

SAFEGUARDING HUMAN RIGHTS

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Leaders of a number of influential Church bodies have expressed grave concern to the Rudd Government regarding efforts to create a national charter of human rights, on the grounds that this could undermine religious freedom and give judges the power to shape laws on issues such as abortion and gay marriage.² This intervention has been occasioned by the recommendation that the Federal Government adopt the charter of human rights drawn up by the government's own select committee led by Jesuit priest Frank Brennan, which includes the clause that the High Court be empowered to interpret all federal laws in a way consistent with the charter. Cardinal George Pell, who is especially trenchant in his criticism of the proposal, maintains that the report is weak on defending human rights and that Fr. Brennan himself has acknowledged that parts of it are unviable. The recommendations, he says, also include a 'comprehensive framework' to educate everybody about the list of human rights and create a 'human rights culture' in the public service.³

The purpose of this article is not to offer a critique of the Brennan committee's report (which has not been available to me to read) nor to question either the integrity or the expertise of Fr. Brennan himself, but to furnish readers with some background information. If the Federal Government decides to accept these recommendations as proposed or in some amended form, it is important that the public be informed about the nature and history of the development of human rights, in order to have established criteria by which to judge this charter of human rights and whether or not a charter of human rights is the best way to protect these rights in the first place.

Meaning and Development of Human Rights

Thinking about human rights is not new. It can be traced back to the great Greek philosophers, Plato and Aristotle and through St. Augustine and others, and especially the profound Christian thinker of the 13th century, St. Thomas Aquinas. This early thought about human rights was introduced into and further developed in Christian theology in the treatise on justice. As is clear from the Latin word for right (*ius-iuris*), human rights are what justice is about. Right is the *object* of justice⁴. And, following Aristotle, Aquinas defines justice as 'the firm and constant will to give each one his due'⁵.

Justice can only be between persons. It is necessarily '*ad alterum*', in regard to another person(s). The 'other' can be an individual or, because a human person is a social being, a community. Both individual persons and communities have basic rights. In the first instance right, then, refers to something that is due, for example a just price for an article or a fair day's wage for a fair day's work. But in the full sense a right is a relationship between two or more persons, to one of whom something is due and to another party who has a duty to render that which is due. My duty to respect your bodily integrity corresponds to your right to life in its fullness. Right and duty are correlatives. There can in reality be no right belonging to one party without a corresponding responsibility to respect that right on the part of another.

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² See the news report, 'Clergy unite over human rights charter', *The Australian*, October 23, 2009

³ See the report, 'Ideology dressed up as social justice', *The Australian*, October 23, 2009

⁴ *Summa Theologiae*, question 58, article 1

⁵ *Summa Theologiae*, question 58, article 1

In this line of thought (called the *natural law theory*⁶), basic human rights do not derive primarily from society, but from natural law, that is, from the very nature of the human person as a rational and relational being. Individual persons, and also human communities, have an inbuilt right as demanded by their nature as persons to a well-ordered existence, self-realisation and personal development in common with others. On a secondary level these basic rights may of course be confirmed by civil law, but they may also derive from the further determination by the civil law of a community, because some basic rights can be recognised in different ways, for example property and inheritance rights, and it is the role of the community to decide in what concrete forms these basic rights will be realised in practice. However, according to this natural law theory, civil laws must agree with the demands of basic human rights as far as possible and may never be in contradiction to them.

In the 16th century a revival of the thought of Aquinas, especially in the field of moral theology occurred in Salamanca in Spain. One of the leading revivalists, Francis of Vitoria, became the founder of international law. In reflecting on the recent Spanish conquests in South America, he set out to champion the human rights of the Indians, faced with slavery and considered to have ceded their right to property by reason of their conduct. Later that century, two Jesuits, working in Salamanca, both stressed the roles of law and philosophy in moral theology, particularly in regard to the theory of natural law, which was identified with the nature of the human person.⁷ Following the teaching of Aquinas, they saw natural law as the foundation of basic human rights.

Around the turn of the 19th century and into the next, the subject of rights and also of democracy got a bad press among Catholic Church leaders. The reason was that at that time they associated talk of both rights and democracy with the Enlightenment and individualistic political liberalism, which tended to absolutise individual reason and freedom deprived of any relationship with God.⁸ As the 20th century got under way, however, the realisation dawned that it was totalitarianism rather than political liberalism that was the real problem. The growing totalitarianism of the last century showed its face in whittling away or denying many basic human rights, as we saw in communist regimes.



Figure 1 Francis of Vitoria, in the Dominican convento, Salamanca, photo courtesy 'rahengo' Flickr

⁶ Not all agree with this natural law theory. Some thinkers maintain that no one has any rights that do not derive from positive (or civil) law. This is the theory of *legal positivism*. Others again hold that all rights are based upon the social good and must serve it. Persons have only those rights that are necessary to advance the common good. This is called the *theory of social good*.

⁷ Terence Kennedy CSsR, *Doers of the Word* (St. Paul's: Slough UK, 1996), Vol.1, p. 126

⁸ See Charles E. Curran, *Catholic Social Teaching 1891- Present: A Historical, Theological and Ethical Analysis* (Washington DC: Georgetown University Press, 2002), 152-156, 215-222

Against this alarming trend Catholic social teaching began to stress the dignity, freedom, equality, and basic rights of the human person and the need for democracy.⁹

There was thus a renewal of the traditional teaching on the nature of the human person as a rational being and the social nature of all human beings. In his encyclical letter *Peace on Earth* (1963), Pope John XXIII highlighted not only political and civil rights, such as freedom of religion, of association and assembly, as political liberalism did, but also social and economic rights, such as the right to food, clothing, shelter, education, medical care and basic social services, which were the rights emphasised by communism and socialism (nn. 11-27).

In the same letter Pope John developed the full spectrum of human rights. In his writings and addresses Pope John Paul II has strongly supported and further developed the teaching on human rights and democracy throughout the world. Flowing from the dignity and value of the human person, and not simply conferred by the state, these rights constitute the basis for social and international peace and are of deep concern for the implementation of social justice within and among countries. All states must recognise and safeguard these fundamental human rights.¹⁰

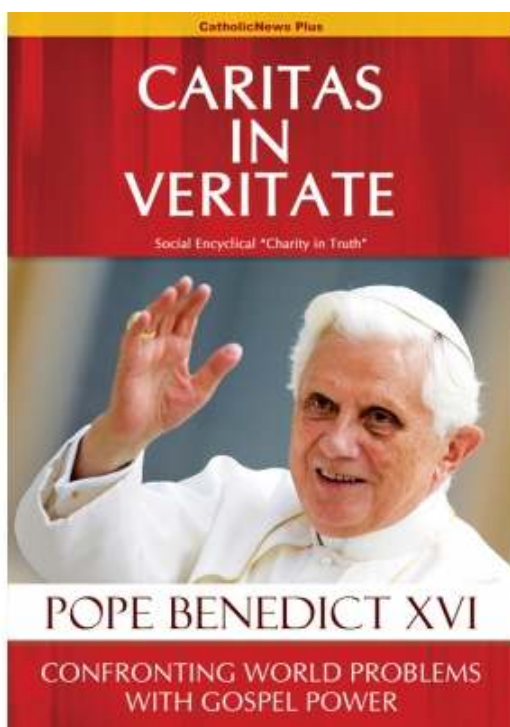
The State's Responsibility to Safeguard Human Rights

As Pope John Paul II has taught in his three important social encyclicals, there is no doubt that the state has the right and the duty to ensure the protection of the basic rights of all its citizens, including the right to life, the right to religious freedom, the right of workers to organise and to a just wage, and the right of everyone to participate in society. This means that at times the state may need to intervene when the family and intermediate groups are unable to safeguard justice and the common good. This raises the question about the means the State employs in order to achieve

this. The means chosen must not impinge upon the rights of citizens and they must be effective in realising the goal of the intervention.

Should the Federal Government decide to proclaim a charter of human rights, even with the laudable purpose of protecting the rights of all Australians, especially of minority groups and those who are underprivileged, some hesitation might well be felt about whether all basic human rights will be recognised and respected in such a charter, especially if, as Cardinal George Pell claims¹¹, this 'definitive list' of rights is simply to be selected from the international treaties Australia has signed. If this is so, there is a risk that basic rights not specifically listed will cease to be recognised by the public as human rights and be violated at least by neglect.

It would seem that Pope Benedict XVI has good reason to be sceptical regarding the current stress on alleged rights, often 'arbitrary and non-



⁹ See Charles E. Curran, *The Moral Theology of Pope John Paul II* (Washington DC: Georgetown University Press, 2005), 225-226

¹⁰ See Curran, *The Moral Theology of Pope John Paul II*, passim

¹¹ George Pell, 'Ideology dressed up as Social Justice', *The Australian*, October 23, 2009

essential in nature, while elementary and basic rights remain unacknowledged and are violated in much of the world'¹². Furthermore, the Pope calls for a renewed reflection on 'how *rights presuppose duties, if they are not to become mere licence*'. Unless a charter of human rights also stresses for the community the corresponding moral duties and includes appropriate legal structures to enforce these, the issue of the effectiveness of such a charter must remain doubtful. Pope Benedict sums these points up in his comment:

Duties thereby reinforce rights and call for their defence and promotion as a task to be undertaken in the service of the common good. Otherwise, if the only basis of human rights is to be found in the deliberations of an assembly of citizens, those rights can be changed at any time, and so the duty to respect and pursue them fades from the common consciousness. Governments and international bodies can then lose sight of the objectivity and 'inviolability' of rights.¹³

In the light of the foregoing considerations, the concern of the delegation of Church leaders to Canberra about the impact of a charter of human rights makes sense. The principal object of their concern is the right of *religious freedom*, which they see as particularly threatened. The right of parents regarding the education of their children and the freedom of religious institutions such as schools, hospitals and charities, could be curtailed and otherwise eroded.¹⁴ If the charters in Britain, the ACT and Victoria are anything to go by, this concern is not without foundation. It is important, then, to understand the foundation, the meaning and the limits of the right of religious freedom.

The Right of Religious Freedom

The classic locus for understanding the right of religious freedom is Vatican II's 1965 *Declaration of Religious Freedom*, which rests on the basic principle of the 'free society'. The Declaration deals primarily with religious freedom but, following the lead of American Jesuit priest John Courtney Murray, one of the principal architects of the document¹⁵, religious freedom rightly understood involves the notion of the proper role and function of a limited constitutional state (a democracy) and therefore the exercise of all freedoms. The Declaration says: 'the usages of society are to be usages of freedom in their full range. These require that the freedom of human beings be respected as far as possible and curtailed only when and insofar as necessary' (n. 7). According to Murray¹⁶, this statement of the principle of freedom (*as much freedom as possible; as little restraint as necessary*) is, and could well be seen by secular experts as, the most significant sentence in the whole document. It has important origins in the mediaeval tradition, in law and in jurisprudence.



¹² Encyclical letter *Charity in Truth* (29/07/2009), n. 43

¹³ *Charity in Truth*, n.43

¹⁴ See the Reports in *The Australian*, October 23, 2009

¹⁵ See Curran, *The Moral Theology of Pope John Paul II*, 231. Murray wrote extensively on this topic. His main works are recorded by Curran in footnote n. 33

¹⁶ Murray's footnote n. 21 in the Abbot edition of the document (London-Dublin: Chapman, 1966). All the citations from the Declaration are taken from this edition

It is worth noting that Pope John Paul II, in line with his personalism and his emphasis on human solidarity, was a strong supporter, both in theory and in practice, of democracy and human rights throughout the world. In his encyclical letters *On the Hundredth Anniversary (Centesimus Annus)* and *On Social Concerns (Sollicitudo Rei Socialis)* he makes the point that democracy demands that all citizens work together and accept responsibility for the common good. Democracy also ensures that all are empowered to elect and hold accountable their leaders and to replace them peaceably wherever appropriate. On the same bases he recognised both political and civil rights as well as social and economic rights.¹⁷

There is no substitute for a perusal of the document of Vatican II, the *Declaration of Religious Freedom*, in its entirety. However, a summary of the salient points of the *Declaration* relevant to the purpose of this article is in place here.

1. *The Meaning of Religious Freedom*

The Declaration states that religious freedom ‘means that all men (and women) are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that in matters religious no one is to be forced to act in a manner contrary to his (her) own beliefs. Nor is anyone to be restrained from acting in accordance with his (her) own beliefs, whether privately or publicly, whether alone or in association with others, within due limits’ (n. 2).

2. *The foundation of the Right of Religious Freedom*

- Lest anyone be tempted to think that the right of religious freedom be based on merely pragmatic grounds or is just a concession to the desires of religiously-minded people, the *Declaration* founds the right of religious freedom, not in the subjective disposition of some individuals, but in the very nature of the human person as a rational and social being. We are religious by nature, for the foundation of this right, both according to reason and revelation, is the inalienable dignity of the human person, that is, ‘a being endowed with reason and free will and therefore privileged to bear personal responsibility to seek the truth and to adhere to it once it is known’ (n. 2) . We cannot do this unless we are free from external coercion and enjoy psychological freedom.

- Furthermore, the *social nature* of human persons requires that they ‘give external expression to their internal acts of religion, ... participate with others in matters of religion, ... and profess their religion in community’ (n. 3).

- ‘Since the family is a society in its own individual right, ... parents have the right to determine, in accordance with their own religious beliefs, the kind of religious education their children are to receive’ (n. 5).

3. *The content or object of the right of religious freedom*

The content of this right is always freedom from coercion, both privately and publicly, regarding religious belief, worship, practice and public testimony. This includes such matters as selection, training and disposition of ministers, erection of buildings, acquisition of funds, and setting up educational, cultural, charitable and social organizations (n. 4).

4. *Regulation of the right of religious freedom*

¹⁷ See Curran, *The Moral Theology of Pope John Paul II*, 227

Since the function of Government is to provide for and protect the common welfare, ‘it would clearly transgress the limits set to its power were it to presume to direct or to prohibit acts that are religious’ (n. 3). The basic principle of the ‘free society’, referred to above, requires that in its exercise religious freedom must be subject to certain regulatory norms.

- The first norm is obviously the moral principle of *personal and social responsibility* in the larger community, for, in exercising freedom, justice and civility demand respect for the rights of others and the fulfilling of one’s duty towards others in the community. Restraints here have to come from individual persons and groups.

This is not to imply that religion is a purely private matter or that it belongs only in the sacristy. While proselytism is an abuse of one’s right to religious freedom and a violation of the rights of others, ‘religious bodies should not be prohibited from freely undertaking to show the special value of their doctrine in what concerns the organization of society and the inspiration of the whole of human activity’ (n. 5).

- The second norm is the *juridical norm* that should control the action of government or state in limiting the exercise of the right of religious freedom.¹⁸ In commenting on this John Courtney Murray says: ‘the norm cannot be the common welfare, since the common welfare requires that human rights should be protected by the state, not limited, in their exercise. Hence the Declaration adopts the concept of *public order*. Although the concept has good warrant in constitutional law, it is more frequently used than defined. The Declaration undertakes to define it. In doing so it makes a contribution to the science of law and jurisprudence’.¹⁹ *Public order* then is a narrower concept than the common welfare; it is the immediate end of the state and the justification for enforcement by law. So, at least in a democracy, we can and should distinguish between the broader and more inclusive concept of society, with the common good as its goal, and the narrower concept of the state, with the more limited goal of ensuring public order.

Defining public order, the Declaration states that norms constituting public order are not arbitrary but must be rooted in moral law. ‘These norms arise out of the need for effective safeguard of the rights of all citizens and for peaceful settlement of conflicts of rights. They flow from the need for an adequate care of public peace, which comes about when men live together in good order and in true justice. They come, finally, out of the need for a proper guardianship of public morality. These matters constitute the basic component of the common welfare: they are what is meant by public order’ (n. 17).

Murray’s commentary on this statement in the same footnote is well worth quoting:

The public order of society is a part of the universal moral order; its requirements must be rooted in the moral law. Public order exhibits a threefold content.

- First, the order of society is essentially an order of justice, in which the rights of all citizens are effectively safeguarded, and provision is made for peaceful settlement of conflicts of rights.
- Second, the order of society is a political order, an order of peace... Public peace, however, is not the result of repressive action by the police. It is, in the classic concept, the work of justice; it comes about, of itself, when the demands of justice are met, and when orderly processes exist for airing and settling grievances.
- Third, the order of society is a moral order, at least in the sense that certain minimal standards of public morality are enforced at all.

¹⁸ See Curran, *The Moral Theology of Pope John Paul II*, 231

¹⁹ Footnote n. 20 in the Abbott edition

Conclusion

In the field of human rights the principle of freedom is paramount and the over-riding consideration.

Since the state is charged with the care of the common good, that is, the care of all human rights, the Government, whether Federal or State, has a grave obligation to safeguard, and even take steps to promote, the fundamental human rights of its citizens. Given the difficulty of drawing up a list that is definitive and the risk that some fundamental human rights, especially the right of religious freedom, will be omitted or downplayed in relation to other rights (and so rendered likely to fade from the consciousness of the public), a charter of human rights is of doubtful value, and perhaps contra-indicated, as a means of this care of the common good.

Legal constraints on the exercise of basic human rights, including especially the right of religious freedom, are morally justified only if required by the demands of public order, that is, if necessary to uphold justice and ensure peace among all the members of society. In Australia at least minimal standards of public morality are enforceable by law and orderly processes are already in place for airing and settling conflicts of rights. Hilary Clinton recently made an apposite comment on this question. She expressed strong disagreement with some who promote anti-discrimination policies that would restrict freedom of expression and the freedom of religion. She concludes: 'the protection of speech about religion is particularly important, since persons of different faiths will inevitably hold divergent views on religious questions. These differences should be met with tolerance, not with suppression of discourse'.²⁰

²⁰ *The Sydney Morning Herald*, October 28, 2009