has to play in it. Reason and cognitive function have played a crucial role in the evolution of law. Aquinas acknowledged that law may be understood as “an ordinance of reason for the common good, made by him who has care of the community.”¹⁷ Reason, something of crucial concern to the Neo-Scholastics, continues to play an important role in international law in both theory and practice. Eventually, the use of reason leads the legal thinker to the notion of the common good—a principle that supports and reinforces the existence of international law.¹⁸

I beg the reader’s indulgence for the cursory treatment of the history of legal philosophy and international law in this essay, but

13. *Tobit* 4:15.

14. *Matthew* 7:12; *see also Luke* 6:31.

15. SUMMA THEOLOGICA, *supra* note 10, Part I-II, Question 58, Article 2.

16. *Id.* at Question 58, Article 6. In his first encyclical, *Summi Pontificatus*, Pope Pius XII developed this theme on the eve of the Second World War when he stated that

it is the noble prerogative and function of the State to control, aid and direct the private and individual activities of national life that they converge harmoniously toward the common good. That good can neither be defined according to arbitrary ideas nor can it accept for its standard primarily the material prosperity of society, but rather it should be defined according to the harmonious development and the natural perfection of man. It is for this perfection that society is designed by the Creator as a means.

Pope Pius XII, *Summi Pontificatus* [On the Unity of Human Society] ¶ 59 (1939), reprinted in THE PAPAL ENCYCLICALS 1939-1958 at 16 (1981) [hereinafter *Summi Pontificatus*].

17. SUMMA THEOLOGICA, *supra* note 10, Part I-II, Question 90, Article 4.

18. A review of classical and contemporary writings on natural law will demonstrate the connection between natural law and the common good. This illustration comes out of the adoption of the 1787 Constitution in the United States, and the impact of John Locke. *See* JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT § 131 (Prometheus Books 1986) (1690).

even this brief exposition will introduce the reader to the fact that international law has a strong foundation in the natural law tradition that is very much at the core of international human rights law.¹⁹ As Pope Pius XII noted in his first encyclical *Summi Pontificatus*,

the new order of the world, of national and international life, must rest no longer on the quicksands of changeable and ephemeral standards that depend only on the selfish interests of groups and individuals. No, they must rest on the unshakeable foundation, on the solid rock of natural law and of Divine Revelation.²⁰

I turn now to an investigation of the Neo-Scholastics and their contribution to human rights.

De Vitoria (1480-1546) lived during the age of the Conquistadors and the Reformation. Like Suárez and Bellarmine who were to follow, de Vitoria's legal principles were rooted in the natural law. It was this foundation that led him to the consequent notion of popular sovereignty: sovereignty not just for some people but for all. De Vitoria's justification for being concerned about everyone raised the relevance to his thinking of the *suum cuique* (to each his own), particularly as he contemplated the consequences of the European insertion into the Western Hemisphere and its impact on the rights of native peoples.²¹

The maxim of the *suum cuique* is found in other ancient legal precepts. For example, there is *juris praecepta sunt haec: honeste vivere; alterum non laedere; suum cuique tribuere* (these are the precepts of the law: to live honorably; to hurt nobody; to render everyone his due). Another is a traditional definition of justice: *Justitia est constans et perpetua voluntas jus suum cuique tribuendi* (Justice is a steady and unceasing disposition to render everyone his due). The essential concept underlying these various formulations may be summed up in the following manner. Justice, an issue of vital importance to most understandings of natural law, is a critical element of legal systems and international order, particularly those concerned with the rights and obligations of people. In the natural law, justice is often considered to exist in the context of the *suum*

19. See BRIERLY, *supra* note 3, at 16-25.

20. *Summi Pontificatus*, *supra* note 16, ¶ 82.

21. See generally FRANCIS DE VITORIA, *De Indis*, in POLITICAL WRITINGS 231-89 (Anthony Pagden & Jeremy Lawrence, eds., 1991).

cuique.²² In essence, the justice that is due someone or something relates to what is due others. In other words, the justice for one cannot be determined until what is just for others involved with the same question is considered. In the framework of human rights in a natural law context, the *suum cuique* plays a significant role.

De Vitoria's training embraced the spirit of the *Gospel of St. Matthew*: to go forth and teach all nations, "baptizing them in the name of the Father, and of the Son, and of the Holy Spirit."²³ De Vitoria, however, asked whether the native peoples of the newly discovered worlds were willing to accept the faith that he wished to give. This question led him to ask and then answer many more questions about the status of native people and to explore what their due might be. His answers to these and other questions astonished many of his contemporaries. Ironically, almost half a millennium later, they still render speechless people of the present day. De Vitoria's influential work in which he applied the *suum cuique*, solidarity, and the common good is *De Indis*.²⁴ What de Vitoria saw and revealed in *De Indis* was that these native peoples were not a savage or subhuman race, but individuals who, like his fellow Europeans, were created in the divine image of God.²⁵ This led de Vitoria to a variety of other conclusions that helped to establish some principles vital to the foundation of human rights doctrines that would be codified in the twentieth century.

Some illustrations from international texts and instruments demonstrate this last point. For example, the Preamble of the United Nations Charter implies the *suum cuique* when it states that the Peoples of the United Nations are "determined . . . to reaffirm faith . . . in the equal rights of men and women and of nations large and small."²⁶ The Preamble additionally states that the "international machinery for the promotion of economic and social advancement of all peoples" shall further such ends.²⁷ The substantive provisions of

22. See generally Rev. Robert John Araujo, S.J., *Justice as Right Relationship: A Philosophical and Theological Reflection on Affirmative Action*, 27 PEPP. L. REV. 377 (2000).

23. *Matthew* 28:19.

24. DE VITORIA, *supra* note 21.

25. *Id.* at 242.

26. U.N. CHARTER, pmb1.

27. *Id.* (emphasis added).

the United Nations Charter elaborate upon the principles of the equality of people and states.²⁸

The Universal Declaration of Human Rights (UDHR) also elaborates on the interrelation of equality amongst all peoples when it states that “a common standard of achievement for all peoples and all nations” shall apply.²⁹ The UDHR further acknowledges the universality of rights when it states that “All human beings are born free and equal in dignity and rights.”³⁰ Moreover, it declares that each person is “endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”³¹ As the *suum cuique* requires, the UDHR speaks not just for some but for all.

In using the Scholastic method of philosophy, de Vitoria reached conclusions that were remarkable for his day and paved the way for recognition of the universality of rights and the *suum cuique*. First, he recognized that the native peoples were rational human beings capable of their own self-determination.³² Because of this, they were the masters of their dominions and the owners of the property they used. Europeans could come to the native not as conqueror but as bearer of things—religion, education, commerce—that could contribute to the lives of the native people if they, the indigenous people, so elected. His views may have inspired popes of the fifteenth through the twentieth centuries when they issued encyclicals urging Europeans and people of European heritage to desist in their enslavement of native peoples.³³ Europeans could claim uninhabited

28. U.N. CHARTER art. 55 (explaining the promotion of international economic and social cooperation for the benefit of all peoples); see also *id.* at art. 2.1 (explaining the organization is based on sovereign equality of all States).

29. UDHR, *supra* note 1.

30. *Id.*

31. *Id.*

32. See DE VITORIA, *supra* note 21, at 231, 250-52, 288-89.

33. See, e.g., Pope Paul III, *Sublimus Dei*, ¶ 4 (1537) at <http://www.papalencyclicals.net/Paul03/p3subli.htm> (on file with the Ave Maria Law Review). While noting that Christians were encouraged by Jesus to “Go ye and teach all nations,” he stated that in any missionary activities, Christians must acknowledge that “the Indians are truly men and that they are not only capable of understanding the Catholic Faith but, according to our information, they desire exceedingly to receive it.” The Pope hastened to add that, “the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property . . . that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and have no effect.” Other popes reiterated the concerns of Paul III during their pontificates. For example, in 1435, Eugene IV condemned the slave trade occurring in the Canary Islands; subsequent popes such as Urban VIII (Bull of April 22, 1639), Benedict XIV (Bull of December 20, 1741), and Gregory XVI (Constitution Against the Slave

territories for the sovereign back home, however they could not dispossess the natives of the land, their culture, and their way of life in the name of an alleged superior civilization. This would be akin to the error identified by Pius XII in his encyclical *Summi Pontificatus* when he declared that

it is indispensable for the existence of harmonious and lasting contacts and of fruitful relations, that the peoples recognize and observe these principles of international natural law which regulate their normal development and activity. Such principles demand respect for corresponding rights to independence, to life and to the possibility of continuous development in the paths of civilization.³⁴

Second, de Vitoria declared the universality of rights.³⁵ In defense of this position he relied on the scriptural account of Jesus telling the lawyer the parable of the Good Samaritan.³⁶ As de Vitoria noted, the response to the lawyer's question of "who is my neighbor?" is this: everyone is the neighbor.

A third crucial point advanced by de Vitoria focused on the issue concerning the relation between the native and the alien.³⁷ He reasoned that if aliens are peace-loving people, they are entitled to call some place of their choosing home. Within this discussion, Vitoria presented his views on the freedom of movement of one person into the territory of another. Assuming that the traveler had no ill purpose in mind, his or her ability to enter and meet and deal with the local peoples was another of the rights supported by natural reason. Once again, taking account of the times in which de Vitoria lived and wrote, he clearly articulated the notions of human rights and obligations of every person that are widely acknowledged today.

The passage of de Vitoria from this life marked the entrance of Francis Suárez and Robert Bellarmine. Like de Vitoria, Suárez (1548-1617) recognized the universality of the principles that he studied. Like de Vitoria, he also acknowledged limits on those in positions of

Trade, November 3, 1839) did the same. For a collection of these documents see JOHN EPPSTEIN, *THE CATHOLIC TRADITION OF THE LAW OF NATIONS* 418-26 (1935).

34. *Summi Pontificatus*, *supra* note 16, ¶ 74.

35. See DE VITORIA, *supra* note 21, at 278-79.

36. *Luke* 10:25-37.

37. See DE VITORIA, *supra* note 21, at 278-79.

human authority.³⁸ With permission from superiors, he eloquently responded to James I's divine right of kings thesis. Suárez advanced the view that it was the people who gave authority to the temporal rulers and it was in their name that the rulers governed.³⁹ These views displeased James I so much that he had Suárez's works burned. It would be safe to conclude, therefore, that the views of Suárez on this point were far more durable than those of the Stuart monarchs. Suárez also suggested that the temporal sovereign who was or became a tyrant could be deposed.⁴⁰ This incensed many European monarchs, including their Catholic majesties. Out of prudence, the Jesuit superiors instructed their subjects, including Suárez, not to press the point.

As a teacher, Suárez spent much of his life working with university students at Coimbra University. While principally a theologian, his lectures and writings had an enormous impact on the development of the law. His main work in this context was *A Treatise on Laws and God the Lawgiver*. Even the great Hugo Grotius, often considered to be the father of international law, acknowledged his debt to Suárez.⁴¹ Like de Vitoria, who developed the notion of universality in the law, Suárez similarly advanced a universal standard of right and wrong pertaining to the "relations of individuals within a state, in the relations of states with one another and in the relations of the international community composed of these individuals and of these states."⁴²

Suárez identified a sophisticated legal method to identify, analyze, and describe how the law could foster what was proper to the

38. FRANCISCO SUÁREZ, S.J., *A DEFENCE OF THE CATHOLIC AND APOSTOLIC FAITH* (1613), reprinted in 2 *THE CLASSICS OF INTERNATIONAL LAW: SELECTIONS FROM THREE WORKS* 647 (James Brown Scott ed., Gwladys L. Williams et al. trans., 1944).

39. JAMES BROWN SCOTT, *THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW* 254 (1934).

40. This concern with tyrants and despotic States survived in Catholic thought as is evident from Pope Pius XII's statement in *Summi Pontificatus*:

Before all else, it is certain that the radical and ultimate cause of the evils which We deplore in modern society is the denial and rejection of a universal norm of morality as well for individual and social life as for international relations; We mean the disregard, so common nowadays, and the forgetfulness of the natural law itself, which has its foundation in God, Almighty Creator and Father of all, supreme and absolute Lawgiver, all-wise and just Judge of human actions.

Summi Pontificatus, supra note 16, ¶ 28.

41. See, e.g., Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* (1625), reprinted in 2 *Classics of International Law* 925, 929 (James Brown Scott ed., Francis W. Kelsey trans., 1925).

42. SCOTT, supra note 39, at 130.

enhancement of these relations. The keystone was the natural law which he clarified as the law “which dwells within the human mind, in order that the righteous may be distinguished from the evil.”⁴³ For Suárez, it was the “true law,”⁴⁴ which manifested itself through the “dictates of natural reason.”⁴⁵ In addition, the law for Suárez was the means to the end, not the end itself. For Suárez, the end, the *telos*, was the promotion of the general welfare or the common good.⁴⁶

According to Suárez, the implementation of the natural law and the advancement of the common good can be found in each person.⁴⁷ If I understand Suárez correctly, the ability to distinguish between right and wrong and the ability to make the moral over the immoral choice is inherent in human nature. Each rational person is gifted with the abilities to make such distinctions and then to choose what to do and what to refrain from doing.

While the law exists primarily for the community, it also exists for the community’s common good, in essence, the community of individuals. In this regard, Suárez was not interested in imposing a world government on nations or states. Rather, he was interested in reinforcing the principle of subsidiarity in which people, along national lines, exercise self-determination within the community of nations.⁴⁸ This is key to the political concepts of self-determination which permeate Article 21.3 of the UDHR, Article 1 of the International Covenant on Civil and Political Rights (ICCPR), and Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In essence, the community was made for the individual and the community is made up of individuals who are in relation with one another.⁴⁹ The welfare of one is dependent on the

43. FRANCISCO SUÁREZ, S.J., A TREATISE ON LAWS AND GOD THE LAWGIVER (1612), *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW: SELECTIONS FROM THREE WORKS 3, 42 (James Brown Scott ed., Gwladys L. Williams et al. trans., 1944).

44. *Id.* at 181.

45. *Id.* at 184.

46. *Id.* at 90.

47. *Id.* at 90-101.

48. *Id.* at 376.

49. In his November 1, 1885 encyclical *Immortale Dei*, Pope Leo XIII reiterated this point when he stated:

[C]ivil society, established for the common welfare, should not only safeguard the well-being of the community, but have also at heart the interests of its individual members, in such mode as not in any way to hinder, but in every manner to render as easy as may be, the possession of that highest and unchangeable good for which all should seek.

welfare of the other. Thus, when the welfare of the community is threatened by the actions of one or some, the common good is threatened because the legitimate interests of the other members of the community are threatened.

The concept of subsidiarity as understood and developed by Suárez has continued to play a significant role in natural law theory.⁵⁰ Subsidiarity generally encompasses the importance of reasoned decision-making at the lowest level of social and political structures where decisions are implemented. Professor E. B. F. Midgley noted that the doctrine of subsidiarity provides latitude for achieving the common good because

just as the natural law does not specify . . . the correct size and scope of a part of humanity which should properly be organized as one political unit . . . the natural law does not dictate any specific detailed hierarchy of political authorities as the correct means for the perfecting of the political organization of both the parts and the whole of the human race.⁵¹

In essence, subsidiarity is a fundamentally democratic and egalitarian principle identified by practical reason that acknowledges the right of self-determination of peoples.⁵² The principle of subsidiarity that is evident in Suárez's thinking is recognized as a fundamental principle of the United Nations Organization.⁵³

The concept of "self-determination," which is also important to natural law theory, is an exercise of subsidiarity. It appears to enjoy a protected status in the world of international law.⁵⁴ It is a concept that

Pope Leo XIII, *Immortale Dei* [*On the Christian Constitution of States*] ¶ 6 (1885), reprinted in THE PAPAL ENCYCLICALS 1878-1903 at 109 (1981).

50. See Araujo, *supra* note 6, at 1761-68.

51. E.B.F. MIDGLEY, THE NATURAL LAW TRADITION AND THE THEORY OF INTERNATIONAL RELATIONS 352 (1975).

52. It is especially pertinent to note that under international law the fundamental unit of society is the family, not the State. See UDHR, *supra* note 1; *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 10, para.1, U.N. Doc. A/6316 (1966) [hereinafter ICESCR]; *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 23, para. 1, U.N. Doc. A/6316 (1966) [hereinafter ICCPR] (suggesting the basic unit of society should be free from imposition by the States when families make crucial decisions for the welfare of the group and the individuals who comprise it).

53. See, e.g., U.N. CHARTER art. 1, para. 2.

54. For helpful background discussion about "self-determination" as a right encompassing the practice of self-government, see Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1 (1993).

synthesizes the interests of the individual and relates them to those of the community.⁵⁵ The interests of both converge on the ability of individuals to exercise their selections about how they wish to live their lives and to be free from the interference and imposition of others.⁵⁶ Professor Ian Brownlie has noted the overlap of interests between the individual and the identifiable group.⁵⁷ He defined self-determination as “the right of cohesive national groups (‘peoples’) to choose for themselves a form of political organization and their relation to other groups.”⁵⁸ This is akin to the concept of the consent of the governed that was important in the political thinking of Cardinal Bellarmine, as we shall see.

In 1975, the International Court of Justice provided further definition to the term self-determination in an advisory opinion concerning the region of the Western Sahara.⁵⁹ In noting the possible application of Article 1.2 of the Charter of the United Nations, the Court acknowledged that General Assembly Resolution 1514 (XV) enunciated the “principle of self-determination as a right of peoples” and the application of this right “for the purpose of bringing all colonial situations to a speedy end.”⁶⁰ In its commentary on the Charter and General Assembly resolutions, the Court noted that the right of self-determination “requires a free and genuine expression of the will of the peoples concerned” with the exercise or attempted exercise of this right.⁶¹ On several occasions, the Court offered a basic

55. For a current and careful examination of “self-determination” as principle and right, see ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (1995).

56. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992).

57. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 599 (5th ed. 1998) (“It is not necessarily the case that there is a divorce between the legal and human rights of groups, on the one hand, and individuals, on the other.”).

58. *Id.* Brownlie continues by stating that, “The choice may be independence as a state, association with other groups in a federal state, or autonomy or assimilation in a unitary (non-federal) state.” *Id.* As Professor Cassese has pointed out, “there is no self-determination without democratic decision-making.” CASSESE, *supra* note 55, at 54.

59. Western Sahara, 1975 I.C.J. 12 (Oct. 16).

60. *Id.* at 31; see also BROWNLIE, *supra* note 57, at 600 (stating that this Declaration “regards the principle of self-determination as a part of the obligations stemming from the Charter [of the United Nations], and is not a ‘recommendation,’ but is in the form of an authoritative interpretation of the Charter”).

61. Western Sahara, *supra* note 59, at 32.

definition of this right as “the freely expressed will of peoples”⁶² or “the free expression of the wishes of the people.”⁶³

In addition, two of the UDHR’s most notable progeny are the ICCPR and the ICESCR. Each document states at the outset in their common Article 1 that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁶⁴ Common Article 1 brings together subsidiarity, popular sovereignty, human rights, and self-determination into a legal synthesis that has its foundations in the work of the Neo-Scholastics.

In examining forms of government best suited to protecting these interests, Suárez was partial to a monarchy. He did not, however, preclude the efficacy of other forms of government providing political structure to the community. Having specified his preference, he cautioned that the monarch he envisaged must not be a tyrant, for the monarch’s authority came from the subjects—from each individual.⁶⁵ It was through the common consent of the governed that the monarch was entrusted with legal authority.⁶⁶ This monarch ruled not by divine right but by the exercise of the natural reason of the members

62. *Id.* at 33 (quoting G.A. Res. 2625 (XXV)).

63. *Id.* at 35 (quoting G.A. Res. 2983 (XXVII)). Professor Casese argues that this discussion from *Western Sahara* offers a principle with a “very loose standard.” As he says, “the principle sets out a general and fundamental standard of behaviour: governments must not decide the life and future of peoples at their discretion. Peoples must be enabled freely to express their wishes in matters concerning their conditions.” CASSESE, *supra* note 55, at 128.

64. ICCPR, *supra* note 52, art. 1, para. 1; ICESCR, *supra* note 52, art. 1, para. 1; *see also* UDHR, *supra* note 1 (offering a basis of support for common Article 1 of the ICCPR and the ICESCR where it was stated that, “[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”). One commentator has observed that “Article 21 [of the UDHR] is more basic than the legal rights described . . . [earlier] because it gives people the human right to help codify the moral principles of the other legal human rights into their own domestic systems. Most of what a government does is to write laws, which is why one early version of Article 21 spoke of everyone’s ‘right to take an effective part directly or through his representative in the formation of law.’” JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 69 (1999) (citation omitted). Matthew Craven has noted that since the ICESCR shares this common article with ICCPR and since the latter covenant has been understood to protect civil and political rights, the same provision in the ICESCR would protect rights to economic self-determination. *See* MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 24-25 (1995); *see also* CASSESE, *supra* note 55, at 66.

65. SUÁREZ, *supra* note 43, at 386.

66. *Id.*

of the community.⁶⁷ Should the monarch err and fall into tyrannical ways, the members of the community were justified in removing this ruler. The people, through the exercise of their reserved legal authority, retained the right to resist the tyrannical rule of any monarch, including those legitimately installed by the consent of the subjects.⁶⁸

Additionally, Suárez undoubtedly would have been welcomed by many current day advocates of human rights for his views on equality and the status of women. He noted that women, as members of the community, should have the right to participate in governance.⁶⁹ Without establishing an age limit to distinguish between “infants” and “adults,” Suárez also believed that people below the age of twenty-five were capable of participating in the affairs of the community.⁷⁰

I now turn to Robert Bellarmine (1542-1621), Suárez’s contemporary and confrere in the Society of Jesus. Like Suárez, he was an extraordinarily productive thinker and writer and a renowned teacher. Unlike Suárez, Bellarmine would hold a high Church office. He was trained in law and theology and served the Church as teacher, pastor, and bishop. Pope Clement VIII created him as a cardinal in 1599. He spent a great deal of his life exploring the relationship between faith and reason, especially legal reason.

As with Suárez, Bellarmine had a preference for monarchical government. It was, after all, the fashion of the time in which he lived.⁷¹ He also agreed with his fellow Jesuit in his criticism of the theory of divine right of kings.⁷² The principal contributions of his upon which I focus concern the self-determination of peoples. Bellarmine thought that since it is impractical for large numbers of people to participate personally in the governance of the community, it is understandable that they consent to a political structure that governs for them. The sovereignty of the community, however, ultimately remains with its members rather than with the monarch, the oligarchy, or the aristocracy.⁷³ It is the members’ consent or its

67. *Id.* at 384.

68. SUÁREZ, *supra* note 38, at 716-17.

69. SUÁREZ, *supra* note 43, at 529.

70. *Id.*

71. REV. JOHN C. RAGER, S.T.D., DEMOCRACY AND BELLARMINI 35 (1926).

72. *Id.* at 54-57.

73. See ROBERT BELLARMINI, DE LAICIS OR THE TREATISE ON CIVIL GOVERNMENT 27 (Kathleen E. Murphy, Ph.D. trans., Fordham Univ. Press 1928) (1576) (stating that “it depends on

withholding that extends or retracts the legitimacy of the governing structures.

While acknowledging that not every person is the same in every respect, Bellarmine remained an advocate for equality among all human beings.⁷⁴ Every person, by the nature of his or her creation by the same loving and concerned God, is given that natural reason essential to the governance of the community to which he or she belongs. An illustration used by Bellarmine to make this point was the Oath of Loyalty (also addressed by Suárez) that James I of England intended his subjects to take.⁷⁵ This oath interfered with each subject's conscience as well as the natural right of each to consent to the authority of those charged with the responsibility of governing the community.

Bellarmino shared the views of Suárez that the monarchs had duties to the governed from whom the monarchs received their consent to govern. Should the monarch betray the trust contained in this consent, the monarch became a tyrant and his subjects could morally and lawfully resist him.⁷⁶ As a consequence of his position, monarchs like James I did not hold Bellarmine in esteem. Bellarmine justified this position in his treatment of popular sovereignty and self-determination.⁷⁷

This Catholic voice of the Neo-Scholastics is certainly a part of our legal discourse today concerning the importance and role of human rights. This voice is challenged by other views that are purely of human origin, an origin that does not go beyond the self that made it. In one sense the self can turn to the voice of the surrounding culture. But what happens when that culture is riddled with error, error that belittles or denies the rights that belong to every person created in God's image? One does not have to think too long or too hard about those legal cultures that were based not on the transcendent principles inscribed on the human heart and discoverable by the natural reason of the mind, but rather on human whim and caprice. That which is purely of human origin can be flawed. The refreshing tonic that can make the world a better place for not just some but all

the consent of the people to decide whether kings, or consuls, or other magistrates are to be established in authority over them; and, if there be legitimate cause, the people can change a kingdom into an aristocracy, or an aristocracy into a democracy, and vice versa.").

74. *Id.* at 35-36, 45.

75. RAGER, *supra* note 71, at 122-23.

76. *Id.* at 104 (citing Bellarmine's *De Potestate Papae in Rebus Temp.*, Chapter XXII).

77. *See generally* BELLARMINE, *supra* note 73, at 20-30.

remains within our grasp, especially if we ponder the wisdom of individuals like de Vitoria, Suárez, and Bellarmine.