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VATICAN II ON RELIGIOUS FREEDOM

MSGR. JOHN P. KLEINZ *

IN 1948 the United Nations adopted a Universal Declaration of the Rights of Man. The World Council of Churches issued its Declaration on Religious Freedom at Amsterdam in 1948 and again definitively at New Delhi in 1961. Both proclaimed the individual person's human and civil right to form his own conscience according to his religious convictions and to determine his relationship to other churches.

In 1965, at the end of the Second Vatican Council, another international organization, the Roman Catholic Church, promulgated its own Declaration on Religious Freedom. Its Latin title, from the first three words, is *Dignitatis Humanae Personae*. Its subtitle already restricts its scope: "On the right of the person and of communities to social and civil freedom in matters religious." Its central thesis is: "It is an injustice done to the human persons, and to the order laid down for men by God, if a man is denied the free exercise of religion in society; saving a just public order."

All three declarations propose essentially the same juridical principle. American lawyers might want to translate the European term "juridical" as "constitutional guarantee." This principle is that every man has an inalienable personal right to determine his own religious attitudes within the limits of public order without any coercion on the part of civil authorities.

There is a sense in which Americans might be tempted to remark that one of the first things they learned about the American way of life is that since 1791 this principle has been written into the First Amendment of the Bill of Rights of their Constitution. Indeed, the three international declarations merely repeat what is the common consensus of much of the modern world. Before the United Nations' and the World Council's statements of 1948, religious liberty had been guaranteed by more than fifty nations and since that time,

* M.A. (1942), Ph.D. (1944), Catholic University; Chairman, Department of Philosophy, Pontifical College Josephinum, Worthington, Ohio.

fifty more of the nations emerging during the past two decades have done the same.

The bishops of Vatican II, whose final vote for the Declaration was 2308 to 70, were aware of this consensus. In noting the "signs of the times" (a phrase they used in almost every document they passed), they began their first paragraph:

A sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man. And the demand is increasingly made that men should act on their own judgment, enjoying and making use of a responsible freedom, not driven by coercion but motivated by a sense of duty. The demand is also made that constitutional limits should be set to the powers of government, in order that there may be no encroachment on the rightful freedom of the persons and of associations.

This demand for freedom in human society chiefly regards the quest for the values proper to the human spirit. It regards, in the first place, the free exercise of religion in society. [#1]¹

No previous Council of the Church had spoken of religious freedom. Vatican II turned to the subject for two reasons especially. One was the violations of that freedom under Communist regimes. The other was the fact that in modern times

this right to religious freedom was increasingly recognized.

The Declaration which followed those first lines on the dignity of man uses only a few thousand of the 103,000 words of the sixteen documents of Vatican II. Compared to the greater themes of the longer and more fundamental Constitutions, it may even be called a minor issue at the Council. But on December 7, 1965, at the end of the Council, Pope Paul VI could tell the statesmen of the world that it was "one of the major texts." As a symbol of the development of doctrine, as a frank answer to American Protestants who had asked for a clear statement from the highest authority in the Catholic Church, for the American bishops and their theological experts who had worked unceasingly to have it passed, for American Catholics in a pluralistic United States, and surely for readers of a journal called *THE CATHOLIC LAWYER*, the Declaration on Religious Freedom must rank as one of the most significant achievements of the most momentous Catholic event of the twentieth century.

My purpose here is the modest one of introducing it to American Catholic lawyers by tracing some of the historical, political, philosophical, and theological implications of the Church's stand on religious liberty today. I shall treat, first, the development of the doctrine for the past century and a half, then attempt to define precisely what the Council meant by religious liberty, and at the end briefly discuss its paramount importance for the rapidly developing spirit of ecumenism in the United States.

¹ The text of the Declaration on Religious Freedom used in this article is in *THE DOCUMENTS OF VATICAN II*, 675 (Walter Abbott ed. 1966), introduced and annotated by John Courtney Murray, and with a Protestant response by Franklin H. Littell. Fr. Murray has also annotated the text of the Declaration for an edition published by The John LaFarge Institute (1966). (Note that the numbers in brackets refer to the suggested reading list.)

The Development of the Doctrine

Pope John XXIII drove the word "*aggiornamento*" into the consciousness of the whole world as a key to the purposes he hoped to achieve in calling the Council. One of the Council's finest exercises in *aggiornamento* was the Declaration on Religious Freedom which Pope Paul VI promulgated on December 7, 1965. It reflects a climate of opinion that is new in conciliar debate. It could only have been written at this stage of the evolution of the Church's growing awareness of its own nature and the development of its doctrine.

The bishops at Rome looked at the structures and practices of the Church in a spirit of reform and even remorse; they were far more open to the concept of the development of doctrine than one would suspect from the theological textbooks they had studied. The Declaration on Religious Freedom is a prime example. It has broken the mold of a static and rigid conception of religious freedom that had prevailed for the past 150 years in the Church. That conception had aroused the suspicions of the non-Catholic world and had led to accusations of "Machiavellianism" against the Church. Happily, we are at the end of an era now. The Council, as it did in other important areas of the Church's life and doctrine, realized that it was no longer possible to freeze a developing doctrine of religious liberty at a certain point in its history. It has been said that the bitter controversies which the Declaration evoked through three sessions of the Council arose less because of its contents

than the theory of doctrinal development implicit in it.

In an important paragraph in the final version, the bishops claim that the Church is faithful to the teachings of Christ and the apostles "when she recognizes and gives support to the principle of religious freedom as befitting the dignity of man and as being in accord with divine revelation," but they go on immediately to apologize for the periods in her history when that principle was violated:

In the life of the people of God as it has made its pilgrim way through the vicissitudes of human history, there has at times appeared a way of acting that was hardly in accord with the spirit of the Gospel or even opposed to it. [#2]

Admittedly, then, the theology of religious freedom through the centuries has been conditioned by history. There is space here for only a glance at the history of the doctrine since 1800, but without that history one cannot understand the breakthrough into the modern world which the Declaration achieved.²

² For a basic survey of the recent theological development, see JOHN COURTNEY MURRAY, *THE PROBLEM OF RELIGIOUS FREEDOM* (1965) and Murray, *The Problem of Religious Freedom*, 25 *THEOLOGICAL STUDIES* 503 (1964). For the historical background, a basic work is: M. SEARLE BATES, *RELIGIOUS LIBERTY: AN INQUIRY* (1945). See also 1 J. LECLER, S.J., *TOLERATION AND THE REFORMATION* (1960); J. LECLER, S.J., *THE TWO SOVEREIGNTIES: A STUDY OF THE RELATIONSHIP BETWEEN CHURCH AND STATE* (1951). Under the sponsorship of the World Council of Churches, A. F. Carrillo de Albornoz has written a fair-minded account in *ROMAN CATHOLICISM AND RELIGIOUS LIBERTY* (1959).

The beginnings of the modern world in which the Church wished to make herself relevant were in the political, economic, scientific, religious, and ideological revolutions at the start of the nineteenth century. The profound changes which these revolutions introduced into the Western world were a threat to the type of Catholic culture in which the Church had lived for over a thousand years. The response of the Church was negative. It tried to preserve, as far as possible, the traditional forms in which it had lived so long. A theological consensus, defended by a Papacy that was increasingly centralized at Rome, crystallized in a decision by the Church to divorce herself from a developing modernity which seemed incompatible with the state of Catholic doctrine at that time.³

A minority of Catholic intellectuals protested this static stance of Catholic philosophy and theology and warned that, if the revolutions continued to develop, the Church would find herself more and more isolated and irrelevant. The Western world of science, philosophy, and culture would evolve without the influence of the Church. The minority voices pleaded that Catholic thought should incorporate what was positive and good in the exploding modern scene. A whole series of condemnations and anathemas during the nineteenth century, notably

the *Syllabus of Errors* of 1864, was the answer from Rome.

Historically, it seems impossible that the Church could have made any other decision. The new ideas were urged within a framework of philosophies of naturalism and secularism from which it was difficult to extricate them, given the static theology of the age. And the Church-State doctrine of the time, when the Church was allied to some of the most powerful nations of Europe, made any new theories of religious freedom and separation of Church and State seem like dangerous innovations.

One of the scholars who protested the standpat policy of the Church in France was a priest, Hugues-Felicité Robert de Lammenais. He called for a "liberalism" in France that would separate Church and State, proclaim full religious liberty for all, and defend a democratic reform of society against the Monarchists. There were few who followed him, and the tragedy of Lammenais, a man before his time, was completed in the condemnation of his doctrines in two encyclicals of Pope Gregory XVI, *Mirari Vos* in 1832, and *Singulari Nos* in 1834.

In *Mirari Vos*, his inaugural encyclical, Pope Gregory was harsh in his condemnation of any change in the Church's position on religious liberty:

We come now to a source which is, alas!, all too productive of the deplorable evils affecting the Church today. We have in mind *indifferentism*, that is, the fatal opinion everywhere spread abroad by the deceit of wicked men. . . . From this poisonous spring of indifferentism flows the false and absurd, or rather the mad principle, that we must secure and guarantee to each one liberty of con-

³ In his recent article, *Have We Loved the Past Too Long*, Leslie Dewart (115 AMERICA 798 (1966)) speaks of the "hellenization of the Church" in this regard, and expands his thesis in the controversial *THE FUTURE OF BELIEF* (1966). His historical analysis has not gone unchallenged. See 116 AMERICA 424 (1967).

science; this is the most contagious of errors.⁴

In 1864, the encyclical *Quanta Cura* of Pope Pius IX, who called liberalism the "error of the century," carried as an appendix the famous *Syllabus of Errors*. Some of the "errors" condemned were:

15. Every man is free to embrace and profess that religion which he, led by the light of reason, thinks to be the true religion. . . .

76. The abolition of the civil power which the Apostolic See possesses would be extremely conducive to the liberty and prosperity of the Church.

77. In this age of ours it is no longer expedient that the Catholic religion should be the only religion of the state, to the exclusion of all other cults whatsoever.

78. Hence, in certain regions of Catholic name, it has been laudably sanctioned by law that men immigrating there be allowed to have public exercises of any form of worship of their own.⁵

Obviously, these condemnations which are so out of spirit with the declarations on Ecumenism and Religious Freedom at Vatican II must be understood within the historical context of the times and evaluated after reading the many papal docu-

⁴ Aubert, *Liberalism and the Church in the Nineteenth Century*, TOLERANCE AND THE CATHOLIC 49 (tr. George Lamb 1955). See also Aubert, *Religious Liberty from "Mirari Vos" to the "Syllabus,"* 7 CONCILIAM 91 (1965); E. HALES, PLO NONO ch. 7 (1954); E. HALES, THE CATHOLIC CHURCH IN THE MODERN WORLD ch. 6 (1960); E. HUGHES, THE CHURCH AND THE LIBERAL SOCIETY (1961).

⁵ H. DENZINGER, THE SOURCES OF CATHOLIC DOGMA 437 & 442 (translated by Roy J. DeFerrari 1957).

ments which were quoted in the footnotes of the *Syllabus* to explain the reason for the condemnations. But just as obviously, there has been a tremendous development of the doctrine of religious freedom.

Pope Leo XIII took the first steps toward healing the breach between the Church and the Europe of his day, notably in the workingman's encyclical, *Rerum Novarum*, in 1891. He wanted, he said somewhere, to push the Church into the twentieth century and advised French Catholics to accept the Republic. But on religious liberty, in his famous encyclical on the State in its relation to the Church (*Immortale Dei*, 1885), Leo still looked back to the golden days of medieval unity in the past rather than forward to the future. Within his historical perspective, "he could not but call for a return to a Christian unity once possessed, to an ecclesiastical obedience once rendered, to the matrix of a culture once fertile of Christian forms."⁶

During the Modernist crisis in the pontificate of Pope St. Pius X, there could hardly be any advance in ecumenism and tolerance of religious freedom, but, in 1939, when the great papal diplomat Eugenio Pacelli became Pope Pius XII, the way was open to new developments. In his Christmas messages and especially in an address to the Fifth National Con-

⁶ J. C. Murray, *Church and State at Vatican II*, 27 THEOLOGICAL STUDIES 583 (1966). This article analyzes two conciliar documents, Declaration on Religious Freedom, and The Church in the Modern World, and finds that the "relevant principles have been stated with a new purity, previous confusions of the historical and doctrinal have been ruled out. . . ." *Id.* at 606.

vention of the Union of Italian Jurists (*Ci riesce*, December 6, 1953)⁷ with its detailed analysis of "toleration," Pope Pius XII was reading the "signs of the times" aright in his realistic assessment of the place of the Church in the modern world. *Ci riesce* abandoned the retrospective view and the medieval dream of his predecessors.

In the nineteen-sixties, the teaching Church under Pope John XXIII, Pope Paul VI, and Vatican Council II confirmed without the hesitations of the past what the theologians had been saying for some time: that freedom of religion means not merely a toleration of error and evil but that it is a natural right of every man. The "neutrality" of the State is no longer condemned as indifferentism and the recognition of religious freedom for every man is advocated as necessary to the dignity and freedom of man.⁸

Between the end of the first session of Vatican II and the beginning of the debate on the Declaration on Religious Freedom in the second, two important statements were made. In *Pacem in Terris* (1963), Pope John XXIII wrote, under the rubric "rights of conscience," that "every human being has the right to worship God according to the right norm of his own conscience and to profess religion publicly and privately."⁹ And on Sep-

tember 29, 1963, in his magnificent address opening the second session of the Council, Pope Paul VI spoke of the many seats at that assembly that were vacant and asked:

In what conditions does religion exist in these territories? . . . What displeasure to see that in certain countries religious liberty, like other fundamental rights of man, is being crushed by principles and methods of political, racial, or anti-religious intolerance!¹⁰

As the bishops of Vatican II assembled on November 19, 1963, to hear Bishop Emile de Smedt of Bruges, Belgium, introduce the first schema (draft text) of the Declaration on Religious Freedom, the contrast between 1864 and 1965 could hardly have been greater. Instead of the condemnations of religious freedom by the Popes of the nineteenth century, they had heard two Popes of the nineteen-sixties proclaim that religious free-

that has been discussed in Catholic theology for centuries. For an account of the different theological interpretations see the commentary on the Declaration by LOUIS JANSSENS, *FREEDOM OF CONSCIENCE AND RELIGIOUS FREEDOM* (1966). He is especially interesting in his analysis of the interpretations by St. Thomas Aquinas and Francis Suarez. Cf. Eric D'Arcy, *CONSCIENCE AND ITS RIGHT TO FREEDOM* (1960).

¹⁰ Pope Paul VI, *Opening Address at the Second Session*, COUNCIL DAYBOOK & VATICAN II, SESSION 1 AND 2 143, 149 (1965). The Paulist Press in their Deus paperback series has published some of the most important speeches in the council hall in the debate on religious liberty; COUNCIL SPEECHES OF VATICAN II (ed. Küng, Congar, O'Hanlon 1964); THIRD SESSION, COUNCIL SPEECHES OF VATICAN II (ed. Leahy, Massimini 1966).

⁷ *Ci riesce*, 52 CATHOLIC MIND 244-51 (1954). Cf. Cardinal Lecaro, *Religious Tolerance in Catholic Tradition*, 58 CATHOLIC MIND (1960).

⁸ Cf. Roger Aubert, *La Liberte religieuse du Syllabus de 1864 a nos jours*, PROBLEMES CHRETIENS SUR LA LIBERTE RELIGIEUSE (1963).

⁹ Encyclical Letter of Pope John XXIII, *PACEM IN TERRIS*, § 14. The key phrase, "right norm of his own conscience" is the *recta conscientia*

dom is not merely the lesser of two evils to be tolerated for the sake of avoiding greater evil; it was a strict right, and to violate it is injustice. That right was claimed not merely for Catholics but is based on the objective truth of a person's belief and it is tied to a man's conscience. It did not merely cover a man's internal beliefs; it extended to the public profession of his faith.

Before we turn now to an analysis of the definition of religious freedom formulated in the Declaration of Vatican II, we should realize that not all the ambiguities and varying interpretations of the past have disappeared. The lines of argument for religious freedom in the Declaration are not clear and sharp. We have to remind ourselves, as Father John Courtney Murray implies in the title of a book of essays on the Declaration he edited, that the theological discussion behind the now clearly acknowledged right of religious liberty is not an end but a beginning.

The Definition of Religious Freedom

The term "religious freedom" can mean many things, and its meaning will vary with the special interests of those who use it. The focus of interest will change for the ecumenist, the analyst of Church-State relations, the historians of various epochs, the political scientist, the constitutional lawyer, and in discussions of freedom within the Catholic Church itself.

The Council's Declaration on Religious Freedom reflects some of these ambiguities, especially in the line of arguments used to defend it. In general, it may be said that American experts who influ-

enced the document advanced juridical and political, but not purely pragmatic, arguments in its defense, while the theologians of Europe, with the exception of Jacques Maritain, were interested almost exclusively in grounding the right on biblical and theological arguments. Carrillo de Albornoz summarized the two approaches in another context when he said that the American approach is based on the conviction that, being one of the "human rights," freedom of religion has no specific problems of its own and can be satisfactorily dealt with juridically, canonically, and politically. The European approach also grants that religious freedom is one of the "human rights," but a right with its own special character, since it is immediately based on the absolute relationship between God and man.¹¹

These two approaches are evident in the background of the various formulations of the Declaration at the Council as they emerged from the floor debates and the committee revisions. Before analyzing them briefly, it would be good to give an overall view of the contents of the final Declaration as a whole.

In its introduction, the Declaration grounds the right to religious freedom in man's intrinsic dignity as a human person. Because of man's increasing awareness of this dignity, the problem of his religious freedom is raised in new terms today and, therefore, the Council feels that it must make a specific declaration on the subject. It is responding to the "signs of the times."

¹¹ Cf. Petrus Huizing, S.J., *Religious Freedom: A Bibliographical Survey*, 18 CONCILIUM 119 (1966).

The first half ("The General Principles of Religious Freedom") is a general account of religious freedom and sketches a philosophical argument for it. The emphasis is restricted; the concern is with the juridical and social order and the validity of that order, of the human, and therefore civil right to the free exercise of religion. Government should respect and favor the religious life of the citizenry but should not command or inhibit religious acts. In preventing abuses, it must act according to religious norms for the preservation of public order.

The rational argument holds that man has an obligation to seek the truth and embrace it where it is found, especially in religious matters. Because of human dignity, man in society must be free from all constraint, legal or extra-legal, in his pursuit of truth, in his religious belief, worship, and practice, both privately and publicly. "Religious freedom . . . has to do with immunity from coercion in civil society." This leaves the traditional teaching of the moral claim of revelation and of Christ's Church on man and the human community explicitly intact. The document speaks of the "moral duty of men and societies toward the true religion and toward the one Church of Christ." Then the norms for the legitimate limitations of this right, because of "public order," are given. The obligation of governments to protect and foster religious freedom is urged, a number of constitutive rights implicit in the basic right are enumerated, and the implications for churches and religious communities are developed.

The second half ("Religious Freedom

in the Light of Revelation") is a rich and succinct statement of the central imperative that man's response to God must be free. It reconsiders the essential aspects of religious freedom under the light of Christian revelation. The Church claims religious freedom and independence for herself; she must live in an atmosphere conducive to the acceptance of God's revelation of the Christian faith. The Council deplors the oppressive policies of some governments.

This claim is not made for the Catholic Church alone. The conclusion is an exercise in *aggiornamento*. Given the present historical situation, religious freedom is necessary for the peaceful and decent coexistence of individuals, nations, and the political communities of the world society. At the end there is a note of joy that most nations in their constitutions have declared religious liberty to be a civil right and in the fact that it is recognized in important international documents. There is a note of sadness, too, and the grim fact is noted that there still exist regimes in the world under which, even though freedom of religious worship receives constitutional recognition, the powers of government are engaged in the effort to deter citizens from the profession of religion and to make life difficult for religious communities.¹²

A glance at the history of the two years of debate and revisions and rewriting of the draft texts will help us under-

¹² For this summary of the Declaration, see D'Arcy, *Freedom of Religion*, 6 NEW CATH. ENCYC. 107; Trisco, *Vatican Council II*, 14 NEW CATH. ENCYC. 563-72. See also J. C. Murray, *The Declaration on Religious Freedom*, 15 CONCILIIUM 3 (1966).

stand why the definition of Religious Freedom which finally emerged at the Council was such a limited one. In attempting to explain these limitations, I have drawn heavily on the many articles and commentaries which Father John Courtney Murray, S.J., Professor of Theology at Woodstock College and Editor of *Theological Studies*, devoted to the subject before, during, and, especially, since the Council. He was a preeminent proponent of the American point of view and took a leading role in formulating the various versions of the Declaration.

When Bishop Emile de Smedt of Bruges, speaking for the Secretariat for the Promotion of Christian Unity which prepared the text, introduced the conciliar debate on religious freedom on November 19, 1963, he presented the first draft as the fifth chapter of the Decree on Ecumenism and the line of argument was influenced by that fact. His *relatio* (a technical term for an introduction of the content and methodology of a draft text) was a declaration of "freedom of conscience" and had the pastoral purpose of instructing Catholics in their conduct of ecumenical activities. The first schema stressed the moral, not juridical, aspects and its line of argument was theological in presenting Catholic doctrine of the freedom of the act of Christian faith. Toward the end, a juridical definition was introduced.

After a rewriting, a second schema was debated publicly during the third session from September 23 to 25, 1964. It was presented as an appendix to the decree on ecumenism and followed the basic line of argument in the first text. The right to religious freedom was still

grounded on the obligation a person has to follow the dictates of his conscience, but a new concept of the "rights of the person" and an argument from human dignity began to emerge as fundamental. The debates brought a basic confusion into the document. A rather drastic revision led to a third text which was substantially the same as the sixth text which was finally promulgated. It defined religious freedom as a juridical concept; the confusion began to clear because of the omission of some theological lines of argument which were not yet settled and still subject to further debate and clarification by theologians.¹³

When the Declaration was published in its final form at the end of 1965, its definition of religious freedom was restricted, for the most part, to the juridical and political meanings of the term, although some of the confusion caused by the different emphases of Anglo-Saxon and Continental approaches remains. The definition now is written in the same sense in which constitutional lawyers interpret the right to religious liberty in the American constitution. "[H]ere," asserts Father Murray, "it was on solid ground. The definition is commonly accepted, and

¹³ John Courtney Murray has traced the thread of the debate through the last three sessions of the Council in his essay, *The Declaration on Religious Freedom: A Moment in its Legislative History*, RELIGIOUS LIBERTY: AN END AND A BEGINNING 15 (1966). For longer accounts, one may consult the works of XAVIER RYNNE, THE SECOND SESSION 223-34; THE THIRD SESSION 24-31; THE FOURTH SESSION 31-53. The last two DAYBOOKS OF THE COUNCIL, published by NCWC, reprint in some detail the course of the debate through the last three sessions.

it is not only technically correct from a juridical point of view, but also unexceptional from a moral point of view.”¹⁴

Before any further exploration of the Declaration's definition, it would be useful to follow Bishop de Smedt's *relatio* as he employed the ancient logical technique of prefacing the definition of what something *is* by first explaining what it is *not*. When he introduced the first draft in 1963 he seemed anxious to remove some of the bitterness and confusion from the debate by explaining that the term “religious liberty” was used in the document in a very restricted sense and that it should not be stretched to cover other aspects of freedom.

First, he said, the term did not mean religious *indifferentism*. “When religious liberty is defended, it is not asserted that it is proper for man to consider the religious problem according to his own whim without any moral obligation and decide for himself according to his own will whether or not to embrace religion.”

Next, the term did not mean laicism: “Nor is it affirmed that the human conscience is free in the sense that it is as if it were outside the law, absolved from any obligation toward God.” Laicism was a theory introduced by Continental European opponents of the Church in upholding a principle of religious liberty which spoke of “freedom of conscience” and “freedom of cult.” As they advocated these “freedoms,” they were ideological, not juridical, statements of religious liberty and meant that the individual con-

science is absolutely autonomous. The theological implication was that religion was a purely private affair, irrelevant to any of the public concerns of the political community. In current Catholic condemnations of this attitude in the United States, the term “secularism” is used to identify this ideology.¹⁵

Bishop de Smedt then explained that the document did not wish to identify religious freedom with doctrinal relativism: “Nor is it said that falsehood is to be considered on an equal footing with truth, as though there were no objective norm of truth.” In an analysis of the development of doctrine on this subject within the Church, Pietro Pavan remarked that one of the two central themes (the other is the dignity of man) constantly recurring is this insistence on the existence of an objective moral order, essentially unchangeable but with innumerable gradations in its concrete application. The Declaration did not ultimately base the right to religious practice on an argument from “freedom of conscience” (it does not use this term anywhere), possibly because the phrase is so often used to imply that “I have a right to do what my conscience tells me to do, simply because my conscience tells me to do it.” This would be subjectivism (the current word is “situationism”) and implies that in the end it is my own conscience, and not objective truth, which determines

¹⁴ J. C. Murray, *The Declaration on Religious Freedom: A Moment in its Legislative History*, *supra* note 13, at 27.

¹⁵ See, e.g., *The Annual Statement of the Bishops of the United States on “Secularism,”* November 14, 1947, reprinted in OUR BISHOPS SPEAK 137 (Huber ed. 1952). See #4 of the Declaration, where “secularism” is implicitly condemned. *Supra* at 102.

what is right or wrong, true or false.¹⁶

What, then, did the Declaration on Religious Freedom define?

The doctrinal substance of the Declaration is stated in two paragraphs at the beginning:

This Vatican Synod declares that the human person has a right to religious freedom. This freedom means that all men 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 own beliefs. Nor is anyone to be restrained from acting in accordance with his own beliefs, whether publicly or privately, whether alone or in association with others, within due limits.

The Synod further declares that the right to religious freedom has its foundation in the very dignity of the human person, as this dignity is known through the revealed Word of God and by reason itself. This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed. Thus it is to become a civil right. [#2]

This definition of religious freedom as a human and, therefore, civil right, is phrased negatively. It is a "freedom from" and not a "freedom for." This puts it into the tradition of the American Bill of Rights, which does not affirm that a man has a right to believe what is false or to do what is wrong, but does guarantee immunity from coercion in religious matters. "Neither error nor evil can be the object of a right, only what is true

and good. It is, however, true and good that a man should enjoy freedom from coercion in matters religious."¹⁷

The right, or moral claim, which every man can make on every other man—individuals, groups, political and social powers—is here said to be twofold: no man can be forced to act contrary to his religious beliefs (Catholic teaching has always held this) and, secondly, no man can be forcibly restrained from acting on his beliefs, "whether privately or publicly." There is a clear advance here; the right to public worship by non-Catholic religious groups had not been acknowledged by the older Catholic writers on religious liberty. It might be said that, for the first time, the Anglo-Saxon concept of religious liberty and the American principle of separation of Church and State have been clearly acknowledged in an official document from the highest Catholic sources.

John Courtney Murray, the chief spokesman at Rome for what has been called the "pragmatic" approach of the Declaration and the principal drafter of the version of the document debated during the fourth session, summed up the intent of the Declaration, as it was finally promulgated, for an international theological conference at Notre Dame in March, 1966:

The conclusion is that the doctrine of

¹⁶ Bishop de Smedt's *relatio* during the second session is printed in COUNCIL SPEECHES OF VATICAN II, *supra* note 10, at 237-54.

¹⁷ J. C. Murray, in his notes to the text in THE DOCUMENTS OF VATICAN II, *supra* note 1. Pietro Pavan, one of the chief writers of the social encyclicals of Pope John XXIII, has written of the definition in the Declaration in *The Right to Religious Freedom in the Conciliar Declaration*, 18 CONCILIVM 37-52 (1966).

the Declaration forms an organic whole. All of it hangs suspended from the supreme principle of the dignity of the human person. Inherent in this dignity is the exigence that a man should act on his own initiative and responsibility, not under coercion, but from inward motivation, by his sense of duty toward the transcendent order of truth and morality. This exigence in turn founds the political principle that the freedom of the person is to be respected as far as possible and restricted only in cases of necessity. The equality of this exigence in all men, who are equal in their dignity as human persons, founds the further juridical principle of the equality of all citizens before the law. And from these two principles in conjunction two sets of conclusions follow with equal immediacy. The first juridical conclusion is that the full immunity of the human person from coercion in religious matters is the object of a genuine human right. The corresponding first political conclusion is the duty of government itself to respect this right and to ensure respect for it in society. The second juridical conclusion is that the exercise of the right to religious freedom is to be as free as possible. And the second political conclusion is that government or legal limitation of the exercise of the right is warranted only by the criterion of necessity.¹⁸

Some commentators on the Declaration are unhappy with the emphasis on the juridical and political aspects of religious freedom which Murray finds (and helped to insert) in the document. Their objections are not to the idea of religious liberty as such but to the method of

presenting it. They reflect the fundamental concern for a more theoretical approach which European members of the drafting committee had upheld. But certainly the Declaration is not a purely pragmatic statement, and just as surely the dialogue between the theologians is not ended, but hardly begun. It seems that all the commentators would agree on that.

Murray's own satisfaction at the primary emphasis given the juridical and political aspects of religious freedom in the Declaration is part of his conviction that the positive values inherent in religious belief, profession, and practice, however great their religious, moral, and social significance, are juridically irrelevant. He holds that a harmony exists between religious freedom in the juridico-social sense and Christian freedom in the various senses of this latter concept as they emerge from scripture and from the doctrine of the Church. The Declaration, he says, merely suggests that the two kinds of freedom are related; it does not undertake to specify more closely what their precise relationship is.¹⁹

¹⁹ For Father Francis J. Canavan, S.J., looking at the Declaration from the viewpoint of a political scientist, the argument in the Declaration fails to appreciate fully the political dimension. He thinks that the ancient "principle of consent" would have strengthened it at one point, and at another, full use of the juridical principle of "equality before the law." He also sees the scheme as tinged with subjectivism, wants even more emphasis on the political order, and more development of the relationship between religious freedom and constitutional government. Canavan, S.J., *The Catholic Concept of Religious Freedom as a Human Right*, RELIGIOUS LIBERTY: AN END AND A BEGINNING 65 (ed. J. C. Murray 1966).

¹⁸ J. C. Murray, *The Declaration on Religious Freedom*, VATICAN II: AN INTERFAITH APPRAISAL 576 (ed. J. Miller, 1966).

Pope John XXIII wanted the Council to be pastoral, and the Declaration on Religious Freedom is a practical pastoral document. This does not mean that it has no doctrinal content. There is in it an ethical doctrine of religious freedom as a human right, both personal and collective. There is a political doctrine about the role of governments in relation to religion in the state. There is also a theological doctrine which claims freedom for the Church, and this principle regulates the relations between the Church and the socio-political order. [# 4]

The Declaration on Religious Liberty did not intend to be a full discussion of the theology of religious freedom, nor did it treat fully the whole question of "freedom of conscience," as that term was used in Catholic theology in the many earlier treatments of a person's right to religious liberty. To put that liberty into the far wider context of a whole theology of freedom would have been more profitable, perhaps, but much more difficult.²⁰ The development of the doctrine has not yet reached the stage where it could be done handily.

For some books and articles reporting and commenting on the Declaration by European authors, a handy list is found in Petrus Huizing's bibliographical survey cited in 18 CONCILIIUM (1966). He also lists many articles that appeared during the Council. Especially interesting is a symposium edited by Murray in FREEDOM AND MAN (1965), with essays by men like Hans Küng, Karl Rahner, Piet Fransen, C. Malik, and Daniel Callahan.

²⁰ Murray has listed "four major themes" which he said would have to be developed for a full theology of religious freedom. Murray, *The Declaration on Religious Freedom*, 15 CONCILIIUM 3 (1966). See also J. MURRAY, VATICAN II: AN INTERFAITH APPRAISAL 577-85 (ed. J. Miller, 1966).

At the beginning of the discussion in the Council, the argument for religious freedom was basically theological. The first drafts argued from freedom of conscience in religious matters to the juridical right to religious liberty. The second draft argued from human dignity and man's highest good to a constitutional demand for liberty. These theological arguments were largely the work of European thinkers influenced by contemporary philosophies of personalism and existentialism. In several of his commentaries, Father Murray shows his uneasiness about the validity of some of these arguments which proceed from the order of ethics and theology and from conscience and human dignity to the juridical order of constitutional guarantees. Father Murray opposed the Europeans who helped prepare the draft when their arguments proceeded too quickly on an abstract, metaphysical plane of deduction from an eternal unchangeable nature of man.

It would seem that John Courtney Murray, who has spent a theological lifetime researching and writing on the historical development, the constitutional statements, and the theology of religious freedom, was able to draw on the tradition of American law and pragmatic application of the law to furnish a valuable corrective to a too abstract treatment of religious liberty. Again, one can sense his satisfaction in all the commentaries he has written that the final version of the Declaration was more a beginning than an end of the dialogue on religious freedom in which the Church has engaged the modern world.

The Impact in America

When he first introduced the text which eventually became the Declaration on Religious Liberty, Bishop Emile de Smedt of Bruges listed four reasons why the Council should clearly explain and defend the right of all men to religious liberty. The first reason was simply that it was true that this freedom is a human right—and the Church should defend the truth. Next, religious freedom is an integral part of the dignity of man and it was up to the Church to proclaim it openly at a time when almost half the human race was deprived of religious liberty by atheistic materialism of various kinds. Thirdly, he said, this is a world of religious pluralism and the Church must light the way to peaceful coexistence for men of different religious beliefs or of no belief at all. And finally, there was ecumenism:

Many non-Catholics harbor an aversion against the Church or at least suspect her of Machiavellianism because we seem to them to demand the free exercise of religion when Catholics are in a minority in any nation and at the same time refuse and deny the same religious liberty when Catholics are in a majority.

Catholics, who are a minority in a pluralistic United States where the principles of the Declaration on Religious Freedom had been commonplace for almost two centuries, will appreciate that last reason most of all.

American Protestants and Jews for the most part have acknowledged that their Catholic fellow citizens staunchly upheld the right to religious liberty and defended, with their lives at times, the American

system of separation of Church and State. They knew that Catholic spokesmen, beginning with Bishop John Carroll in colonial times, welcomed the provision of the first amendment which forbade the the congress to make any law favoring the establishment of one religion over another. They knew that American Catholic historians and theologians were realistically aware that, despite the record of periodic intolerance against their Church, she had grown and prospered under the first amendment and were convinced that a system of separation of Church and State was a better guarantee for the growth and freedom of their Church than any European system of union of Church and State.

Through all the stress and strain in the conflicts between Protestants and Catholics over such issues as the parochial schools, Catholics realized that their Protestant and Jewish neighbors did not really doubt that they were devoted to the constitutional provisions for religious freedom for all. But there was always the suspicion of what Bishop de Smedt had called "Machiavellianism." American Jews and Protestants were legitimately concerned over the fact that the religious freedom which Catholics professed and defended in the United States had never been clearly defined and defended in official documents from Rome.

Non-Catholics in the United States did not reject Archbishop McNicholas of Cincinnati when in 1948 as the chairman of the Administrative Board of the National Catholic Welfare Conference he solemnly promised; "If tomorrow Catholics con-

stituted a majority in our country, they would not seek a union of Church and State. They would then as now uphold the Constitution and all its Amendments." But they knew that there were passages in Pope Leo XIII's encyclical epistle to the bishops of the United States in 1895 which generously praised the American government's attitude and laws about religion, but immediately added:

Yet, though all this is true, it would be very erroneous to draw the conclusion that in America is to be sought the type of the most desirable status of the Church, or that it would be universally lawful or expedient for State and Church to be, as in America, dissevered and divorced. . . . Catholicity in America is in good condition, nay, is even enjoying a prosperous growth . . . but she would bring forth more abundant fruits if, in addition to liberty, she enjoyed the favor of the laws and the patronage of public authority.²¹

There were passages in Pope Leo's 1885 encyclical on "The Christian Constitution of States" which seemed to write off the American experience as merely "tolerable," and pages in Catholic textbooks on political science like Ryan and Boland's *Catholic Principles of Politics* which theoretically could advocate the repeal of the first amendment while saying that, realistically, such an act was exceedingly improbable.²²

²¹ Encyclical Letter of Pope Leo XIII, *Longinqua* (1895). This is reprinted in 12 AMER. ECCLESIASTICAL REV. 346-56 (1895); J. T. ELLIS, DOCUMENTS OF AMERICAN CATHOLIC HISTORY 514-17 (1956).

²² J. RYAN & F. BOLAND, CATHOLIC PRINCIPLES OF POLITICS 315, 320-22 (1947). See also J. KERWIN, CATHOLIC VIEWPOINT ON CHURCH AND

If anything is needed to demonstrate the development of doctrine from Leo XIII to Paul VI, it might well be the glaring difference in tone between such statements and the sixth section of the Declaration on Religious Freedom:

If, in view of the peculiar circumstances obtaining among certain peoples, special legal recognition is given in the constitutional order of society to one religious body, it is at the same time imperative that the right of all citizens and religious bodies to religious freedom should be recognized and made effective in practice.²³

Here the Declaration which Pope Paul promulgated in 1965 still holds out the possibility of some kind of union of Church and State, but it puts that possibility in rather weak hypothetical terms and insinuates that establishment of a religion by the State, from a Catholic point of view, is a matter of historical circumstance, not of theological doctrine.

There are other important implications in that paragraph. One is the acknowledgment that there has been a decisive development of doctrine between the *Syllabus of Errors* of 1864 and the Declaration of 1965. This recognition of development, here and in other sections of the Declaration, will have repercussions in theological thought in many other areas.

STATE 90 (1960); J. T. ELLIS, *Church and State: An American Catholic Tradition*, 207 HARPER'S MAG. 63 (Nov. 1953).

²³ See Murray's notes to this passage in *Declaration on Religious Freedom*, supra note 1.

It is more important for our purposes here to realize that the significant modification of the traditional attitude on the relation of Church and State means that the Church has truly read the "signs of the times," has acknowledged its minority position in the modern world, and has abandoned the "thesis-hypothesis" theory of the relation of Church and State which dominated Catholic thought for the past hundred years. This is the theory implicit in Leo XIII's encyclicals, in Ryan and Boland's textbook, and in dozens of Church-State treatments in the Catholic manuals up to the present. The "hypothesis" that separation of Church and State was merely to be "tolerated," especially in countries where Catholics were in a minority, has become the "thesis," that is, the normal situation, the only one that counts.

The "thesis-hypothesis" doctrine, which until recently was presented as if it were an ancient dogmatic principle of the Church, is really only a hundred years old. Historians trace it back to an article in the Jesuit periodical, *La Civiltà Cattolica*, at the time of the First Vatican Council, although the idea itself can be traced back to St. Thomas Aquinas in the thirteenth century and was extended to the Protestant churches from the sixteenth century.²⁴

²⁴ J. Lecler, S.J., *Religious Freedom: An Historical Survey*, 18 CONCILIIUM 10 (1966). See M. Bevenot, *Thesis and Hypothesis*, 15 THEOLOGICAL STUDIES 440-46 (1954). G. Weigel, S.J., *The Church and The Democratic State*, 27 THOUGHT 165 (1952) makes an interesting distinction between the static expositors of the doctrine on Church and State and the dynamic expositors (Murray's position, which Weigel

As the doctrine appeared in Catholic textbooks of theology and philosophy for the past hundred years, the "thesis" meant the ideal situation of a union between the Roman Catholic Church and the State, with the implication that worship by non-Catholic groups should be private and limited. The "hypothesis" meant a situation where the Catholic religion was in a minority status within a nation; in that case separation of Church and State could be "tolerated" for reasons of expediency. The practical result, as noted above, was a frequent charge of "Machiavellianism" against the Church. Catholics were accused of demanding freedom for themselves when they were the minority, but of being unwilling to extend a genuine freedom to non-Catholics where they were the majority.

The "thesis-hypothesis" issue was an important part of a rather celebrated controversy between Father John Courtney Murray and a group of Catholic University theologians at the beginning of the nineteen-fifties. In response to a series of articles in which Father Murray argued that "thesis-hypothesis" was not defined by the Church as Catholic doctrine, they wrote that it was a recent innovation and not truly part of the long tradition of Catholic doctrine on the issue, and that the American principle of separation of Church and State was an equally and, indeed, more valid theological conclusion. The American system, in other words,

defends). The abandonment of the "thesis-hypothesis" position is taken for granted in Vatican II's PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD (*Gaudium et Spes*) 76.

was not a purely pragmatic device of expediency for the Church, but could be stated as a principle in its own right. The Declaration on Religious Freedom of 1965 is a source of considerable satisfaction to the followers of Father Murray in his controversy with a rather formidable and powerful array of American Catholic theologians.²⁵

In 1870, at the time of the First Vatican Council, an editorial in the Catholic *Dublin Review* admitted that the editors did not know for sure just what would be discussed at the Council, but the one

thing they were sure of was that the "sacred principle" of the union of Church and State would never be discussed or denied. A century later, during the Second Vatican Council, an editorial in the American magazine, *The Commonweal*, said that "it is absolutely vital that the Church be on record, in a way that Catholics over the world cannot contravene, as a firm supporter of religious liberty. This can only be done by a pronouncement which grounds religious liberty and the nature of man in faith as a free gift of God."

Happily, the Church is on record with her Declaration on Religious Freedom. She has answered the legitimate questions of American supporters of religious liberty who had asked for an official interpretation of the Church's view of religious freedom in the modern world. In this area, she has responded to Pope John's call for *aggiornamento*.

* * * * *

Some Suggestions for Further Reading for Catholic Lawyers on "Religious Freedom":

1. Father John Courtney Murray holds an altogether unique place in the discussions before, during, and since the Council. Many other articles in professional and popular journals, both American and European, could be added to those already quoted in the notes. In the Spring, 1952, issue of *THOUGHT* (27 *THOUGHT* 6), Fr. Victor R. Yanitelli published an anthology of his writings in an article entitled, *A Church-State Anthology: The Work of Father Murray*. The author gives a bibliography as of that

²⁵ Some of the key articles by Murray in this controversy were printed in the journal *THEOLOGICAL STUDIES*, which he edits: *Freedom of Religion: Contemporary Orientations of Catholic Thought on Church and State in the Light of History*, vol. 6, 1945; *Current Theology on Religious Freedom*, vol. 10, 1949; *The Problem of State Religion*, vol. 12, 1951. Important also is J. C. Murray, *Governmental Repression of Heresy*, *PROCEEDINGS OF THE CATHOLIC THEOLOGICAL SOCIETY OF AMERICA* 26 (1949). The attacks on Murray's "dynamic" position made by various "static" professors at Catholic University (Joseph C. Fenton, Francis Connell) and by George W. Shea and Cardinal Ottaviani appeared in *THE AMERICAN ECCLESIASTICAL REVIEW*, volumes 123-28 (1950-53). Fr. Murray replied in the same journal to Fr. Shea in the 1951 volume, pp. 327-52. Fr. Joseph Fenton published *The Status of a Controversy*, in the same volume, pp. 451-58. A good bibliography of the whole controversy appeared in *1 THEOLOGY DIGEST* 173-75 (1953). Murray's article, *This Matter of Religious Freedom*, 112 *AMERICA* 40 (1965), is a summary of several talks he gave as a *peritus* to the Council Fathers. In *PETER AND CAESAR* (1965), E. A. GOERNER, a Catholic political scientist, wrote a critical study of Murray's approach and doctrine and the Council's competency and wisdom in speaking on religious freedom.

date. Thomas T. Love, a Protestant theologian, has written a sympathetic and understanding synthesis of the thought of Fr. Murray. LOVE, JOHN COURTNEY MURRAY: CONTEMPORARY CHURCH-STATE THEORY (1965). There is a lengthy bibliography of books and articles containing all the pertinent material to illuminate the important controversy in the early Fifties in this work.

2. THE NEW CATHOLIC ENCYCLOPEDIA, published in 1967, has several valuable articles which give a succinct but comprehensive background on the Declaration and its application for American lawyers. Especially recommended are the following sections:

Vol. 3 *Church and State* 726-38, articles by M.R.P. McGuire, D.J. Herlihy, M.J. Havran and J.N. Moody.

Vol. 3 *Church and State Legal History in the United States* 742-58, articles by T.O. Hanley, M.J. Mullaney, Jr., J.C. Polking, and R.J. Regan.

Vol. 6 *Freedom of Religion* 107-14, by E. D'Arcy.

Vol. 6 *Freedom of Religion, U.S. Law of* 114-22, by G.E. Reed.

Vol. 13 *Freedom of Religion, Papal Teaching on* 352-61, by P. Pavan.

In the index volume (15) various cases on the United States Law of Freedom of Religion are indexed on page 483.

3. Some books worth consulting:

J. MARITAIN, THE TRUE HUMANISM (1938); THE RIGHTS OF

MAN AND NATURAL LAW (1943); CHRISTIANITY AND DEMOCRACY (1944); THE PERSON AND THE COMMON GOOD (1947); THE THINGS THAT ARE NOT CAESAR'S (1939).

E. D'ARCY, CONSCIENCE AND ITS RIGHT TO FREEDOM (1961). A revised and augmented edition was published in French in 1964. R.J. REGAN, S.J., AMERICAN PLURALISM AND THE CATHOLIC CONSCIENCE (1963).

J.G. KERWIN, CATHOLIC VIEWPOINT ON CHURCH AND STATE (1960).

FREEDOM AND MAN (J.C. Murray ed. 1965).

A.P. STOKES, CHURCH AND STATE IN THE UNITED STATES (1950), a monumental, three volume work that has been called "definitive."

T.G. SANDERS, PROTESTANT CONCEPTS OF CHURCH AND STATE (1964).

4. Some useful articles on religious liberty in the United States:

E. Duff, S.J., *Church-State in the American Environment: An Historical And Legal Survey*, SOCIAL ORDER, (1960) (published by the National Jesuit Social Science Center).

197 THE CATHOLIC WORLD 280 (1963) with a symposium, *The Meaning of Religion in the First Amendment*, containing the proceedings of the 1963 First Amendment Conference.

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J.A. Hardon, S.J., *Cooperation of Church and State in American Legislation*, 57 THE HOMILETIC AND PASTORAL REVIEW 309 (1967).

J.A. Hardon, S.J., *Cooperation of Church and State in the Supreme Court*, 57 THE HOMILETIC AND PASTORAL REVIEW 419 (1967).

J.A. Hardon, S.J., *Cooperation of Church and State in American Education*, 57 THE HOMILETIC AND PASTORAL REVIEW 523 (1967).

D.R. Russell, *English and American Democracy and The Papacy*, 72 THE DOWNSIDE REVIEW

30 (1953-4) (reprinted in THE CATHOLIC MIND 338 (1954)).

Cardinal Augustin Bea, *Religious Freedom*, THE CATHOLIC MIND 4-15 (1964).

Bennet, *A Protestant Views Religious Liberty*, 201 THE CATHOLIC WORLD 362 (1965).

Canavan, *The Declaration on Religious Liberty*, AMERICA, Nov. 20, 1965 at 635. See also Canavan, *Church, State, and Council*, ECUMENISM AND VATICAN II 44-62 (O'Neill ed. 1964).

Giacchi, *Freedom of Religion and the State*, 11 CATHOLIC LAW. 271 (1965).

Sheerin, C.S.P., *The Nature of Religious Liberty*, 201 THE CATHOLIC WORLD 356 (1965).



IN OTHER PUBLICATIONS

(Continued)

In seeking to attain the application of the equal protection clause to the laws on illegitimacy, the author advocates that, at one end of the spectrum of legislation, the illegitimate should be given all the support rights of a legitimate child. The other extreme would be paternal affection, a matter which the author feels cannot be legislated in the illegitimate's favor. Other matters of legislation, such as intestacy, welfare, and the use of the paternal name would fall somewhere in between.

The author's argument for legal equality

for illegitimates is a convincing one. The child is an unwitting victim of a situation over which he could exercise no control. There seems little justification for punishing him for this fact by giving him second-class legal rights. Although he will never be free of social stigma, there is no sound justification for denying him the legal rights of all citizens. While Mr. Krause's explanation of the "real" reason for discriminatory legislation is somewhat oversimplified, it seems clear that an illegitimate child's rights outweigh other considerations for such discriminatory legislation.