

# ARTICLE: THE HOLY SEE AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: WORKING TOWARD A LEGAL ANTHROPOLOGY OF HUMAN RIGHTS AND THE FAMILY

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## Reporter

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## Text

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Alfonso Cardinal Lopez Trujillo, President of the Pontifical Council on the Family ("Pontifical Council"), speaks directly to the legal community with an important and timely message. It comes from a dicastery of the Roman Curia, which, together with its head, the Roman Pontiff, makes up the Holy See - a subject of rights and duties on the international level. <sup>1</sup> In his article, *The Nature of Marriage and Its Various Aspects*, <sup>2</sup> Cardinal Trujillo calls for the development of an anthropology on sexuality, marriage, and the family based on natural law, <sup>3</sup> which would

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<sup>1</sup> The Holy See is the governing organ of Vatican City and the Catholic Church having sui generis international legal personality. It has had Permanent Observer Status with the United Nations since the 1960s. For an in-depth study of the Holy See, see Robert John Araujo, S.J., *The International Personality and Sovereignty of the Holy See*, [50 Cath. U. L. Rev. 291 \(2001\)](#). For a discussion of the international legal personality of the Holy See and its involvement with the rights of children on the international plane, see Jane Adolphe, *A Light to the Nations: The Holy See and the Convention on the Rights of the Child* (self-published Ph.D. dissertation, Rome 2003) (on file with the author and Pontificia Università della Santa Croce).

<sup>2</sup> Alfonso Cardinal Lopez Trujillo, *The Nature of Marriage and Its Various Aspects*, [4 Ave Maria L. Rev. 297 \(2006\)](#).

<sup>3</sup> *Id.* at 336.

Thus, in an effort to recuperate the unity between the legal comprehension of marriage and the family, it is necessary to rediscover the legal dimension intrinsic to the family and to develop its anthropological study. This study will not only describe what the family is, but will also attempt to define what it should be. It will incorporate the dimension of justice into the various areas of human sexuality.

include an analysis [\*344] regarding the nature of the family, its link to the human person,<sup>4</sup> and the proper role of the state.<sup>5</sup>

This is not the first time he has directed such an appeal to the legal community. At the invitation of the Pontifical Council, a group of experts gathered together in 1998, during the anniversary year of the 1948 Universal Declaration of Human Rights ("UDHR").<sup>6</sup> At that meeting, participants discussed the theme of "Human Rights and the Rights of the Family" and their reflections are reproduced in a conference document entitled *The Family and Human Rights*.<sup>7</sup> The reflections contained in the document forge the way in developing a legal anthropology in the area of human rights and the family.

Although the depth of the anthropological position, as articulated by the Cardinal in this volume, finds no equivalence in the UDHR, undoubtedly, many will be surprised to learn that the Holy See finds a "great convergence between the Declaration and Christian anthropology."<sup>8</sup> The Holy See argues that the Declaration

Id.

<sup>4</sup> Id.

Such an anthropology would ... analyze the logic and the dynamic of family identities and family relationships. It would consider their ontological link to the human person. This would provide a foundation on which cultures could develop their laws pertaining to the family. In this way, there would be an anthropological basis rather than a system of rules driven by a positivistic perspective and enacted by each parliament or each national or international institution.

Id.

<sup>5</sup> Id.

A legal anthropology, therefore, would provide the natural law foundation for limits on the power of public institutions. These institutions do not create the family and their jurisdiction must be limited according to a proper anthropology so that they recognize this truth. Moreover, it is the duty of these institutions to form laws that reflect, and do not confuse, the identity of the family and each one of the identities within the family relationship.

Id.

<sup>6</sup> Universal Declaration of Human Rights, G.A. Res. 217A U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

<sup>7</sup> Pontifical Council for the Family, *The Family and Human Rights* (Dec. 9, 1999), [http://www.vatican.va/roman\\_curia/pontifical\\_councils/family/documents/rc\\_pc\\_family\\_doc\\_20001115\\_family-human-rights\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001115_family-human-rights_en.html) [hereinafter *The Family and Human Rights*].

<sup>8</sup> Id. P 2. The work of the Holy See in promoting human rights in general, and the UDHR in particular, is not without its detractors. The main objection from what might be termed the "political right" argues that there is nothing natural or universal about the UDHR. It is "without reference to any stipulated ontological or metaphysical ground." William Joseph Wagner, *Universal Human Rights, the United Nations, and the Telos of Human Dignity*, [3 Ave Maria L. Rev. 197, 200 \(2005\)](#).

Even today, not all adherents of religion agree with the Catholic Church on the wisdom of adopting the rights model... . Experience under the Declaration, to this point, is mixed, even from the perspective of Catholicism... . The Catholic option to support the international human rights framework of the United Nations as a means of advancing a sustainable global vision of human dignity must be viewed, in a certain sense, as an experiment.

Id. at 199-200. It is noteworthy that in his study of the UDHR, Wagner makes no reference to *The Family and Human Rights*, supra note 7. The Holy See itself is very aware of the criticism: "We certainly do not ignore the reservations to which the Declaration may have given rise: it could favor individualism and subjectivism. In this sense, various critiques have been made of it." Id. P 2. For a more recent critique of human rights generally, see Symposium, *Rethinking Rights: Historical, Political, and Theological Perspectives*, [3 Ave Maria L. Rev. 1 \(2005\)](#). In contrast to the "political right," the "political left" ridicules the UDHR for an archaic rendition of human rights and indifference to liberty by its protection of the family based on heterosexual marriage, of the rights of parents, and of the rights of religious and ethnic communities. The political left's central argument is that the UDHR uses language that is itself socially constructed, reflecting a perspective of the world that is culturally and linguistically

finds [\*345] human rights on the notion of human dignity. Then, in Article 1, the concept of dignity is linked to the capacious view of the human person as "born free and equal," endowed with "reason and conscience," and having duties to others.<sup>9</sup> From this understanding, the Holy See contends that dignity emanates from man's nature; it is "a reflection of the substantial and spiritual reality of the human person and not a creation of human will."<sup>10</sup> Every person has not only an innate dignity but also an acquired dignity that is developed when one freely maximizes or perfects his or her possibilities in accordance with right reason. By grasping the nature of the human person, and upon further reflection, one can also come to understand the deeper significance of man's innate dignity. Namely, that God created man, whose nature is different from the whole created order, and whose nature reflects something of the divine. Through the faculties of intellect and will, the human person is naturally open and inclined to God who is the fullness of truth and goodness. The deeper realization of man's innate and acquired dignity as inextricably bound to the triune God is available only through right reason as illuminated with the gift of faith. Having said that, the preeminent place for [\*346] recognition and development of the human person in his or her path to complete dignity is within the bosom of the family - a community of persons living in communion - which forms the foundational element of society. This idea is at the root of Article 16, which proclaims the natural family in logical sequence.

Men and women of full age have the right to marry and to found a family ... . Marriage shall be entered into with free and full consent of the intending spouses... . The family is the natural and fundamental unit of society and is entitled to protection by society and the State.<sup>11</sup>

In this way, the rights of the family, which imply the protection of marriage, play a preeminent part of the international human rights system.

The purpose of this article is to give an overview of the Holy See's perspective on the UDHR with the aspiration of promoting further study and development of an authentic perspective of international human rights and the family. While looking at human rights through an anthropological lens, the article will explore how the UDHR remains an important touchstone for international dialogue. To this end, the article will be divided into four parts.

Part I will consider the anthropology of the UDHR. It begins by summarizing Cardinal Trujillo's key points on the anthropology of the family and marriage as set out in this symposium. This summary serves as a point of reference for a discussion of the UDHR. Then an historical overview of the UDHR is presented, which highlights the key protagonists, the overall process, and the UDHR drafters' intentions that the UDHR proclaims rights, sets important limits, and be read as an integral whole. This discussion is followed by a review of the Holy See's position on the UDHR as articulated in *The Family and Human Rights*. It does not purport to be an exhaustive discussion of this document since my examination will not, for [\*347] example, address the right to work or the right to life as

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conditioned. This trend is noted and critically assessed in Father Robert Araujo, *Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law*, [24 Fordham Int'l L.J. 1477, 1525 \(2001\)](#). For a perspective which accepts the redefinition of family in international law and argues for the protection of all family forms, see Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, [21 Berkeley J. Int'l L. 213 \(2003\)](#).

<sup>9</sup> 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." Universal Declaration of Human Rights, *supra* note 6, art. 1.

<sup>10</sup> *The Family and Human Rights*, *supra* note 7, P 20.

<sup>11</sup> Article 16 of the UDHR provides in full:

(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.

(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.

Universal Declaration of Human Rights, *supra* note 6, art. 16.

detailed therein. Parts II through IV illustrate the importance and impact of the UDHR for protection of the natural family. This serves to explain why the Holy See has devoted so much attention to the UDHR. Part II gives an overview of how the important language about the natural family, as articulated in the UDHR, has been adopted and even strengthened in the major human rights systems of the world. Part III considers the ideology of family diversity and how it challenges the continued recognition and protection of the natural family. Part IV argues that, notwithstanding the ideology of family diversity and recent trends to dilute the significance of the natural family, binding documents contain language pertaining to the natural family, as first proclaimed in the UDHR. States have objected when specific provisions in various conventions have strayed from this foundation, instead favoring the UDHR's concept of the natural family as entitled to special protection and assistance. It is argued that due to the centrality of the UDHR in the international human rights system and the fact that it has been incorporated by reference in the preamble of almost every human rights document, all regional and international human rights documents ought to be read as an integral whole with reference to the anthropology contained in the UDHR.

## I. The Anthropology of the UDHR

### A. Setting the Stage

What does one mean by the expression, "an anthropology of sexuality, marriage, and the family?" It is beyond the scope of Cardinal Trujillo's article, as well as my mine, to attempt an exhaustive treatment of the subject. However, His Eminence, in this symposium, sketches out an answer. A few of his underlying assumptions, points 1-3, and key points, 4-10, may be summarized in the following manner:

1) The universal essence of man is that which transcends the limits of culture and history. It rests in the fact that the human person is an integral unity of body and soul. All human beings are created either male or female, and endowed with intellect and will.

2) The faculty of the intellect can know the objective reality or order of nature. Through this order, it can move backwards from knowledge of the effect or objective reality to an awareness of God, its ultimate cause, and it can know imperfectly God's mode of being as the first cause (i.e., no change, no composition, supremely free, good, [\*348] beautiful, etc.). Further, the faculty of the will is open and tends toward God, the supreme Truth and Goodness, through basic natural inclinations, whereby one yearns for the good known by the practical intellect. Every human being resembles God imperfectly in goodness because the effect falls short of the ultimate cause. In other words, whatever good is attributed to a human person exists previously in God. In this way, one can argue that the human person's essential dignity is that he or she is created in the image and likeness of God. The above discussion does not require a faith-based acceptance; however, if taken as principles to which one arrives by reason, they certainly are more remote conclusions of natural law.<sup>12</sup> Many, by the use of reason alone, may find them difficult to achieve. It is only through the added gift of faith that one can understand the fullness of man's inherent dignity within the context of salvation history - man the creature, man the sinner, man redeemed in Christ.

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<sup>12</sup> In particular, taken as a reasoned-to principle, being an "image of God" is certainly a more remote conclusion of natural law reasoning and not a starting point - it is a conclusion that many by the use of reason alone may find difficult to attain. Therefore, the fact that we are images of God would not be a starting point of a natural law argument for the dignity of man in arguing with those who do not yet accept the notion of a Creator. On the other hand, the basic natural law insights into the human person's nature, as containing an openness to unlimited goodness and unlimited truth, and his right to determine himself with respect to those inclinations to goodness and truth itself establishes the transcendence of the human person that points to the call for some transcendent end. This natural inner calling of man to something transcendent is in fact the natural law foundation that prepares a human person for and opens him or her to faith - to an answer to the meaning of life that fulfills and perfects our natural inclinations to goodness, truth, and communion in the face of our experience of their frustration in suffering and ultimately death. (I would like to acknowledge the contribution of my colleague Professor Edward Lyons in connection with these points.) See also Martin Rhonheimer, *Natural Moral Law: Moral Knowledge and Conscience. The Cognitive Structure of the Natural Law and the Truth of Subjectivity*, in *Proceedings of the VIII Assembly of the Pontifical Academy for Life* (Juan De Dios Vial Correa & Elio Sgreccia eds., 2003). Under this second point, I have attempted to summarize an argument developed in Fulvio di Blasi, *God and the Natural Law: A Rereading of Thomas Aquinas* (David Thunder trans., 2006).

3) Sexuality is a constitutive part of the human person, touching the profound aspects of the person (i.e., temperament, sensibility, mentality, psychic structures, and so forth). Both personal beings, male and female, are equal in dignity but complementary in their diverse sexual dimensions.

4) Human persons cannot fully find themselves except through a free and sincere gift of self. Men and women are social beings, naturally oriented to the family. They give origin at the moment of consent to marriage and the family, whose object is the mutual gift and reciprocal donation of man and woman in their respective masculinity and femininity. [**\*349**]

5) This exchange, or conjugal pact, creates a natural bond in justice established through the will of the spouses and the natural order of God whereby spouses owe a duty to love. Because there is an actual self gift in one's totality as man and woman, which includes an openness to life, the marriage created is indissoluble, monogamous, and ordered toward the well-being of the spouses and to the procreation and formation of children.

6) Such self-giving in its fullness is possible only in marriage, which is natural as it was from the beginning, a fruit of the human inclination toward the good and worthy of the personal nature of man. In brief, the institution of marriage has its foundation in man and his profound aspirations.

7) The covenant of conjugal love is publicly affirmed as unique and exclusive. The nuptial pact constitutes the first family relation and the beginning of the family community. In other words, marriage has a special status because it is tied to the social nature of the human person and can be understood as an opening toward others that unfolds through sexual relations. In brief, the conjugal communion of love between husband and wife is naturally expressed through the community of the life of persons (e.g., husband and wife relations unfold into father, mother, brother, sister).

8) The family is a community founded on the communion between husband and wife, and is a unit made of its members which cannot be separated into isolated individuals. The family is an interrelated whole possessing a sovereignty that protects it from unreasonable and arbitrary state intervention. In brief, it is a subject of rights and duties vis-a-vis the state.

9) The state's role is to promote the common good, which includes respect for the principle of subsidiarity and an acknowledgment of the sovereignty of the family. In keeping with this principle, the state and its laws must promote and protect the family, which is founded on marriage because it is integrally tied to the development of the human person and society.

10) The fundamental characteristics of natural marriage, described above, do not cease but acquire a more profound significance when raised to a Christian sacrament.

### **[\*350]**

#### B. UDHR: Historical Overview

##### 1. Introduction

This section of Part I gives an overview of the UDHR. To this end, it is divided into three sections. The first section deals with the players and process. The second section details the drafting history of Article 1. The third section details the drafting history of Article 16 and the drafters' overall vision. This section largely relies upon, perhaps, two of the most important works on the UDHR: Professor Mary Ann Glendon's book on the subject,<sup>13</sup> which gives an

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<sup>13</sup> Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) [hereinafter Glendon, *A World Made New*]. See also Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, [73 \*Notre Dame L. Rev.\* 1153 \(1998\)](#) [hereinafter Glendon, *Knowing the Declaration*]. It is noteworthy that Professor Glendon is an advisor to the Pontifical Council.

in-depth historical overview of the process and participants, and Professor Johannes Morsink's comprehensive research and commentary on the UDHR's working papers.<sup>14</sup>

## 2. The Participants and Process

The notion of human rights was given considerable prominence during the drafting of the U.N. Charter and the creation of the United Nations. Rights are mentioned in several places in the U.N. Charter. The preamble calls on states "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."<sup>15</sup> Article 1 reinforces this idea by stating that one of the purposes of the United Nations is to respect the "self-determination of peoples" as well as "human rights" and "fundamental freedoms."<sup>16</sup> Then, in Article 56 of the U.N. Charter, state parties pledge to promote these rights and freedoms.<sup>17</sup>

In this way, the idea of universal human rights was embedded in the U.N. Charter, but the delineation of these rights was yet to be articulated and there was no conviction that any such list of rights could be "acceptable to all nations and peoples, including those not [\*351] yet represented in the United Nations."<sup>18</sup> It was the task of the Human Rights Commission to flesh out the idea of human rights in preparation for a declaration on the topic.<sup>19</sup>

Shortly after its first session in 1947, the Human Rights Commission simultaneously began work on both a draft declaration and a covenant. It was a compromise solution. Some states wanted a non-binding declaration, which would preserve national sovereignty and leave it to states to assure and promote human rights, while others pushed for a convention that would transform one of the United Nations' key purposes into law.<sup>20</sup> In other words, the idea was that a declaration embodying good intentions would soon be followed by a covenant with binding legal force; however, "it was not anticipated that establishing those legal obligations would require a score of years."<sup>21</sup> The end result was the 1948 UDHR and two covenants (the 1966 Covenant on Civil and Political Rights<sup>22</sup> and the 1966 Covenant on Economic, Social and Cultural Rights<sup>23</sup>), which have become known collectively as the International Bill of Rights.

The Human Rights Commission was composed of an eclectic group of talented persons well-versed in various traditions, cultures, religions, and philosophies. The following members are especially noteworthy: Eleanor Roosevelt, the wife of President Franklin Roosevelt, was the chair of the Commission; Hansa Mehta, the only other woman, was an Indian legislator who had been "an activist in the movement that led to India's independence in August 1947";<sup>24</sup> the French civil lawyer Rene Cassin, "at the insistence of his devoutly religious mother ... had

<sup>14</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (1999).

<sup>15</sup> U.N. Charter pmb. l.

<sup>16</sup> U.N. Charter art. 1, PP 2-3.

<sup>17</sup> U.N. Charter art. 56.

<sup>18</sup> Glendon, *A World Made New*, supra note 13, at 19.

<sup>19</sup> Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights, in The International Bill of Rights: The Covenant on Civil and Political Rights 32-34* (Louis Henkin ed., 1981).

<sup>20</sup> Id. at 34.

<sup>21</sup> Id. at 38.

<sup>22</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

<sup>23</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Exec. Doc. No. 95-2 (1978), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

<sup>24</sup> Glendon, *A World Made New*, supra note 13, at 35.

received an Orthodox Jewish education,"<sup>25</sup> and through his friendships with members of the Catholic social action groups, developed "a great respect for religion and for Christian thought";<sup>26</sup> Charles Malik of Lebanon, a philosophy professor, described as at the "crossroads of many cultures ... [and [\*352] who] knew the Bible well";<sup>27</sup> and Peng-chun Chang of China was "a playwright, musician, educator, and seasoned diplomat, devoted to traditional Chinese music and literature but conversant with Islamic and Western culture as well."<sup>28</sup> In reference to Malik and Chang, Glendon notes:

Not only did each contribute significant insights from his own culture, but each possessed an exceptional ability to understand other cultures and to "translate" concepts from one frame of reference to another. Those skills, indispensable for effective cross-cultural collaboration, were key to the successful adoption of the Declaration without a single dissenting vote.<sup>29</sup>

Malik's first intervention revealed why he was so important to the drafting process. He argued that the discussion about human rights raised the fundamental question: what is man?<sup>30</sup> Throughout the drafting process, he continually proposed language that would give human rights a metaphysical grounding.<sup>31</sup>

The eighteen-member Commission was made up of the five world powers at the time (the United States, the United Kingdom, the Soviet Union, France, and China) and thirteen other states, rotated at three-year intervals.<sup>32</sup> For reasons of efficiency, like most present-day U.N. conferences, the Commission was in turn broken up into committees, most notably into a drafting committee and still further into a working group, which reported back to the drafting committee that in turn reported back to the Commission.

The draft was submitted to the Human Rights Commission and approved with thirteen votes in favor, none opposed, and some abstentions.<sup>33</sup> The Third Committee of the Economic and Social Council, in turn, approved the draft but only after considerable debate over each article and 170 amendment proposals. Following [\*353] this debate, the draft was submitted to the General Assembly of the United Nations.<sup>34</sup> After numerous speeches, the General Assembly members were polled on each article. Remarkably, twenty-three of the thirty articles were unanimously approved, while other provisions received nay votes. (Article 19 on freedom of opinion and expression (seven votes), and Article 16 regarding the family (six votes)). A few articles received abstentions (articles on human dignity, non-discrimination, and others relating to the freedom or right of movement, religion, opinion, expression, education, and social and international order).<sup>35</sup> In sum, the entire draft was adopted (forty-eight votes

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<sup>25</sup> Id. at 61.

<sup>26</sup> Id. (footnote and quotations omitted).

<sup>27</sup> Id. at 33.

<sup>28</sup> Id.

<sup>29</sup> Id. at 225-26.

<sup>30</sup> Morsink, *supra* note 14, at 298.

<sup>31</sup> Id. at 284, 298. Indeed, "Malik was ... one of the original essentialists who insisted on the importance of [certain] kinds of language in the Declaration." Id. at 298.

<sup>32</sup> Glendon, *A World Made New*, *supra* note 13, at 32. At the first session, Eleanor Roosevelt of the United States was elected chairman and worked alongside the vice chair, Peng-chun Chang of China, and secretary or rapporteur, Charles Malik of Lebanon, and delegates from Australia, Belgium, the Byelorussian Soviet Socialist Republic, Chile, Egypt, France, India, Iran, Panama, the Philippines, Ukraine, the Union of Soviet Socialist Republics, the United Kingdom, Uruguay, and Yugoslavia. Id. at 33.

<sup>33</sup> Id. at 93.

<sup>34</sup> Id. at 162.

<sup>35</sup> Id. at 169.

in favor, none opposed, eight abstentions, and two countries absent).<sup>36</sup> By that time, the United Nations had grown substantially to contain "four-fifths of the world's population - twenty-two [countries] from the Americas, sixteen from Europe, five from Asia, eight from the Near and Middle East, four from Africa, and three from Oceania."<sup>37</sup>

### 3. Drafting History of Article 1

Article 1 reads in full: "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."<sup>38</sup> The following points are particularly noteworthy.

The delegations of France and the Philippines submitted the phrase "by nature" to the text: "all men are endowed by nature with reason and conscience."<sup>39</sup> Assuming that "by nature" was referring only to a materialistic concept of man and therefore opposed to the notion of God, the Brazilian delegation, in response, proposed: "Created in the image and likeness of God, they are endowed with reason and conscience."<sup>40</sup> The Dutch delegation proposed: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family, based on man's divine origin and immortal destiny, is the foundation of freedom[,] justice and peace in the world."<sup>41</sup>

**[\*354]** Needless to say, these proposals led to great debates. The Brazilians withdrew their amendment when the promise was made that "by nature" would be dropped.<sup>42</sup> In the end, each amendment was withdrawn, which prevented any of them from being voted upon. Opposition to all statements came from nations both actively shaped and not shaped by religion. The Communist delegations wanted "a secular document that had no anchor in any kind of religious tradition, no matter how vaguely stated."<sup>43</sup> Theistically inclined nations thought it inconceivable that a "delicate philosophical problem" or the question of "man's origin" should be resolved by a vote.<sup>44</sup> Clearly, many state delegates viewed nature as something opposed to God and knowledge of God as something pertaining to religious belief alone.<sup>45</sup> It was the Chinese delegate, Chang, who attempted to rejoin God with nature. He argued: "There was no contradiction between the eighteenth-century idea of the goodness of man's essential nature and the idea of a soul given to man by God, for the concept of God laid particular stress upon the human, as opposed to the animal part of man's nature."<sup>46</sup> He went on to contend that the term "nature" in some quarters had underlined the materialistic rather than the spiritual aspect of human nature.<sup>47</sup> In the end, Article 1 makes no reference to God or nature, but this does not mean that many of the drafters did not see a metaphysical basis for human rights.

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<sup>36</sup> Id. at 170.

<sup>37</sup> Id. at 50.

<sup>38</sup> Universal Declaration of Human Rights, *supra* note 6, art. 1.

<sup>39</sup> Morsink, *supra* note 14, at 284 (emphasis added).

<sup>40</sup> Id. at 285.

<sup>41</sup> Id.

<sup>42</sup> Id. at 286.

<sup>43</sup> Id. at 288.

<sup>44</sup> Id. at 288-89.

<sup>45</sup> Id. at 284-90.

<sup>46</sup> Id. at 287.

<sup>47</sup> Id.



In regard to the terms "endowed by reason and conscience," Malik later admitted that he had "introduced this phrase and had meant it as a reference to Christian natural law theory."<sup>48</sup> During the negotiations, he was insistent that the essential characteristics of man ought to be stated.<sup>49</sup> The Philippine delegation supported him. Other delegates who had consistently used metaphysical or essentialist language never doubted the existence of these characteristics but thought that the phrase was self-evident and therefore unnecessary.<sup>50</sup> In the end, Malik won out and the phrase remained.

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4. Drafting History of Article 16

Article 16 provides in full:

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

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.<sup>51</sup>

The following points are particularly noteworthy.

Canadian John Humphrey included the right to marry in his original draft, while French delegate Rene Cassin added the protection for mothers and children,<sup>52</sup> which eventually found its way into Article 25(2).<sup>53</sup> The Byelorussian delegate reworked the original proposal and included a reference to the protection of marriage and the family by the state.<sup>54</sup> In response, Cassin added the reference to "society" to clarify "that the principle could and should also be implemented by institutions of civil society, such as the churches."<sup>55</sup> Lebanese delegate Malik wanted to reinforce the centrality of the family and suggested the phrase: "The family deriving from marriage is the natural and fundamental unit of society. It is endowed by the Creator with inalienable rights antecedent to all positive law ... ." <sup>56</sup> American delegate Eleanor Roosevelt suggested that the right to marry be followed by a reference to the equal rights of men and women upon marriage dissolution.<sup>57</sup>

Opposition to, and ultimate rejection of, Malik's second phrase was led by the Soviet representative, who argued "that "many people did not believe in God and that the Declaration was meant for mankind as a whole, whether believers or unbelievers."<sup>58</sup> Another **[\*356]** controversial part of the article was, in the words of Glendon, the "bold proclamation of equal rights for men and women in marriage."<sup>59</sup> This caused a problem for some Muslim

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<sup>48</sup> Id. at 284.

<sup>49</sup> Id. at 298.

<sup>50</sup> Id.

<sup>51</sup> Universal Declaration of Human Rights, *supra* note 6, art. 16.

<sup>52</sup> Glendon, *A World Made New*, *supra* note 13, at 93.

<sup>53</sup> Universal Declaration of Human Rights, *supra* note 6, art. 25.

<sup>54</sup> Glendon, *A World Made New*, *supra* note 13, at 93.

<sup>55</sup> Id. (footnote omitted).

<sup>56</sup> Morsink, *supra* note 14, at 284.

<sup>57</sup> Glendon, *A World Made New*, *supra* note 13, at 93.

<sup>58</sup> Morsink, *supra* note 14, at 284.

nations that eventually voted against the article in the U.N. General Assembly, while others accepted the language on the condition that it "did not mean identical rights." <sup>60</sup> Morsink notes that Saudi Arabia abstained due "to the Muslim interdiction to marrying someone of another faith." <sup>61</sup>

During the entire drafting process, it is noteworthy that there were strong advocates for the rights of women. Both Indian delegate Mehta and American delegate Roosevelt (who actually chaired the Human Rights Commission) were particularly attentive to these rights. Mehta was "battling back home against purdah, child marriage, polygamy, unequal inheritance laws, and bans on marriage among different castes." <sup>62</sup> And "Roosevelt was completely dedicated to equal opportunities in the workplace and public life." <sup>63</sup> However, Roosevelt, like other delegates, especially those representing Muslim populations, was adamant that differences between the sexes ought to be considered. She credited mothers with a specific role, different from that of men, which more intimately involved the shaping of children's lives and the promotion of social issues, both of which contributed greatly to the molding of a nation's identity. <sup>64</sup> Lastly, there was aggressive support from the women's lobby due to the efforts of the first chairperson of the Commission on the Status of **[\*357]** Women, Bodil Begtrup of Denmark, and the "steady pressure of the Soviet delegation." <sup>65</sup>

## 5. The Drafters' Vision

The contributions of two people in the drafting process are particularly important: Humphrey, a Canadian international law expert, and Cassin, the French civil lawyer. It was Cassin who transformed the UDHR from a simple list of rights put together by Humphrey into a document that was to be read as an integral whole, founded on a capacious view of the human person.

Humphrey and his multinational staff at the Human Rights Division of the U.N. Secretariat provided research and other assistance to the Human Rights Commission and were eventually entrusted to draft a list of rights for discussion purposes. <sup>66</sup> In response, he and his staff prepared a list of rights - forty-eight in total - after studying materials that poured in from numerous governmental and non-governmental entities around the world and after considering national constitutions as well as both new and old civil and human rights declarations. <sup>67</sup>

<sup>59</sup> Glendon, *A World Made New*, supra note 13, at 153.

<sup>60</sup> *Id.* at 154.

<sup>61</sup> Morsink, supra note 14, at 24.

<sup>62</sup> Glendon, *A World Made New*, supra note 13, at 90. Purdah is the practice of requiring women to cover their bodies to conceal their skin and form.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 91. Roosevelt stated:

There are certain fundamental things that mean more to the great majority of women than to the great majority of men. These things are undoubtedly tied up with women's biological functions. The women bear the children, and love them before they even come into the world... . We find [concern for children] in greater or less degree in women who have never had a child. From it springs that concern about the home, the shelter for the children. And here is the great point of unity for the majority of women.

*Id.* (quoting Eleanor Roosevelt, *Women in Politics*, in Allid M. Black, *Courage in a Dangerous World: The Political Writings of Eleanor Roosevelt* 66-67 (1999)). In regard to social issues, Glendon notes that Roosevelt "felt these issues would be neglected if women did not push them. It seemed to her that men in power, even men like her husband who sympathized with her goals, had not devoted enough attention to addressing the country's social ills." *Id.* at 90.

<sup>65</sup> Morsink, supra note 14, at 117. For Morsink's discussion of the women's lobby and women's rights, see *id.* at 116-29.

<sup>66</sup> Glendon, *A World Made New*, supra note 13, at 32.

<sup>67</sup> *Id.* at 57-58.

This draft was later transformed, with little substantive change, into a document with an overall logical structure. Cassin created such a structure so as to ensure that the document would be read as an integral whole.<sup>68</sup> The Cassin draft was then further refined and reduced mainly through the work of the drafting Committee, the Human Rights Commission in plenary session, the Economic and Social Council's Third Committee, and eventually the General Assembly of the United Nations.

Glendon, in her article, *Knowing the Universal Declaration of Human Rights*, explains how Cassin intended for the document to be read:

Cassin often compared the Declaration to the portico of a temple. (He had no illusions that the document could be anything more than an entryway to a future where human rights would be respected.) **[\*358]** He saw the Preamble, with its eight "whereas" clauses, as the courtyard steps moving by degrees from the recognition of human dignity to the unity of the human family to the aspiration for peace on earth. The general principles of dignity, liberty, equality, and fraternity, proclaimed in Articles 1 and 2, are the portico's foundation blocks. The facade consists of four equal columns crowned by a pediment. The four pillars are: the personal liberties (Articles 3 through 11); the rights of the individual in relation to others and to various groups (Articles 12 through 17); the spiritual, public and political liberties (Articles 18 through 21); and the economic, social, and cultural rights (Articles 22 through 27). The pediment is composed of the three concluding articles, 28 through 30, which establish a range of connections between the individual and society.<sup>69</sup>

Further, Glendon argues that Cassin and other important contributors were fully aware of the contentious issues surrounding the topic of human rights, including the basic questions: What are they? What is their origin? Do they have limits?<sup>70</sup> Cassin understood that the answers to these questions frequently involved: 1) different understandings of man and society; 2) opportunistic interpretations of various rights; and 3) practical problems in application. In anticipation of these issues, the UDHR was deliberately founded on the universal value of human dignity, which was recognized or proclaimed and then embedded in a format that integrated certain interpretative limitations.<sup>71</sup>

The Declaration's vision of the human person, the meaning of human dignity, and the interrelatedness of rights and responsibilities is not consistent with all secular philosophies and ideologies. Implicitly rejected is a purely collectivist approach to human rights; that is, an approach that treats the state as the fundamental unit or entity, and as such, possessing rights that the individual may not violate. According to this perspective, human rights are primarily class rights flowing from the individual's position within society. Neither does the UDHR accept the characteristically Western and individualistic position that views the human person as an autonomous free chooser without any responsibilities to other **[\*359]** individuals or the community as a whole.<sup>72</sup> On this point, Glendon briefly sums up the situation: "Cassin's introductory articles (and the Declaration as ultimately adopted) did implicitly take sides against the extremes of capitalist individualism and socialist collectivism. They also implied a position on the nature of man and society."<sup>73</sup>

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<sup>68</sup> Morsink, *supra* note 14, at 232 ("The drafters wanted the readers of the Declaration to interpret each article in light of all the others."). For his full discussion of the issue see *id.* at 232-38.

<sup>69</sup> Glendon, *Knowing the Declaration*, *supra* note 13, at 1163. See also Morsink, *supra* note 14, at 236 (discussing Cassin's vision of the Declaration).

<sup>70</sup> Glendon, *Knowing the Declaration*, *supra* note 13, at 1170.

<sup>71</sup> *Id.* at 1172.

<sup>72</sup> For a discussion of rights discourse in the United States as absolutist, insular, individualistic, and missing language with respect to responsibilities, see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991).

<sup>73</sup> Glendon, *A World Made New*, *supra* note 13, at 68.

In sum, taking into consideration that the Declaration merely proclaims preexisting rights tied to the notion of human dignity and must be read as an organic whole, one can reasonably conclude that the rights expressed in the UDHR reflect a different dimension of the human person, who is by necessary implication also to be treated in his or her totality.

## 6. Summary

The main points may be summarized as follows. The drafters included influential persons who believed in a metaphysical basis of human rights with well-grounded understandings of other traditions, cultures, religions, and philosophies. The document proclaims rights - it does not create them - and should be read as an integral whole. Rights as well as duties are articulated in the document. Human dignity is the interpretative key, which in turn is related to the human person in Article 1. The terms "God" and "nature" were dropped from Article 1 to create a document accessible to believers and non-believers; however, the terms "endowed with reason and conscience" remained after being introduced by a delegate who insisted that the essential characteristics of man be stated. Finally, Article 16 on the natural family was drafted with women's rights in mind, from a perspective that respected and endorsed sexual complementarity.

### C. UDHR and the Holy See

#### 1. Human Person, Human Dignity

The aforementioned analysis of the UDHR's drafting history and the key personalities involved dovetails with the Holy See's document, *The Family and Human Rights*, and the assertion therein that the UDHR "was inspired by firmly anchored ethical and [\*360] anthropological values consolidated by convictions regarding an objective moral order which were well-grounded at that time." <sup>74</sup>

The UDHR recognizes in its preamble that "a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge." <sup>75</sup> The assertion is important when one considers that different definitions of human dignity mean that the rights that flow from one definition might be hard to reconcile with the rights flowing from another. From a textual reading, the Declaration's preambular use of certain language in reference to human dignity and rights ("Whereas recognition" and "Whereas the peoples ... have ... reaffirmed") indicates that the document does not grant rights but merely proclaims or recognizes those universal and fundamental rights that are inherent in the dignity of the human person. <sup>76</sup> In other words, these rights are inherent to the human person and therefore predate the Declaration and exist irrespective of the pressures connected with the question of culture, politics, ideology, religion, economics, and so forth.

Repeated references to human dignity confirm the drafters' intent to deliberately ground the document in this ultimate value. For example, the first paragraph of the preamble recognizes that "the inherent dignity and ... the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." <sup>77</sup> Again, paragraph five of the preamble recognizes that "the peoples of the United Nations have ... reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person." <sup>78</sup> Then, in the Declaration's body, Article 1 proclaims that "all human beings are born free and equal in dignity and rights." <sup>79</sup> In this way, human dignity is the interpretative key. <sup>80</sup>

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<sup>74</sup> *The Family and Human Rights*, supra note 7, P 8.

<sup>75</sup> Universal Declaration of Human Rights, supra note 6, pmb.

<sup>76</sup> *The Family and Human Rights*, supra note 7, P 2 (footnote omitted).

<sup>77</sup> Universal Declaration of Human Rights, supra note 6, pmb.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* art. 1; see also Morsink, supra note 14, at 290:

**[\*361]** The notion of human dignity is related to an understanding of the human person. Article 1, in its entirety, reads: "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."<sup>81</sup> The concept of the human person is connected, but not identical, to the notion of human dignity.<sup>82</sup> The Holy See describes this relationship in the following terms:

The person refers to being in its highest degree of perfection with its three characteristics of subsistence, spirituality and totality. Dignity refers first to the quality of being, a value that can be opposed to a countervalue. Every person as such has an innate dignity that must be recognized and respected. However, the personal being, as a free and evolving being, is called to take on another dignity by developing his or her human possibilities. In this sense, a person also has an acquired dignity that is attained as one perfects in the human order.<sup>83</sup>

The Holy See unravels the concepts of innate and acquired dignity in the following manner. God created man. Man's innate dignity transcends other created beings with a nature different from the whole created order in that the human person transcends all other created beings. "Endowed with reason and free will, and called to eternal happiness," man reflects something of the divine; he is an image of God.<sup>84</sup> In regard to man's acquired dignity, this is something that he attains as he acts in accordance with right reason. His formation and development to act rightly toward his ultimate end, through education, character training, and cooperation with others, is best realized within the bosom of the family based on marriage.<sup>85</sup> In this way, the Holy See places the concepts of the human person and human dignity at the foundation of the notion of brotherhood in Article 1. It is noteworthy that the aforementioned discussion is reminiscent of Cardinal Trujillo's approach in this symposium, in that certain assumptions are made regarding what one can know through right reason about God's existence and mode of being, and what man can know only with the assistance of faith. An open and detailed discussion of these issues would be helpful.

**[\*362]** Since human dignity is linked to man's free will, reason, and conscience, the Holy See argues that "dignity is a reality that emanates from man's essence, i.e., from his nature. Therefore, this is a reflection of the substantial and spiritual reality of the human person and not a creation of the human will, a concession by public authorities, or a product of cultures or historical circumstances."<sup>86</sup> In this way, dignity is a meaningful concept, not an empty one, because rights are not treated in "an abstract way but concretely, as a woman or man, wife or husband, child or parent."<sup>87</sup> Further, the Holy See notes that "since ancient times, it has been thought that man is characterized by his reason."<sup>88</sup> After referring to Euripides, Plato, Aristotle, and Boethius, the Holy See goes on:

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The words "inherent," ... and "born" in the first recital and in Article 1 make the same point as did the phrase "by [their] nature" that was traded away. Together the drafting fragments comprising these words add up to what I shall call the inherence view of human rights. This is the view that human rights inhere in people as such; people have these moral rights because of their membership in the human family, not because of any external force or agency.

<sup>80</sup> The Family and Human Rights, supra note 7, P 18.

<sup>81</sup> Universal Declaration of Human Rights, supra note 6, art. 1.

<sup>82</sup> The Family and Human Rights, supra note 7, P 13.

<sup>83</sup> Id. (footnote omitted).

<sup>84</sup> Id. P 14.

<sup>85</sup> Id. P 15.

<sup>86</sup> Id. P 20.

<sup>87</sup> Id. P 21.

<sup>88</sup> Id. P 12.

St. Thomas Aquinas continued in this direction and recognized that man is a person and that this is what is most perfect in the whole of nature: perfectissimum in omni natura. Man is a living, bodily and spiritual being; he is a structured whole. He is distinctum subsistens in intellectuali natura.<sup>89</sup>

The Declaration affirms full equality and inalienability of one's rights in Article 1 and then in Article 2 prohibits all forms of discrimination such as that based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>90</sup> The Holy See, here, emphasizes that such a statement of equality clearly recognizes "that every person is entitled to rights at every stage of [his or her] development and at every moment of [his or her] existence."<sup>91</sup>

Article 1 specifically recalls that all men "should act towards one another in a spirit of brotherhood,"<sup>92</sup> and Articles 28 through 30 establish a range of relationships between the individual and society. Article 28 speaks of a social and international order in which rights can be fully realized;<sup>93</sup> Article 29 refers to the duties that all persons have to the community;<sup>94</sup> Article 30 notes the duties of the state, **[\*363]** group, or person not to act in a way that destroys these rights.<sup>95</sup> In specific reference to the notion of "brotherhood" in Article 1, the Holy See highlights how rights correlate with responsibilities and how "every man and every woman has the right and responsibility to participate in social, political and cultural life locally, nationally and internationally."<sup>96</sup> In this way, human persons are bound to the rest of the human community in which they participate by their very nature.

## 2. The Natural Family

By acknowledging, in Article 1 of the UDHR, that "all human beings are ... endowed with reason and conscience,"<sup>97</sup> one may appeal to reason and human experience in order to argue that the human person is born male or female and that this sexual complementarity brings couples together in marriage to form a family. Indeed, this human drama is recognized and presented in logical sequence in Article 16 of the UDHR:

(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.

(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.<sup>98</sup>

The Holy See notes that "as the first natural community, the family is the exemplary place for solidarity."<sup>99</sup> Members "gradually become aware of their dignity, acquire a sense of responsibility, and learn to give attention to

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<sup>89</sup> Id.

<sup>90</sup> Universal Declaration of Human Rights, *supra* note 6, art. 2.

<sup>91</sup> The Family and Human Rights, *supra* note 7, P 22.

<sup>92</sup> Universal Declaration of Human Rights, *supra* note 6, art. 1.

<sup>93</sup> Id. art. 28.

<sup>94</sup> Id. art. 29.

<sup>95</sup> Id. art. 30.

<sup>96</sup> The Family and Human Rights, *supra* note 7, P 52.

<sup>97</sup> Universal Declaration of Human Rights, *supra* note 6, art. 1.

<sup>98</sup> Id. art. 16.

<sup>99</sup> The Family and Human Rights, *supra* note 7, P 58.

others." <sup>100</sup> Such a "solidarity develops beyond the spouses' love relation and extends to the relations between parents and children, siblings, and inter-generational [\*364] relations." <sup>101</sup> This solidarity builds "on the reciprocity of the genders," that is, the natural complementarity between the two sexes. <sup>102</sup> Each share common characteristics and values, yet the woman and man enrich each other and the whole of society through their different strengths, interests, and emphases. <sup>103</sup> In sum, authentic equality, then, "does not mean undifferentiated uniformity." <sup>104</sup> Therefore, human solidarity is successfully achieved when women and men cooperate and collaborate with one another. <sup>105</sup>

The Holy See argues that "respect for human rights is necessary for the human development of persons in the community." <sup>106</sup> The family is a community of persons founded on the communion of husband and wife. The values essential to the family, as noted in the UDHR itself, such as life, health, work, and so forth, "can only be achieved when a man and a woman give themselves to one another totally in marriage, a community of love and life, and are willing to fully accept the gift of new life in procreation and in education." <sup>107</sup>

By its very nature, the family is a subject of rights as well as the basis of society, and it is necessary for the full development of the human person as part of his or her acquired dignity. <sup>108</sup> In Article 16, the state, society, and thereby the sovereignty of the family are on equal footing, and in this context the principle of subsidiarity comes into play, which means that:

[A] community of higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good. <sup>109</sup>

The principle gives value to the contributions made to the common good by civil society, such as the many communities, [\*365] affinities, associations, and voluntary alliances. It also speaks to the limits of state power. The Holy See argues that state coercion must "be strictly controlled by constitutional rules," so as to prevent undue intervention when the undertakings of the individual and affiliations of the lower order are sufficient. <sup>110</sup> In this way, Article 16 of the UDHR reaffirms that the natural family requires the protection of the state as well as society. In this way, the family is recognized as a subject of rights and duties, and one can properly speak of the sovereignty of the family. <sup>111</sup>

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<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Id. P 59 (emphasis omitted).

<sup>103</sup> Id. P 61.

<sup>104</sup> Id. P 60.

<sup>105</sup> Id. P 59. The Holy See goes further and elucidates on the most profound understanding of the complementarity of the sexes as founded in the idea of the triune God, knowable only by belief, that is, "sharing in the existence of God who is a communion of love." Id.

<sup>106</sup> The Family and Human Rights, *supra* note 7, P 16.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Pope John Paul II, Centesimus Annus [Encyclical Letter on the Hundredth Anniversary of Rerum Novarum] P 48 (St. Paul ed. 1991).

<sup>110</sup> The Family and Human Rights, *supra* note 7, P 63.

<sup>111</sup> See, e.g., id. P 71.

### 3. Summary

The Holy See's reflections, as discussed above, may be summarized in the following manner. First, the universal essence of man is affirmed and not created by human will. For example, the first paragraph of the UDHR's preamble provides: "Whereas recognition of the inherent dignity ... ." <sup>112</sup> Further, Article 1 acknowledges that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience" <sup>113</sup> and have duties to each other in that they "should act towards one another in a spirit of brotherhood." <sup>114</sup> Second, Article 1 of the UDHR can offer a common point of dialogue, which can lead men of good will and right reason to discuss the possibility, and perhaps ultimately conclude, that 1) the human person is created by God in His likeness and image (man's inherent dignity); and 2) the human person is perfected through action in accordance with right reason (man's acquired dignity). Third, with the dignity of the human person at the foundation, rights are to be read as an integral whole through which rights and duties are linked and respected in other persons and even limited by the needs of a just society. Fourth, the family is the exemplary place in which human persons gradually become aware of their own dignity and acquire a sense of dignity through recognition of their responsibilities to others. Solidarity commences with the husband and wife and extends outward. Their sexual relationship unfolds into other relationships: parent-child, brother-sister, and so forth. In this way, the family is the fundamental cell of society. Finally, the state, as part of its role in facilitating the common good, has a duty to provide [\*366] special protection and assistance to the family and marriage in accordance with the principle of subsidiarity.

#### II. The Natural Family Affirmed

Heretofore, I have established that the UDHR has something to offer in the area of human rights. This section will consider how States have responded in the four major human rights systems in the world: 1) the international or United Nations system; 2) the Organization of American States ("OAS") or Inter-American System; 3) the African Union ("AU"); and 4) the European Union ("EU") System. <sup>115</sup> Key documents in three of these systems (the U.N., the OAS, and the AU) have used equivalent language or even stronger phraseology about the nature, duties, and protection that ought to be afforded the family, while only one system (the EU) has opted to drop the term "natural."

In regard to the U.N. system, as previously mentioned, the Commission on Human Rights originally intended the UDHR to be a mere statement of moral principles that would be followed up with one binding covenant on civil and political rights and social and economic rights. Given the diversity of opinion, the 1948 UDHR was followed about twenty years later with two 1966 Covenants. This interval of twenty years gave unintended importance to the UDHR, raising many, if not all of its provisions, from moral ideals to arguably binding principles of international law. All three documents have become collectively known as the International Bill of Rights: the 1948 UDHR, the 1966 International Covenant on Civil and Political Rights ("ICCPR"), <sup>116</sup> and the 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR"). <sup>117</sup>

Both the ICCPR and the ICESCR set up monitoring committees and special procedures for securing compliance, and the covenants have been assumed and accepted by state parties with their signature and ratification. <sup>118</sup> The

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<sup>112</sup> Universal Declaration of Human Rights, *supra* note 6, pmb. (emphasis omitted).

<sup>113</sup> *Id.* art. 1.

<sup>114</sup> *Id.*

<sup>115</sup> For an overview of these systems, see Henry J. Steiner & Philip Alston, *International Human Rights in Context* 592-704, 786-937 (2000).

<sup>116</sup> ICCPR, *supra* note 22.

<sup>117</sup> ICESCR, *supra* note 23.

<sup>118</sup> ICCPR and ICESCR both entered into force in 1976. As of June 9, 2004, the Covenants have 152 and 149 state parties, respectively. Office of the U.N. High Comm'r for Human Rights, *Status of Ratification of the Principal International Human Rights Treaties* 12 (2004), <http://www.unhchr.ch/pdf/report.pdf> [hereinafter *Status of Ratification*].



ICCPR (152 state parties) and the ICESCR (149 state parties) are legally binding treaties in international law.<sup>119</sup> They **[\*367]** have reaffirmed the principle of the natural family and bind the state parties in their obligations to each other, usually after they have signed and ratified the agreements. Article 23(1) of the ICCPR expressly repeats Article 16(3) of the UDHR in declaring "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State."<sup>120</sup> The protection and assistance phrase is broadened in Article 10(1) of the ICESCR when it mandates that states ensure the following: "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."<sup>121</sup> Both the ICCPR and ICESCR refer to the UDHR in their preambles.

Within the Inter-American system, Article 17 of the 1969 American Convention on Human Rights adopts the exact language of **[\*368]** Article 16(3) of the UDHR.<sup>122</sup> In addition, Article 15 of the 1988 "Protocol of San Salvador" to

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<sup>119</sup> For the status of the two Covenants, see *id.* at 1-12.

<sup>120</sup> ICCPR, *supra* note 22, art. 23. Article 23 reads in full:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

<sup>121</sup> ICESCR, *supra* note 23, art. 10, P 1 (emphasis added). Article 10 reads in full:

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

*Id.* art. 10.

<sup>122</sup> American Convention on Human Rights, art. 17, Nov. 22, 1969, 1144 U.N.T.S. 123. Article 17 reads in full:

- (1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
- (2) The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.
- (3) No marriage shall be entered into without the free and full consent of the intending spouses.
- (4) The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

the American Human Rights Convention expands on Article 16(3) and reads: "The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions." <sup>123</sup> Both documents mention the UDHR in their preambles.

**[\*369]** Article 18 of the 1981 African Charter, in the AU System, goes even further in recognizing the pedagogical value of the family when it states:

1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals.

2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community. <sup>124</sup>

Finally, Article 18 (entitled "Protection of the Family") of the 1990 African Charter on the Rights and Welfare of the Child provides: "The family shall be the natural unit and basis of society. It shall enjoy the protection and support of

(5) The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

Id.

<sup>123</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 15, Nov. 17, 1988, [28 I.L.M. 161](#) (emphasis added). The remaining text reads:

2. Everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation.

3. The States Parties hereby undertake to accord adequate protection to the family unit and in particular:

a. To provide special care and assistance to mothers during a reasonable period before and after childbirth;

b. To guarantee adequate nutrition for children at the nursing stage and during school attendance years;

c. To adopt special measures for the protection of adolescents in order to ensure the full development of their physical, intellectual and moral capacities;

d. To undertake special programs of family training so as to help create a stable and positive environment in which children will receive and develop the values of understanding, solidarity, respect and responsibility.

Id.

Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.

Id. art. 16 (entitled "Rights of Children").

<sup>124</sup> African Charter on Human and Peoples' Rights, art. 18, June 27, 1981, [21 I.L.M. 58](#) (entered into force Oct. 21, 1986) (emphasis added). The remaining text reads:

(3) The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

(4) The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Id. at 62.

the State for its establishment and development." <sup>125</sup> The UDHR is again incorporated by reference in the preamble.

The terminology of the 1961 European Social Charter and 1996 version differs in that the term "natural" has been dropped. Article 16 reads: "With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and **[\*370]** social protection of family life ... ." <sup>126</sup> The UDHR is not mentioned in the preamble; however, the Convention for the Protection of Human Rights and Fundamental Freedoms, which does cite the UDHR in its preamble, is referenced. <sup>127</sup>

In sum, due to the repeated reaffirmation of this original UDHR family language in the aforementioned human rights systems, one might argue that it has been elevated to a binding principle of international law. Indeed, repeated inclusion of the language in conventions such as the ICCPR and ICESCR, as well as others, strongly suggests, although this is not conclusive, that the principle is, at a minimum, customary in international law, <sup>128</sup> or perhaps an obligation erga omnes (a human right so important that it is owed to the international community as a whole), <sup>129</sup> or even a jus cogens (a preemptory norm of general international law which renders a treaty void when such a treaty is in conflict with the norm). <sup>130</sup> Further, the **[\*371]** fact that the UDHR has been incorporated by reference in

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<sup>125</sup> African Charter on the Rights and Welfare of the Child, art. 18, July 1990, O.A.U. Doc. CAB/LEG/153/Rev. 2 (entered into force Nov. 29, 1999). The remaining text of Article 18 reads:

2.States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.

3.No child shall be deprived of maintenance by reference to the parents' marital status.

Id. at 13.

<sup>126</sup> European Social Charter, ETS No. 35, Oct. 18, 1961, 529 U.N.T.S. 89, reprinted in Council of Europe Texts, European Social Charter: The Charter, Its Protocols, the Revised Charter 27 (1997); see also European Social Charter (Revised), ETS No. 163, [36 I.L.M. 31 \(1997\)](#) (entered into force Jan. 7, 1999), reprinted in Council of Europe Texts, European Social Charter: The Charter, its Protocols, the Revised Charter 77-78 (1997) (giving recognition to "the advantage of embodying in a Revised Charter, designed progressively to take the place of the European Social Charter, the rights guaranteed by the Charter as amended, the rights guaranteed by the Additional Protocol of 1988 and to add new rights").

<sup>127</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, Nov. 4, 1950, 213 U.N.T.S. 222.

<sup>128</sup> See Jane Adolphe, Securing a Future for Children: The International Custom to Protect the Natural Family, in *The Family in the New Millennium: Protecting the Natural and Fundamental Group Unit of Society* (A. Scott Loveless and Thomas B. Holman eds., forthcoming 2006).

<sup>129</sup> See *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (articulating the obligation); see also *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, 102 (June 30) (applying the principle with respect to the right to self-determination); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.)*, 1996 I.C.J. 595, 616 (July 11) (applying the principle with respect to genocide). For a scholarly discussion of this principle, see generally Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (1997). For a discussion of the obligation in relation to the activities of the World Bank, see Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, [17 Am. U. Int'l L. Rev. 527, 565-66 \(2002\)](#). For a discussion of an obligation erga omnes in regard to the right to religious freedom, see Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, [41 Colum. J. Transnat'l L. 33, 74-84 \(2002\)](#).

<sup>130</sup> E.g., Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 344, 347, May 23, 1969, arts. 53, 64 (entered into force Jan. 27, 1980); Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, I.L.M. 543, 572, 577, Mar. 21, 1986, arts. 53, 64, 25 (not yet in force); cf. Pontifical Council for the

other documents' preambles also suggests that all of these texts, which clearly adopt the UDHR language and then incorporate the UDHR as a whole by preambular reference, must be read coherently - that is, together. This means that there is a certain anthropology at the basis of the international and regional human rights regimes that is at the core of the rights of the family - and such anthropology must be respected.

### III. The Natural Family Obscured: Ideology of Family Diversity

Having reviewed the successful integration of language regarding the natural family, this discussion will now consider contrary trends and the problem that will arise if the documents are not read as an integral whole. Cardinal Trujillo, in this symposium, speaks about how the natural family is being obscured by the ideology of family diversity. In this regard, he argues that a "radically individualistic anthropology" about the family is being promoted and then supported by positive law (e.g., legislation recognizing de facto and same-sex unions).<sup>131</sup> Let us consider some of the arguments that are being made in the field of human rights and the family.

Maria Sophia Aguirre and Ann Wolfgram explain how various factions have recently attempted to introduce "a new definition of the family: "family in its various forms," a definition that "is broader than any prior understanding of nuclear, extended, or even female-headed families and leaves the public and its policymakers with an ambiguous term that potentially includes any group wishing to call itself "family." <sup>132</sup> Activists working within the United Nations system argue that the 1948 UDHR is "practically obsolete and in need of major modifications, if not outright substitution." <sup>133</sup> Such a perspective views "human rights as evolving and thereby regards later, less binding and less comprehensive documents as more important because they are more attuned to progress." <sup>134</sup> These [\*372] activists promote the family and its interrelationships "in terms of an evolving, progressive notion of rights." <sup>135</sup> For them, "the ties that bind the family are no longer permanent or sacred, but transitory, breakable, and subject to intervention and redefinition." <sup>136</sup> For example, some argue that one cannot speak of only one form of family because there are a plethora of possibilities (e.g., single, blended, polygamous, cohabitating couples, both heterosexual and homosexual, and married couples, both heterosexual and homosexual) and on the basis of equality, every family form must be treated the same. This position has fueled, in a few Western States, the treatment of the various living situations (e.g., cohabitating heterosexual and homosexual couples) as on the same par with the natural family. In brief, they argue that "family" is an illiberal concept that cannot be the source of moral principles, which should only derive from autonomy and individual liberty.

Others opine that notions of family, family rights, or privacy do great harm because they insulate individual members from state scrutiny and thereby ensure the continuation of violence and oppression within families. <sup>137</sup> In other words, the notion of family preserves a private/public dichotomy in law, which institutionalizes domestic

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Family, *The Family and Life Fifty Years after the Universal Declaration of Human Rights* (Aug. 5, 1999), reprinted in *Enchiridion on the Family: A Compendium of Church Teaching on Family and Life Issues From Vatican II to the Present* 1057, 1058-65 (2004) [hereinafter *Compendium of Church Teaching on Family and Life Issues*] (discussing universal human rights).

<sup>131</sup> Trujillo, *supra* note 2, at 334.

<sup>132</sup> Maria Sophia Aguirre & Ann Wolfgram, *United Nations Policy and the Family: Redefining the Ties that Bind: A Study of History, Forces and Trends*, [16 \*BYU J. Pub. L.\* 113, 116-17 \(2002\)](#).

<sup>133</sup> *Id.* at 117.

<sup>134</sup> *Id.* at 118.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 118-19 (footnote omitted).

<sup>137</sup> For a brief overview of this feminist position and others, see Fernando R. Teson, *Feminism and International Law: A Reply*, [33 \*Va. J. Int'l L.\* 647, 657-58 \(1993\)](#); Starr & Brilmayer, *supra* note 8, at 231-32; Hilary Charlesworth et al., *Feminist Approaches to International Law*, [85 \*Am. J. Int'l L.\* 613, 636-37 \(1991\)](#) (arguing that the provisions of the UDHR "ignore that to many women the family is a unit for abuse and violence; hence, protection of the family also preserves the power structure within the family, which can lead to subjugation and dominance by men over women and children").

violence because the home is considered a man's castle and therefore insulated from the law. <sup>138</sup> In brief, to protect and assist the natural family in positive law means to promote violence or a structure of violence.

Based on similar reasoning, the term "marriage" is questioned - it is said to mean different things to different people. Therefore, it is wrong for the UDHR to presume a static set of facts; namely, that a man and a woman marry in order to reproduce - a notion that does not correspond to current realities. Men and women do not marry solely for the purpose of reproduction; many marriages are childless, and often couples remarry when they are beyond child-bearing years. People marry for a number of reasons: love, companionship, stability, financial and emotional support, and sometimes reproduction. **[\*373]** Hence, the best that any state can do is to adopt a flexible or functional approach to the definition of marriage. For example, this understanding has been underlying the aggressive push for the redefinition of marriage so as to include same-sex couples in Canada, the Netherlands, Belgium, and Spain. <sup>139</sup> Canada has also explored the possibility of abolishing state marriage laws in favor of an optional state registration scheme by which a wide range of "close personal relationships," can be protected and supported; in this way, the natural family would be ignored and undermined in favor of an unmoored and self-defined family. <sup>140</sup>

Some of these strong objections to the natural family founded on marriage are grounded in the Western ideology of gender. However, it is important to distinguish between those who promote gender as an ideology and those who view gender as simply referring to the differences between the sexes. In terms of the latter approach, many women and men who participate within the United Nations system, especially those who work at the local level, may understand the term to mean simply male and female. In Africa, for instance, it is common knowledge that girls do not, as a general rule, receive the same level **[\*374]** of education as boys; hence references to "gender discrimination" or initiatives designed specifically for the "girl child" may be reasonable.

According to the gender perspective encountered primarily in Western sources, one's biological sex may or may not be naturally determined. But all other sex-related differences (e.g., masculinity, femininity, manhood, womanhood, motherhood, fatherhood, and heterosexuality) are culturally constructed "gender roles" and, hence, artificial and arbitrary. <sup>141</sup> Indeed, the term "sexual difference" is reduced to the merely biological, having little effect on how the

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<sup>138</sup> Starr & Brilmayer, *supra* note 8, at 232.

<sup>139</sup> See The Civil Marriage Act, 2005 S.C., ch. 33 (Can.); Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio (B.O.E. 2005, 11364) (Spain); Wet van 21 december 2000, Stb. 2001, 9 (The Netherlands) (for an unofficial translation, see <http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=69>); Loi ouvrant le mariage a des personnes de meme sexe et modifiant certaines dispositions du Code civil. Moniteur Belge, 28 Feb. 2003 ed. 3, 9880-83 (Belgium). For a brief overview of same-sex marriage as discussed in legal literature and treated in various Western legal systems, see Paul Axel-Lute, Same-Sex Marriage: A Selective Bibliography of the Legal Literature (2002), <http://law-library.rutgers.edu/SSM.html#FMA> (maintained by the Rutgers School of Law).

<sup>140</sup> See, e.g., Law Commission of Canada, Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships (Dec. 21, 2001), [http://www.lcc.gc.ca/about/conjuality\\_toc-en.asp](http://www.lcc.gc.ca/about/conjuality_toc-en.asp). For example, a version of this line of thinking is behind the 2001 "Beyond Conjuality" report, which argues that the narrow focus on spousal or conjugal relationships does not promote the state's interest in close personal relationships because it excludes other important relationships. *Id.* at ix. It argues for the abolition of marriage stating: "the state's interest in marriage is not connected to the promotion of a particular conception of appropriate gender roles, nor is it to reserve procreation and the raising of children to marriage"; rather, the state has an interest in ordering private affairs by "providing an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations." *Id.* at xviii. The report recommends a registration scheme as the best solution to accord legal recognition to a full range of these relationships which include those who are married or live with conjugal partners (both same-sex and heterosexual relationships), in addition to those who share a home with parents, other relatives, friends, and caregivers (e.g., in the case of the elderly and disabled). *Id.* at xvi-xviii. Should the state not be willing to abolish marriage immediately, then, in the interim, the report suggests that marriage be redefined in order to include same-sex couples. *Id.* at xviii-xix.

<sup>141</sup> In accordance with gender ideology, the term "gender" has been defined as follows:

human person thinks, acts, and feels, while "the purely cultural element, termed gender, is emphasized to the maximum and held to be primary."<sup>142</sup> For example, motherhood, a vocation biologically unique to women, is frequently challenged and in fact overtly undermined and demeaned. A fundamental idea underlying gender ideology is that the goal of statistical equality between men and women in the work force, women's autonomy, and access to political power can never be met if "even a significant percentage of women choose mothering as their primary vocation."<sup>143</sup>

**[\*375]** In response, as we have already considered, such an ideology stands in clear contrast to the views of important female protagonists behind the drafting of the UDHR, including the American delegate Roosevelt, and the Indian delegate, Mehta. Given their thinking, as described above, it is difficult to see how these accomplished diplomats would have accepted this new view of women. Such a view undermines the complementarity between men and women, especially when such an approach does not promote collaboration and cooperation between males and females but rather competition and conflict, which leads to the emphasis and preference of one sex over the other.<sup>144</sup>

Further, arguments that the family and marriage promote violence are classic "strawmen," misdefining the opposition in order to discredit it. The family founded on marriage that is defined herein does not sanction the labeling or treatment of women as inferior to men, nor does it negate the important and essential role women play in all sectors of society. Nor does the natural family herein described condone domestic violence. Violence is a social reality that touches all sectors of society. While domestic violence has undoubtedly occurred within a deformed version of the natural family, it would defy common sense to see it as the norm. And even if domestic law has failed to deal adequately with this difficult issue, it would be simplistic in the extreme to conclude that, due to the state of the law, the natural family should not be given special protection and assistance in international law.<sup>145</sup>

Gender is a concept that refers to a system of roles and relationships between women and men that are determined not by biology but by the social, political and economic context. One's biological sex is a natural given; gender is constructed... . Gender can be seen as the ... process by which individuals ... are born into biological categories of ... women and men through the acquisition of locally defined attributes of masculinity and femininity.

United Nations Int'l Research and Training Inst. for the Advancement of Women, *Gender Concepts in Dev. Planning: Basic Approach* 11, U.N. Doc. Instraw/Ser.B/50, U.N. Sales No. 96.III.C.1 (1995), available at [http://www.un-instraw.org/en/docs/publications/Gender\\_concepts.pdf](http://www.un-instraw.org/en/docs/publications/Gender_concepts.pdf) (quotations and citation omitted) (emphasis omitted) [hereinafter INSTRAW]. See Dale O'Leary, *The Gender Agenda: Redefining Equality* 120-21 (1997) (discussing the development of the term in feminist thought and its employment within the context of U.N. conferences); see generally Martha Lorena de Casco et al., *Empowering Women: Critical Views on the Beijing Conference* (1995) (containing similar analysis within the scope of the Beijing Conference); Rosemarie Putnam Tong, *Feminist Thought: A More Comprehensive Introduction* (2d ed. 1998) (presenting a brief historical overview of feminist thought); *Human Rights of Women: National and International Perspectives* (Rebecca J. Cook ed., 1994) (presenting an overview of feminist thought in the field of human rights).

<sup>142</sup> 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*, 34 *Origins* 169, 171 (2004) [hereinafter *Letter to the Bishops*].

<sup>143</sup> O'Leary, *supra* note 141. This deconstruction of motherhood is a recurring theme in the INSTRAW booklet, where the following quote from Maureen Macintosh appears: "Nothing in the fact that women bear children implies that they exclusively should care for them throughout childhood." INSTRAW, *supra* note 141, at 18 (footnote omitted) (emphasis omitted). The booklet continues: "The fact of sexual difference is used to arbitrarily limit women's autonomy, economic activities and access to political power." *Id.* at 19 (footnote omitted). To eradicate this problem, INSTRAW advocates increasing "women's access to political and economic power" and the development of a "broad view of human reproduction activities," including abortion and contraceptive services, thus articulating the connection between production and reproduction. *Id.* at 21-22. O'Leary's review of feminist literature reveals that any woman who aspires to mothering is seen as a threat to other women who have not been so "socially conditioned to want the wrong things." O'Leary, *supra* note 141, at 124. See Catharine A. MacKinnon, *Toward a Feminist Theory of the State*, at xv (1989) (discussing some feminist literature within the context of a feminist theory of the state).

<sup>144</sup> *Letter to the Bishops*, *supra* note 142.

<sup>145</sup> Starr & Brilmayer, *supra* note 8, at 233.



Finally, one may argue that those pushing to abolish or undermine the natural family by putting it on an equal footing with other life situations are really seeking an optimal formula for the conduct of sexual relations. And they have decided that marriage alone is too restrictive and does not optimize or adequately allow for freedom of sexual expression in human relations. <sup>146</sup> However, as [\*376] Professor Pedro-Juan Viladrich notes, the question - what is the optimum formula for sexual relations? - is an old one; although many different responses have been tried throughout history (e.g., promiscuity, polygamy, lesbianism, homosexuality, and so forth), the natural family based on marriage has been the most constant and consistently successful answer throughout the ages - the only arrangement to have passed the scrutiny of time in all stable, successful cultures of the world. <sup>147</sup> It is the product of the constant reconsideration of sexual relations. And "like a carefully distilled drop, [it is] the fruit of a thousand crises, a drop which, unlike many other distilled formulae, happens to be the most purified." <sup>148</sup>

#### IV. The Natural Family Preserved

Given the aforementioned ideological problem, there have been many efforts to discredit the natural family in international documents, non-binding and binding alike. This section will discuss binding documents and will argue that, despite the ideology of family diversity, the UDHR's anthropology remains largely intact. This enhances the importance of the UDHR. It has been incorporated by reference into preambles of important international conventions, and, therefore, all documents ought to be read as an integral whole. Further, despite the emphasis on "various forms of family" in some non-binding documents, international scholar Fr. Robert Araujo notes that states still recognize that "highest levels of protection [are] to be given to families, parents, children, and their relationships with one another." <sup>149</sup> These recognitions of the various relationships (husband-wife, mother-father, parent-child, brother-sister, and so forth) are an affirmation of the social nature of man grounded in the complementarity of the sexes. When documents have drifted from this essential position, more than a few states have persistently objected orally and then entered reservations stating their objections. I have argued elsewhere that such persistent objection has prevented the growth of a contrary principle of customary international law. <sup>150</sup> Despite efforts to obscure the natural family, the social dimension of the human person has remained intact, as well as the acknowledgement of the natural family. To flesh out this argument, I [\*377] will examine some of the international provisions that refer to family-child relationships, parent-child relationships, and female-male relationships. This article does not address the issue of inter-generational relationships.

##### A. Family-Centered Relationships

The 1989 Convention on the Rights of the Child, ratified by 192 state parties, reaffirms the centrality of the natural family founded on marriage in preambular paragraph 3, in which it incorporates the UDHR and International Covenants on Human Rights, which "proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein." <sup>151</sup>

Moreover, there are numerous provisions that recognize the fundamental importance of the family and the communitarian perspective of children's rights, which treats children as part of a social fabric, born into a social context known as the family, in which the value of relationships must be balanced with individual rights and duties. For example, the Preamble of the Convention on the Rights of the Child states, "the family [is] the fundamental

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<sup>146</sup> See e.g., Pedro-Juan Viladrich, *The Agony of Legal Marriage: An Introduction to the Basic Conceptual Elements of Matrimony* 23 (D. Javier Hervada ed., Alban d'Entremont trans., 1990).

<sup>147</sup> *Id.* at 24.

<sup>148</sup> *Id.* at 26.

<sup>149</sup> Araujo, *supra* note 8, at 1507.

<sup>150</sup> See Adolphe, *supra* note 128.

<sup>151</sup> Convention on the Rights of the Child, G.A. Res 44/25, pmb., P 3, U.N. GAOR, 44th Sess. Supp. No. 49, U.N.Doc. A/44/25 (Nov. 20, 1989) [hereinafter Convention on the Rights of the Child].

group of society and the natural environment for the growth and well-being of all its members and particularly children ... . The child ... should grow up in a family environment ... . [and] should be fully prepared to live an individual life in society ... ." <sup>152</sup> Similarly, according to Article 8, the child has a right "to preserve his or her identity, including ... family relations." <sup>153</sup> Moreover, Article 16 states that "no child shall be subjected to arbitrary or unlawful interference with his or her ... family ... ." <sup>154</sup> Finally, Article 20 provides that when separation of the child from his or her family is required, either temporarily or permanently, an alternative family environment setting shall be sought by the state. <sup>155</sup>

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#### B. Parent-Child Relationships

There are also statements in U.N. declarations that acknowledge the parent-child relationship. For example, Article 26 of the UDHR recognizes that "parents have a prior right to choose the kind of education that shall be given to their children." <sup>156</sup> In addition, Article 25 gives prominence to the essential bond between mother and child when it declares "motherhood and childhood are entitled to special care and assistance." <sup>157</sup>

Similar themes have been picked up in the 1966 International Covenants. Article 18(4) of the ICCPR provides that "States Parties ... undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions." <sup>158</sup> ICESCR states in Article 10(2) that "special protection" should be given to mothers before and after childbirth. <sup>159</sup>

The 1989 Convention is very aggressive about promoting a healthy parent-child relationship through state intervention and assistance - a fact that has been the subject of much debate. <sup>160</sup> However, it nonetheless affirms a key principle well known to many states, namely, the best interests of the child standard embodied in Article 3. <sup>161</sup> Yet this article is very explicit in acknowledging that the rights of the child must be seen within the family context and balanced with those of the parents when it requires that the standard "take into account the rights and duties of ... parents." <sup>162</sup>

Moreover, the familial context and parental rights are once again emphasized in Article 5, which highlights that "States Parties shall respect the responsibilities, rights and duties of parents" in guiding and directing the child's development. <sup>163</sup> And Article 18(2) admonished states to appreciate that "the primary responsibility for the upbringing and development of the child" lies with parents or legal guardians, but that the state shall take on the important task of rendering "appropriate assistance to parents." <sup>164</sup> Indeed, according to **[\*379]** Articles 9 and 19,

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<sup>152</sup> Id. PP 5-7.

<sup>153</sup> Id. art. 8.

<sup>154</sup> Id. art. 16.

<sup>155</sup> Id. art. 20.

<sup>156</sup> Universal Declaration of Human Rights, *supra* note 6, art. 26.

<sup>157</sup> Id. art. 25.

<sup>158</sup> ICCPR, *supra* note 22, art. 18, P 4.

<sup>159</sup> ICESCR, *supra* note 23, art. 10, P 2.

<sup>160</sup> For a discussion of this debate, see Adolphe, *supra* note 1, at 75-107.

<sup>161</sup> Convention on the Rights of the Child, *supra* note 151, art. 3.

<sup>162</sup> Id.

<sup>163</sup> Id. art. 5.



the state has a compelling interest to intervene when a parent is unwilling or unable to comply with his or her primary responsibilities, including that of protecting the child from abuse and neglect. <sup>165</sup> To this end, a child may even be separated from his or her parents according to the "best interests" principle, but when such separation is required, the child has a right to "maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests." <sup>166</sup>

Finally, children's rights are no longer defined exclusively as involving care and protection, but on a more controversial note, include political and civil rights, such as Article 13 (freedom of expression), Article 14 (freedom of religion), Article 15 (freedom of assembly), and Article 16 (right to privacy). <sup>167</sup> Undoubtedly, these provisions would require state assistance and intervention if they were to be directed against the parents as opposed to the state itself or third parties. Hence, due to fear that an overly individualistic interpretation of these rights might unduly increase state intervention into family life, obscure the centrality of the family, and undermine parental duties and rights, many states have entered reservations. <sup>168</sup> **[\*380]** Indeed, such a radical interpretation of these "adult-like" rights has often and unfortunately been promoted in recommendations given by the Committee on the Rights of the Child ("CRC") to state parties. <sup>169</sup> However, such interpretations need not be accepted by state parties, which remain the final interpreters of the document. A more consistent interpretation of the Convention on the Rights of the Child, commencing with the preamble, which recognizes a communitarian perspective of children's rights, clearly views children as members of a family. They are not isolated persons - this means that any interpretation of "adult-like" rights must be read in light of, and appropriately balanced with, familial relationships and parental rights and responsibilities. <sup>170</sup> Finally, given that the UDHR is incorporated by reference, any

<sup>164</sup> Id. art. 18.

<sup>165</sup> See id. arts. 9, 19.

<sup>166</sup> Id. art. 9, P 3.

<sup>167</sup> This new grouping of children's rights has contributed to the lack of domestic and international consensus on the meaning of children's rights under the Convention. The main question is: how are such rights to be balanced with those of the parents and the family? Two major factors point to this fundamental controversy: 1) the numerous interpretative declarations and reservations that have been entered by state parties on the topic of parental authority, see Committee on the Rights of the Child, Reservations, Declarations and Objections Relating to the Convention on the Rights of the Child, U.N. Doc. CRC/C/2/Rev.7 (Mar. 12, 1998), and 2) the conclusions concerning Articles 13, 14, and 15. See Canadian Coalition for the Rights of Children, The U.N. Convention on the Rights of the Children: How Does Canada Measure Up? (1999), available at <http://www.rightsofchildren.ca/report/index.htm>, which reads:

In the absence of widespread public discussion, there is little consensus about children's fundamental freedoms. Are these rights inherent or do they need to be earned? What are reasonable limits? What are unreasonable infringements? How can the tension between children's rights and parent's [sic] rights be resolved? How can rights in the private sphere be monitored? How are community and school standards determined in a pluralistic society?

Canadian Coalition for the Rights of Children, *supra*, <http://www.rightsofchildren.ca/report/page12.htm>.

<sup>168</sup> See Adolphe, *supra* note 128, for a critique of how the provisions of the Convention lend themselves toward a radical individualistic interpretation, which has unfortunately been reinforced by the Committee on the Rights of the Child. To study the content of the reservations to the Convention on the Rights of the Child, see the Convention itself, *supra* note 151; Convention on the Rights of the Child, art. 43, P 2 amend. C.N.147.1993.TREATIES-5 1577 U.N.T.S. 3 (May 15, 1993); and Convention on the Rights of the Child, art. 43, P 2 amend. C.N.322.1995.TREATIES-7 1577 U.N.T.S. 3 (Nov. 7, 1995) [amendment to Article 43, P 2].

<sup>169</sup> See Adolphe, *supra* note 128, for a recent study of the problems associated with the Convention and the Committee on the Rights of the Child.

<sup>170</sup> To be consistent with the International Bill of Rights and the Convention provisions relating to family and parental duties and rights, application by states should never be overly individualistic. The applicable rules for interpretation of treaties are set out in the Vienna Convention on the Law of Treaties, which requires that a treaty must be interpreted, according to Article 31, in "good

interpretation will need to be consistent with provisions contained in the UDHR, in particular its protection of the natural family, respect for life, and recognition of the "prior right" of parents "to choose the kind of education that shall be given to their children." <sup>171</sup>

### [\*381]

#### C. Female-Male Relationships

As previously discussed, the natural family endorsed in the UDHR reaffirms the essential and objective truth about the dignity and worth of the human person and the equal rights of men and women. The theme is addressed in Article 1, which provides that "all human beings are born free and equal in dignity and rights." <sup>172</sup> However, due to problematic trends in societies across the globe, the interests of women have been felt to warrant special emphasis from the international community.

Faced with increasing amounts of unjust discrimination, mistreatment, lack of respect, and even violence against women within the family (which are disturbing and inappropriate distortions of the family), the United Nations General Assembly responded in 1979 with the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"). <sup>173</sup> This Convention, ratified by 177 state parties, <sup>174</sup> in preambular paragraph 2, incorporates the UDHR by reference in affirming the "principle of the inadmissibility of discrimination and proclaiming that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein." <sup>175</sup>

In specific regard to the family, preambular paragraph 13 emphasizes "the great contribution of women to the welfare of the family and to the development of society," underlines "the role of both parents in the family and in the upbringing of children," and highlights the fact that "the role of women in procreation should not be a basis for discrimination." <sup>176</sup> Further, Article 16 notes that state parties shall take all appropriate measures "to eliminate

faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Vienna Convention on the Law of Treaties, *supra* note 130, art. 31. It is well accepted that the legislative intent is generally expressed in the "object and purpose" of the treaty and the preamble is the first place in which international scholars and lawyers look. In the case of the Convention on the Rights of the Child, the Preamble (paragraphs 5, 6, and 7) reveals that the treaty was drafted to reinforce the importance of the family in relation to children's rights. Convention on the Rights of the Child, *supra* note 151, arts. 5-7. Indeed, the preambular provisions clearly put children's rights in context, that is, within the family. Therefore, from a consideration of the international rules of interpretation together with the preambular provisions, one may conclude that this new category of children's rights can never be interpreted in a way that is overly individualistic and absolutist in a way that undermines the natural family based on marriage and the duties and rights of parents. See also Jeff Le Pere, *The Convention on the Rights of the Child: A Familial Perspective 6-7* (1994) (unpublished thesis presented to the faculty of Simon Greenleaf University in partial fulfillment of the requirements for the degree Master of Arts in International Human Rights) (on file with the author); Ian Sinclair, *The Vienna Convention on the Law of Treaties* 128 (2d ed. 1984); Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12 Hum. Rts. Q. 156, 156-78 (1990).

<sup>171</sup> Universal Declaration of Human Rights, *supra* note 6.

<sup>172</sup> *Id.* art. 1.

<sup>173</sup> G.A. Res 34/180, U.N. Doc. A/34/830 (Dec. 18, 1979) [hereinafter CEDAW].

<sup>174</sup> See Status of Ratification, *supra* note 118.

<sup>175</sup> CEDAW, *supra* note 173, pmb., P 2.

<sup>176</sup> *Id.* pmb., P 13. It is noteworthy that when the document mentions maternity it prefaces the reference with the phrase "social significance of," which undermines the natural reality of marriage. The provision in full reads:

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole[.]

**[\*382]** discrimination against women in all matters relating to marriage and family relations." <sup>177</sup> Moreover, state parties must:

Ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents ... . <sup>178</sup>

However, there are controversial phrases and provisions, which many state parties fear could promote abortion and/or a new paradigm of "polymorphous sexuality" <sup>179</sup> (e.g., heterosexuality, homosexuality, bisexuality, transsexuality). For example, CEDAW provides that "a change in the traditional role of men as well as the role of women ... in the family is needed to achieve full equality between men and women." <sup>180</sup> State parties are obliged in Article 5 to "take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices ... based on ... stereotyped roles for men and women." <sup>181</sup> Article 14(2)(b) provides that state parties "shall ensure to such women the right ... to have access to ... family planning." <sup>182</sup>

As a result, concerned state parties have entered reservations in an attempt to ensure: 1) that the centrality of the natural family based on the human person (male and female) is sustained, and 2) that the health and safety of the fetus is recognized, both within the limits of national law and/or religious law. <sup>183</sup> The number and extent of these reservations again demonstrates that the novel interpretations of "family" and human sexuality have not risen to the level of a contrary, binding, and preemptive norm of customary international **[\*383]** law so as to even arguably supersede the documents comprising the International Bill of Rights. <sup>184</sup> Further, given that the UDHR is incorporated by reference in the preamble, any interpretation would need to be consistent with provisions contained in the UDHR, and in particular, its protection of the natural family.

## Conclusion

This article has examined the Holy See's perspective on the development of a legal anthropology in the area of human rights and the family. Part I considered the essential points of Cardinal Trujillo's anthropology on sexuality, marriage, and the family that set the stage for a consideration of the natural family in the UDHR. The drafters intended that it proclaim existing rights and duties, be read as an integral whole, and be founded on the concept of human dignity. This perspective is supported by a textual reading of the document and the work of Morsink and Glendon. Although there is no explicit reference to God, the Holy See fleshes out a legal anthropology. The common point for conversation centers on the Declaration's "vibrant defense of man and his transcendental,

Id.

<sup>177</sup> Id. art. 16.

<sup>178</sup> Id.

<sup>179</sup> The expression is taken as used in Letter to the Bishops, *supra* note 142, P 2.

<sup>180</sup> CEDAW, *supra* note 173, pmb., P 14.

<sup>181</sup> Id. art. 5(a).

<sup>182</sup> Id. art. 14(2)(b).

<sup>183</sup> Status of Ratification, *supra* note 118.

<sup>184</sup> See generally Adolphe, *supra* note 128.

inviolable, inalienable and irreplaceable dignity." <sup>185</sup> Parts II through IV emphasized the continuing significance of the UDHR and why it is an important platform from which the Holy See seeks to promote an authentic view of the human person and his or her dignity as the source of human rights. Part II gave an overview of the impact of the UDHR on protection and promotion of the natural family in the four human rights' systems of the world. Part III discussed the problems contributing to the crisis of marriage and family on the international level and grounded them in an ideology of family diversity that promotes all family forms as equally beneficial to society. This Part then highlighted the need for a legal anthropology of human rights and the family. Part IV argued that attempts to obscure the special protection and promotion due the natural family have been met with persistent objections from state parties, usually in the form of reservations. The UDHR's strong affirmation of the natural family remains intact.

The UDHR's importance may be summarized in the following manner. Since the UDHR has been incorporated by reference in [\*384] subsequent treaties in the four main human rights systems, such treaties should be read as an integral whole and ought not to conflict with the UDHR. In 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. Subsequent treaties that have attempted to depart from the special protection given to the natural family have been met with persistent objections from state parties, mostly in the form of reservations, so far defeating the growth of a contrary custom. In contrast to relativistic and nihilist positions, the Declaration 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." <sup>186</sup> 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 man. This article leaves open the possibility for men of good will and right reason to discuss the meaning of human dignity as tied to the understanding that man is made in the image and likeness of God, as articulated in Part I of this article. Finally, 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." <sup>187</sup>

In brief, the drafters intended that the UDHR be read as promoting a universal nature of man and they anticipated that it would proclaim existing rights and duties and should stand as an integral whole. With its capacious definition of the human person, affirmation of human dignity as its interpretative key, and organic structure that associates rights and duties and sets limits for a just social order, John Paul II has described it as "one of the most valuable and significant documents in the history of law." <sup>188</sup>

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<sup>185</sup> 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*, supra note 130, at 1058.

<sup>186</sup> *Id.* at 1059.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1127 (footnote omitted).