A paradigmatic change: Religious Liberty from Alfredo Ottaviani to *Dignitatis humanae**

Un cambio paradigmático: la libertad religiosa desde Alfredo Ottaviani a la «Dignitatis Humanae»

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Abstract: There is no human right that has been as controversial as religious liberty. While it is but a consequence of the existing pluralism in society which today is recognised by the most advanced States and communities of States as forming the practical and theoretical basis for all political institutions, Islamic countries still reject what they consider simply a Judeo-Christian tradition; and the Cairo Declaration on Human Rights in Islam of 1990 subjects all the rights and freedoms stipulated in this Declaration to the Islamic Sharia.

The essential flaw of this position consists in that it regards religious liberty not a liberty of man but a liberty of truth. And since Islam is considered to be the religion of true unspoiled nature it is concluded that there cannot exist any human right that is not supported by, or even runs counter to, Islamic doctrine. Until this approach is overcome, there will not be true religious liberty in Islamic countries.

That it is possible, for a religious community that claims to be the keeper of religious truth, to overcome such an approach has been demonstrated in an exemplary manner by the Catholic Church. Papal teaching and ecclesiastical doctrine before the Second Vatican Council maintained a position not unsimilar to that of the Cairo Declaration, arguing that error cannot claim the same right as truth. It was only the Council's Declaration on Religious Liberty *Dignitatis humanae* of 1965 that brought about a radical change by recognising that religious liberty is a liberty of man deriving from his dignity as a free person and – as all human rights – not subject to any other restrictions than those which are necessary to protect the same rights and liberties of others. The position taken by the Second Vatican Council can serve as a model for overcoming the traditional approach of religions and/or religious institutions and "religious" States towards freedom of religion.

Key words: Cairo Declaration on Human Rights in Islam; Church and State; dignity of man; *Dignitatis humanae*; freedom of expression; freedom of religion; freedom of thought; human rights in Catholic doctrine before and after Vaticanum II; human rights in Islam; Ius publicum ecclesiasticum; religion and the State; Second Vatican Council, Declaration on religious freedom.

Resumen: No hay un derecho humano que haya despertado tanta polémica como la libertad religiosa. Los países islámicos aún la rechazan puesto que la consideran una simple tradición judeo-cristiana. En este sentido, la Declaración de El Cairo sobre los Derechos Humanos de 1990 sujetó todos los derechos entonces reconocidos al respeto de la Sharia islámica.

En este artículo se criticará esta posición y se propondrá un enfoque distinto, basado sobre la aproximación que ha tenido hacia este tema la Iglesia Católica desde la declaración conciliar sobre la libertad religiosa «Dignitatis Humanae», de 1965.

Palabras clave: Declaración de El Cairo sobre Derechos Humanos en el Islam, la Iglesia y el Estado, dignidad del hombre, *Dignitatis humanae*, libertad de expresión, libertad religiosa, libertad de pensamiento, los derechos humanos en la doctrina católica, los derechos humanos en el Islam; *ecclesiasticum Ius publicum*, la religión y el Estado, el Concilio Vaticano II, Declaración sobre la libertad religiosa.

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I. Dignity of man the basis of human rights

If we accept that human rights are rooted in the dignity of man and if the dignity of man is based on, or even consist in, his being endowed with reason and free will, then the most fundamental human rights are those which relate to these human faculties. Man must be free to search for truth and man must be free to act according to his perception of truth.

The right of man to search for truth presupposes freedom of thought; and the right to hold a truth and to act according to one's perception of truth presupposes freedom of conscience. Freedom of thought includes the right to form a view about (what is colloquially referred to as) "God and the World" and what is called in academic discussion the philosophy of life or, with a loan word taken from the German language, the *Weltanschauung*. And if this *Weltanschauung* is based on the belief in a numinous, it is commonly called religion. Freedom of thought and freedom of conscience therefore include freedom of religion; and freedom to hold a truth and freedom to act accordingly include the right to free exercise of religion.

The fact that man is not an isolated being but a *zóon politikón*, an *ens sociale*, a social being, makes it necessary for him to communicate and to cooperate with other human beings for the establishment of the common good. Communication is necessary not only for making cooperation more effective but also for clarifying the respective spheres of freedom in order to avoid that the freedom of the one is unduly curtailed by the unrestricted exercise of the freedom of the other. Freedom of thought and freedom to act according to one's conscience include therefore the freedom of speech, including the freedom of all forms of expression[1]. And freedom of *Weltanschauung* and religion includes the freedom to propagate one's own belief and to preach one's own faith.

Again, as a social being living in community with others, man has the right to exercise his religion not only in private and alone but also in public and in community with others. This right is but the social side of freedom of religion.

[1] E.g. freedom of press, of radio and television, and of the internet.

II. Gradual recognition of freedom of religion

Freedom of religion has been recognised in the early declarations of human rights and fundamental freedoms, from the Virginia Declaration of Right of 1776[2] and the American Bill of Rights of 1789/1791[3] to the Déclaration des droits de l'homme et du citoyen of 1789[4].

It has found its way into the different constitutions enacted in the course of the nineteenth and twentieth century[5]. It has also been embodied in international instruments intended for the protection of human rights, especially in the Universal Declaration of Human Rights of 1948[6] and in the United Nations Covenant of Civil and Political Rights of 1966[7], and, with regard to Europe, in

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[2] Section XVI provides: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity toward each other". Cfr. Thorpe, F. N. (ed.), *The Federal and State Constitutions, Colonial Charters etc.*, vol. VII, Washington 1909, pp. 3812 et seqs.

[3] Folwell, R. (ed.), *The Laws of the United States*, Philadelphia 1796. The so-called First Amendment to the United States Constitution contains the establishment clause, the free exercise clause; freedom of speech, of the press, and of assembly; and the right to petition. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

[4] Cfr. Article 10: "Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi". Cfr. also Article 11: "La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme: tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi". Article

[5] Cfr., as an example, the Austrian Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger of 1867, Articles 13, 14 and 15 and 16. Articles 15 and 16 distinguished between religious communities recognised by law and others, not recognised by law. While the Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger of 1867still forms part of the Austrian Constitution, Article 16 has been derogated by those international instruments binding upon Austria which grant the right to free exercise of religion, both in private and in public, to everyone.

[6] General Assembly resolution 217 A (III), adopted by the General Assembly of the United Nations on 10 December 1948. Cfr. Art. 18: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance". Cfr. also Art. 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

[7] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Cfr. Article 18:

the European Convention on Human Rights of 1950[8], and the Charter of Fundamental Rights of the European Union of 2000/2009[9].

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
The States Parties to the present Covenant 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.
Cfr. also Article 19:
Everyone shall have the right to hold opinions without interference.
Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
For respect of the rights or reputations of others;
For the protection of national security or of public order (ordre public), or of public health or morals.

8 Convention for the Protection of Human Rights and Fundamental Freedoms, with Additional Protocols. The (so far) 15 Protocols open for signature [can be divided into two main groups: those adding additional rights to those protected by the convention and those concerning institutions and procedures for the international protection of the rights protected by the Convention's system. Cfr. Articles 9 and 10.
Art. 9**.** Freedom of thought, conscience and religion:
Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
Article 10. Freedom of expression
Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

9 EU OJ 2000/C 364/01. Cfr. Articles 1, 10 and 11.
Article 1. Human dignity
Human dignity is inviolable. It must be respected and protected.

III. Freedom of religion not opposed to reason and religion

If freedom of religion is rooted in the dignity of man and if the dignity of man is based on, or even consist in, his being endowed with reason and free will, than logic forbids to draw arguments from reason to abolish or curtail freedom of religion. What characterises the dignity of man cannot be used as an instrument against the consequences directly following from that dignity.

Moreover, logic forbids to invoke religion for the purpose of abolishing or curtailing freedom of religion. Where this is done, freedom of religion is not based on human dignity but on certain religious tenets which allegedly are based on a command of God. In such a case, full freedom of religion is granted only to the followers of the religion which proclaims these tenets, while the followers of all other religions enjoy (at the best) limited toleration.

IV. Religious communities and their approach to freedom of religion

Unfortunately, in the past as in the presence, arguments both from the sphere of reason and from the sphere of religion have been brought forward in order to deny or to curtail freedom of religion for others.

A. *Islamic approach to freedom of religion*

The rejection, by certain Islamic countries, of the Universal Declaration of Human Rights of 1948 as merely presenting a secular understanding of the

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Article 10
Freedom of thought, conscience and religion
1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.
Article 11
Freedom of expression and information
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Judeo-Christian tradition and the allegation that Muslims could not conform to it without trespassing the Islamic law[10] shows that the prevailing Islamic concept of human rights is not based on the dignity of man but on Islamic law. This is confirmed by the Cairo Declaration on Human Rights in Islam of 1990[11], which subjects all rights and freedoms to the Islamic Shari'ah[12]. As regards religious freedom, the Declaration states that "Islam is the religion of true unspoiled nature"[13]. This gives Islam a privileged status[14], while the

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[10] Cfr. the Statement of the Iranian representative, Said Rajaie-Khorassani, to the UN General Assembly's Third Committee on 7 December 1984: "In his delegation's view, the concept of human rights was not limited to the Universal Declaration of Human Rights. Man was of divine origin and human dignity could not be reduced to a series of secular norms [...] certain concepts contained in the Universal Declaration of Human Rights needed to be revised. [Iran] recognized no authority or power but that of Almighty God and no legal tradition apart from Islamic law. As his delegation had already stated at the thirty-sixth session of the General Assembly, conventions, declarations and resolutions or decisions of international organizations, which were contrary to Islam had no validity in the Islamic Republic of Iran. [...] The Universal Declaration of Human Rights, which represented a secular understanding of the Judeo-Christian tradition, could not be implemented by Muslims and did not accord with the system of values recognized by the Islamic Republic of Iran; his country would therefore not hesitate to violate its provisions, since it had to choose between violating the divine law of the country and violating secular conventions". UN Doc. A/C.3/39/SR.65, paras. 91-95. Cfr. also DAVID LITTMAN, Universal Human Rights and "Human Rights in Islam", in *Midstream* (February/March 1999), also: http://web.archive.org/web/20060501234759/http://mypage.bluewin.ch/ameland/Islam.html.

[11] Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, contained in: U.N. GAOR, World Conference on Human Rights., Fourth Session Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) in an English translation. This Declaration also refers to the dignity of man but connects it with the "true religion", i.e. Islam. Cfr. Article 1, lit.a: "All human beings form one family whose members are united by their subordination to Allah and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations. The true religion is the guarantee for enhancing such dignity along the path to human integrity".

[12] Cfr. Article 24: "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah". Cfr. also Article 25: "The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration". The Cairo Declaration has been criticised not only for failing to guarantee freedom of religion, but also for failing to recognise full equality of men and women.

[13] Article 10.

[14] This applies also and especially in the field of education. Cfr. Article 9: "(a) The seeking of knowledge is an obligation and provision of education is the duty of the society and the State. The State shall ensure the availability of ways and means to acquire education and shall guarantee its diversity in the interest of the society *so as to enable man to be acquainted with the religion of Islam* and uncover the secrets of the Universe for the benefit of mankind. (b) Every human being has a right to receive both religious and worldly education from the various institutions of teaching, education and guidance, including the family, the school, the university,

followers of other religions are only tolerated[15] and in the dissemination of their belief under a constant threat of prosecution[16], all the more so as freedom of expression is also subject to the "principles"[17] and "norms of Islamic Shari'ah"[18].

B. *The Catholic Church's approach to freedom of religion*

The same position was –*mutatis mutandis*– maintained, up to the Second Vatican Council, in the teachings of the Catholic Church. This can be demonstrated by a number of documents issued by various Popes in the nineteenth[19]

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the media, etc., and in such an integrated and balanced manner that would develop human personality, *strengthen man's faith in Allah* and promote man's respect to and defence of both rights and obligations" (Italics supplied).

15 This becomes clear if Article 18, lit. a ("Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property") is read in conjunction with the provisions of Article 10 and of Article 22, lit. c and d.

16 Cfr. Article 10, second sentence: "It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism". This can be easily applied to all situations where the propagation of faith goes together with educational, medical, or otherwise charitable work, as is the case, e.g., with many Christian mission establishments. Cfr. also Article 22, lit. c: "Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith". It is a fact that today Christians are persecuted in many Islamic countries on the basis of laws that are inspired, or at least justified, by such kind of restrictions on freedom of expression.

17 Cfr. Article 22, lit. a: "Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah".

18 Cfr. Article 22, lit. b: "Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah".

19 It is not astonishing that the best collection of former illiberal teachings of the Popes can be found in in the works of those who reject *Dignitatis humanae* as a breach of the Church's tradition. The following quotations are taken from the document "The Doctrinal Errors of Dignitatis Humanae", issued by the sectarian "Traditional Catholic Religious Congregation of Mary Immaculate Queen (CMRI)". Cfr., in particular, the Gregory's XVI Encyclical Letter *Mirari vos* of 1832: "We come now to another cause, alas! all too fruitful of the deplorable ills which today afflict the Church. We mean indifferentism, or that widespread and dangerous opinion sown by the perfidy of the wicked, according to which it is possible, by the profession of some sort of faith, to procure the soul's salvation, provided that one's morals conform to the norms of justice and probity. From this poisoned source of indifferentism springs that false and absurd maxim, better termed the insanity **[***deliramentum***],** that liberty of conscience must be obtained and guaranteed for everyone. This is the most contagious of errors, which prepares the way for that absolute and

and twentieth[20] century which relativise man's liberty in favour of an objective truth. In order to avoid discussion on whether and to what extent these docu-

totally unrestrained liberty of opinions which, for the ruin of Church and State, is spreading everywhere and which certain men, through an excess of impudence, do not fear to put forward as advantageous to religion. Ah, 'what more disastrous death for souls than the liberty of error,' said St. Augustine". Cfr. also Pius' IX Encyclical Letter *Quanta cura* (1864); "Contrary to the teachings of the Holy Scriptures, of the Church, and of the holy Fathers, these persons do not hesitate to assert that 'the best condition of human society is that wherein no duty is recognized by the government of correcting, by enacted penalties, the violators of the Catholic religion, except when the maintenance of the public peace requires it.' From this totally false notion of social government, they fear not to uphold that erroneous opinion most pernicious to the Catholic Church, and to the salvation of souls, which was called by Our Predecessor, Gregory XVI (lately quoted) the insanity [*deliramentum*]: namely, 'that the liberty of conscience and of worship is the peculiar (or inalienable) right of every man, which should be proclaimed by law, and that citizens have the right to all kinds of liberty, to be restrained by no law, whether ecclesiastical or civil, by which they may be enabled to manifest openly and publicly their ideas, by word of mouth, through the press, or by any other means.'" Cfr. also the attached *Syllabus errorum* 1864, which lists the following "errors": "'15. Every man is free to embrace and profess that religion which, guided by the light of reason, he shall consider true.' '55. The Church ought to be separated from the State, and the State from the Church.' '77. In the present day, it is no longer expedient that the Catholic religion should be held as the only religion of the State, to the exclusion of all other forms of worship.' '79. Moreover, it is false that the civil liberty of every form of worship, and the full power, given to all, of overtly and publicly manifesting any opinions whatsoever and thoughts, conduce more easily to corrupt the morals and minds of the people, and to propagate the pest of indifferentism.'" Cfr. also Leo's XIII Encyclical Letter *Libertas* (1888): "... Civil society must acknowledge God as its Founder and Parent, and must obey and reverence His power and authority. Justice therefore forbids, and reason itself forbids, the State to be godless; or to adopt a line of action which would end in godlessness - namely, to treat the various religions (as they call them) alike, and to bestow upon them promiscuously equal rights and privileges".

[20] Cfr. Pius' X Encyclical Letter *Pascendi Dominici Gregis*, of 1907, with states with regard to the "Relation of Church and State", describing the alleged errors of "modernists": "Formerly it was possible to subordinate the temporal to the spiritual and to speak of some questions as mixed, conceding to the Church the position of queen and mistress in all such, because the Church was then regarded as having been instituted immediately by God as the author of the supernatural order. But this doctrine is today repudiated alike by philosophers and historians. The State must, therefore, be separated from the Church, and the Catholic from the citizen. Every Catholic, from the fact that he is also a citizen, has the right and the duty to work for the common good in the way he thinks best, without troubling himself about the authority of the Church, without paying any heed to its wishes, its counsels, its orders--nay, even in spite of its rebukes. For the Church to trace out and prescribe for the citizen any line of action, on any pretext whatsoever, is to be guilty of an abuse of authority, against which one is bound to protest with all one's might. Venerable Brethren, the principles from which these doctrines spring have been solemnly condemned by Our predecessor, Pius VI, in his Apostolic Constitution Auctorem fidei". Cfr. also Pius' XII address to Catholic lawyers Ci Riesce (1953): "It must be clearly affirmed that no human authority, no State, no Community of States, of whatever religious character, can give a positive mandate or a positive authorization to teach or to do that which would be contrary to religious truth or moral good... Whatever does not respond to truth and the moral law has objectively no right to existence, nor to propaganda, nor to action".

ments are but unclear and mistakable answers to equally unclear and mistakable claims to freedom made at the time by various groups actually or allegedly hostile to the Church, I leave them aside in this context and take up, in their place, the doctrine of the Ius publicum Ecclesiasticum as it was officially taught in Rome in the early nineteen sixties.

1. The Church's traditional approach as reflected in Ottaviani's Ius Publicum Ecclesiasticum

And in order not to give anyone the chance to allege that I have singled out the obscure teachings of an obscure priest of no standing whatsoever, I shall concentrate on the Ius Publicum Ecclesiasticum written by Alfredo Ottaviani, an opus in two volumes the fourth edition of which appeared in 1958 and 1960, respectively, in the Vatican[21] as an official publication of the Pontificium Institutum Utriusque Iuris. The author of this opus was no less a figure than a Cardinal of the Roman Church and the Prefect of the Holy Office (after the Council renamed the Congregation of the Faith)[22], and therefore himself a predecessor of the present Pope Benedict XVI in the latter's former function[23].

The passages which interest in this context can be found in the second volume of Ottaviani's opus which deals with the relationship between Church and State[24]. In order to lay the basis for the further elaboration of this subject, Ottaviani addresses three principles which are, in his opinion, at the bottom of all misconceptions of Church-State relationship. These principles are: the principle of freedom of thought, the principle of freedom of speech, and the principle of freedom of worship.

(a) No general freedom of thought

As regards freedom of thought, Ottaviani acknowledges that (and since he writes in Latin, I translate it for the benefit of all those who are not that conver-

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[21] ALAPHRIDUS OTTAVIANI, *Ius Publicum Ecclesiasticum*,4th ed., 2 vols., Vatican 1958 and 1960 (with the support of IOSEPHUS DAMIZIA).

[22] Cfr. GELMI, J., "Ottaviani", in KASPER, W. (ed.), *Lexikon für Theologie und Kirche*, 3rd ed., vol. 7, Freiburg-Basel-Rome-Vienna 1998, 1217 et seq., who characterises Ottaviani as the last great representative of the Ius Publicum Ecclesiasticum and the self-styled "custodian of the deposit of faith".

[23] Cardinal Joseph Ratzinger was 1981-2005 Prefect of the Congregation of the Faith.

[24] Ecclesia et Status.

sant in this old language) "the human intellect is by its very nature directed to the investigation of the unknown truth and to the amplification of knowledge". But does this give man a right to freedom of thought? According to Ottaviani, "freedom of thought" and consequently "freedom of conscience in the speculative field" as a general principle is a mere assertion of those adhering to (what Ottaviani considers to be the principal errors of) indifferentism and liberalism[25], which all are evils that either paved the way for, or are to be found in the wake of, the central error regarding the relationship between Church and State, which is secularism[26]. The accent is not on man's natural inclination to *investigate* as such, which would of course demand freedom of thought in the form of freedom of conscience in the speculative field; the accent is on investigation of the *truth*. If the human intellect "is deceived, and perceives something false, than it does not have the right and the competence to adhere to the misconception, and it does not have, therefore, the right to claim that others respect its way of thinking. The community is therefore not at all obliged to respect the opinions of all, even the contradictory and wrong ones, but has to take as a yardstick only truth and justice, and the legislator cannot be blamed to be partial if he denies to the error the rights conceded to the truth"[27].

Ottaviani thus distinguishes between a legitimate and an illegitimate use of man's intellect: "The state of mind accepting the truth is legitimate, necessary and to be respected; the state of the erring mind is illegitimate and must be dissipated, and, in particular, it may not claim rights in the social order, especially if it subtracts itself from its creator and negates that tribute of allegiance which the mind itself owes"[28].

(b) No general freedom of speech

Ottaviani then turns to freedom of speech, including the freedom of the press. To him, freedom of speech is at least as objectionable, and probably

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[25] ALAPHRIDUS OTTAVIANI, *Institutiones Iuris Publici Ecclesiastici*, Vol. II: *Ecclesia et Status*, 4th ed. (with the support of IOSEPHUS DAMIZIA), Rome 1960, pp. 50 et seqs. To these errors, Ottaviani also adds the atheism of the state (*atheismus statalis*), claiming that the State, as the organised form of society, is no less bound to venerate God than man as an individual (at p. 51), and naturalism, by which he understands regard, by the State, only to that form of religion which is based on human reason rather than on revelation (at p. 51 et seqs.)

[26] *Ibid.*, p. 77 et seqs., et *passim*.

[27] *Ibid.*, p. 60.

[28] *Ibid.*, p. 61.

even more dangerous, than freedom of thought. This appears from the strong words used by Ottaviani with reference to freedom of speech which, "if understood in the secularist manner", for him "is not less impious, wrong and absurd as the freedom of thought"[29].

That there cannot be a general freedom of speech already follows, according to Ottaviani, from the obligation to embrace the truth and nothing but the truth. He states: "Since, namely, not everything is in itself true and decent, it is a duty not only to make right judgments but also, *a fortiori*, only to speak, defend and propagate what is right and true"[30]. Thus, Ottaviani again distinguishes between what is legitimate and what is illegitimate; and any expression that does not communicate, defend and propagate what is right and true does not constitute a legitimate exercise of the freedom of speech.

Since man thus dos not enjoy freedom of speech unless used for the dissemination and propagation of truth, to Ottaviani "[i]t would be absurd to make it a duty of government to respect the freedom of speech and of writing even if they disseminate what is wrong and indecent: because this would be to the greatest detriment of the people, given the fact that men are usually given to wrong inclinations and are generally incapable to detect all the false dialectic allurements"[31].

(c) No general freedom of religion and of worship

Ottaviani then turns to the freedom of religion; and since freedom of religious belief and freedom of religious preaching have already been taken care of under the headings of freedom of thought and freedom of speech he now deals more specifically with the freedom of worship.

Ottaviani first reports the position of his opponents (the "secularists") who describe freedom of worship as "the right granted by the State to the individual citizens to worship God by external acts of his choice, so that all forms of worship should be publicly recognised as being on equalling footing with each other, so that none is given preference to the other, not even the catholic cult in societies consisting of catholic citizens. In this way, they say,

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[29] *Ibidem*.
[30] *Ibidem*.
[31] *Ibidem*.

the neutrality of the State in religious disputes has to be observed, so that the conscience of no citizen suffers coercion or offence"[32].

Ottaviani counters this argument by another which he used already to rebut an unlimited freedom of thought.[33] For Ottaviani, as we have seen, freedom of thought is limited to holding the objective truth; the mere personal conviction which deviates from objective truth is not protected. As regards freedom of worship, Ottaviani comes forward with an argument which is based on the logical principle of *a fortiori*: "[A]s in all things truth has to be sought, this applies first and foremost to divine things; and as it is unreasonable to put the truth on equal footing with the error, it is also unreasonable to treat the true religion on par with the false ones"[34].

And since there thus is no subjective right to freedom of worship for the followers of false religions, there is also no obligation of the State to grant to them, in its legal order, such freedom of worship. Ottaviani even finds it appropriate to adduce arguments of convenience from ancient times. "[...] It is therefore not useful and reasonable to open up a free road for all cults; this only gives free entrance to dissension and civil strife. It is for this reason that the wise political direction of the Roman people is praised; because in religion there was to be observed what was already stated as law in the Twelve Tables: 'No one may have separate Gods' ('[...] Gods of his own'). [...] And the Christian emperors saw to it that there was no place for heretic cults"[35].

According to Ottaviani, there can be only two grounds on which a false cult can be tolerated; and those are the same grounds on which any evil has to be tolerated from time to time, namely, first, if it is not possible to suppress it, and, secondly, if suppressing it might cause an even greater evil. For Ottaviani, the only basis for tolerance is thus the impossibility or the inopportunity to be intolerant. Thus, it might be actually impossible or highly inopportune for a predominantly Catholic State to prohibit non-Catholic cults or even non-Christian forms of worshipping, because this might give rise to internal unrest

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[32] *Ibidem*.
[33] Cfr. *supra*, at fn. 25 et seqs.
[34] OTTAVIANI, A., *Institutiones Iuris Publici Ecclesiastici*, Vol. II: *ECCLESIA ET STATUS*, 2nd ed. (with Iosephus Damizia), Rome 1960, p. 62.
[35] *Ibid*., p. 62.

and thus threaten public peace and good order, and because it might lead to reprisals directed against Catholics in foreign countries.

(d) Excursus. Concordats as instruments of curtailing general religious freedom

The Holy See has always sought to insert, in concordats with so-called Catholic countries, provisions to the effect that the Catholic Church was granted rights as far-reaching as possible, while at the same time the State was obliged to curtail the freedoms of other religions, both Christian and non-Christian, as much as possible. The last concordat concluded on these lines was the Concordat with Spain in 1953[36].

2. The approach taken by the Second Vatican Council

The approach taken to religious freedom by the Second Vatican Council has no similarity to the Church's traditional position as reflected in Ottavi-

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[36] At the time, it was considered exemplary by the Roman Curia. Cfr. GONZÁLES-NOVALÍN, J. L., "Spanien, I. Kirchengeschichte, 4. Vom 17. Jahrhundert bis zum Vaticanum II", in KASPER, W. (ed.), *Lexikon für Theologie und Kirche*, 3rd ed., Vol. 9, Freiburg-Basel-Rome-Vienna 2000, 809 et seqs., at 810. The concordat's most relevant provision in this context was

Article I. "The Roman Apostolic Catholic Religion continues to be the sole religion of the Spanish nation and shall enjoy the rights and prerogatives which belong to it in accordance with divine law and canon law". It had to be read in conjunction with the Final Protocol which provided: "At the time of signing the Concordat concluded today between the Holy See and Spain, the undersigned plenipotentiaries made, by mutual consent, the following declarations, which form an integral part of the said Concordat:

Concerning article I:

In national territory, the provisions of article 6 of the Fuero de los Españoles shall continue in force.

As relates to the tolerance of non-Catholic cults, in the territories under Spanish sovereignty in Africa, the status quo shall be maintained.

Article 6 of the Spaniards' Charter (Fuero de los Españoles) provided:

1) The profession and practice of the Catholic religion, which is that of the Spanish State, will enjoy official protection.

2) No one shall be disturbed for his religious beliefs nor the private exercise of his religion. There is no authorization for external ceremonies or manifestations of other than those of the Catholic religion".

Cfr. also Article XXVI. "In all State or non-State centres of learning of any order or degree, teaching shall be in accordance with the principles of the dogma and morality of the Catholic Church. Ordinaries shall freely exercise their mission of watchfulness over such centres of learning with respect to the purity of the faith, morals and religious education.

Ordinaries may demand that books, publications and teaching materials contrary to Catholic dogma and morality should not be permitted or should be withdrawn".

ani's Ius Publicum Ecclesiasticum of 1960. Only five years later, in 1965, the Council adopted the Declaration *Dignitatis Humanae* on Religious Freedom[37], which constitutes a volte-face diametrically opposed to the Church's former teachings in this field.

(a) The dignity of the human person

The Council itself explains this radical change of position by the progress of human insight. "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"[38]. This, of course, cannot remain without effects on the political legal order. Consequently, "[t]he demand is likewise 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 person and of associations"[39]. This applies also and especially with regard to "[r]eligious freedom, [...] which men demand as necessary to fulfil their duty to worship God, [and which] has to do with immunity from coercion in civil society"[40].

(b) General freedom of religion

The Council than continues to expound the essence and the fundaments of religious freedom. "This Vatican Council 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 no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others [...]"[41].

"The Council further declares that the right to religious freedom has its foundation in the very dignity of the human person as this dignity is

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37 *Acta Apostolicae Sedis* 58 (1966), pp. 929 et ss.
38 Art. 1.
39 *Ibidem*.
40 *Ibidem*.
41 Art. 2.

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 and thus it is to become a civil right"[42].

(c) General freedom of thought

The Council then affirms that "every man has the duty, and therefore the right, to seek the truth in matters religious in order that he may with prudence form for himself right and true judgments of conscience, under use of all suitable means"[43]. However, "[t]ruth [...] is to be sought after in a manner proper to the dignity of the human person and his social nature". Therefore, the Council states that "'[t]he inquiry is to be free', it may be supported but not unduly influenced by others"[44].

(d) General freedom of conscience

"Moreover, as the truth is discovered, it is by a personal assent that men are to adhere to it" according to the dictates of their conscience. "On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of conscience. In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious. [... Moreover], [t]he social nature of man [...] itself requires that he should give external expression to his internal acts of religion: that he should share with others in matters religious; that he should profess his religion in community. Injury therefore is done to the human person and to the very order established by God for human life, if the free exercise of religion is denied in society, provided just public order is observed".

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[42] Art. 2.
[43] Art. 3.
[44] The Council names, as legitimate support in the quest of truth, "the aid of teaching or instruction, communication and dialogue, in the course of which men explain to one another the truth they have discovered, or think they have discovered, in order thus to assist one another in the quest for truth". Art. 3.

(e) The temporal power enjoined from interfering

"There is a further consideration. The religious acts whereby men, in private and in public and out of a sense of personal conviction, direct their lives to God transcend by their very nature the order of terrestrial and temporal affairs. [...I]t would clearly transgress the limits set to [the temporal] power, were it to presume to command or inhibit acts that are religious"[45].

"The freedom or immunity from coercion in matters religious which is the endowment of persons as individuals is also to be recognized as their right when they act in community. [... R]eligious communities rightfully claim freedom in order that they may govern themselves according to their own norms, honour the Supreme Being in public worship, assist their members in the practice of the religious life, strengthen them by instruction, and promote institutions in which they may join together for the purpose of ordering their own lives in accordance with their religious principles".

3. Objective truth *versus* dignity of man

If we compare the approach taken to freedom of religion by the Second Vatican Council to that taken by previous Public Ecclesiastical law of which Ottaviani's opus is a quasi-authentic expression, the difference between the two is the different starting point.

(a) Ottaviani's starting point: objective truth

For Ottaviani, the starting point is the objective truth. Freedom of thought, freedom of conscience, freedom of speech and freedom of worship are all rights connected with the objective truth. The opposite of truth, whether it is called untruth, error or falsehood, does not entitle to freedom of thought, freedom of conscience, freedom of speech and freedom of worship. The classic formulation of this position is that "error cannot have the same right as truth".

(b) The Council's starting point: dignity of man

For the Second Vatican Council, the starting point is the dignity of man. Because of this dignity, man is entitled to freedom of thought, freedom of

[45] Art. 3.

conscience, freedom of speech and freedom of worship. Of course, man is under an obligation to use these freedoms according to his conscience. But since only God, and not the State, can look into man's heart, it is not for the State to decide whether a person makes right or wrong use of his freedoms. The Council thus stresses that "the right to religious freedom has its foundation not in the subjective disposition of the person, but in his very nature. In consequence, the right to this immunity [from external interference] continues to exist even in those who do not live up to their obligation of seeking the truth and adhering to it and the exercise of this right is not to be impeded [...]"[46].

This change from (what we may call) the dignity of truth to the dignity of man as the starting point for freedom of religion is a truly paradigmatic one. It takes serious an essential aspect of the pluralistic society, namely that here on earth no one has been made judge over others in matters of conscience, not even the State (or, by the way, the Church).[47]

V. *DIGNITATIS HUMANAE* – A LANDMARK DECISION OF EXEMPLARY CHARACTER

The fact that such a paradigmatic change was possible within five years only, albeit under favourable circumstances that helped to overcome the dogged opposition of the supporters of the former position,[48] is a token of hope for

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[46] Art. 2.

[47] The paradigmatic change brought about by *Dignitatis humanae* has made it the subject on ongoing controversy between those in the Catholic Church who regard it an inalienable token of liberty and those who consider it a surrender to relativism. Cfr. KWASNIEWSKI, P. A., *Dignitatis humane. Die Auslegungsprinzipien*: "In der Geschichte der Kirche hat kein Lehrdokument bei seiner Auslegung so viele Kontroversen und so viel Widerspruch ausgelöst wie die Erklärung des Zweiten Vatikanischen Konzils über die Religionsfreiheit Dignitatis Humanae. Von einigen gepriesen als edelste Frucht des Konzils, von anderen verachtet als ein schändliches Abweichen von der vorkonziliaren Lehre, wurde sie in zahllosen Büchern und Artikeln rezensiert, analysiert, kritisiert und verteidigt". ("Never before in the history of the Church a magisterial document has raised,I the course of interpretation, as the Declaration of the Second Vatican Council on Religious Freedom Dignitatis Humanae. Praised by some as the most noble fruit of the Council, despised by others as an ignominious deviation from theachings prior to the Council, it was reviewed, analysed, criticised and defended in countless books and articles". [Author's translation.]) See: http://www.kath-info.de/dignitatis.html

[48] Cfr. PAVAN, P., "Einleitung und Kommentar zur Erklärung über die Religionsfreiheit", in *Lexikon für Theologie und Kirche*, *Das Zweite Vatikanische Konzil*, Dokumente und Kommentare,

future developments in the field of human rights[49]. The human right situation in the Islamic countries would radically change if it were recognised there, too, that human rights have their basis in human dignity and not in objective truth; and that it is not for society and the State, and not even for the authorities of one or the other religion, to pass judgment on the use made by man of his liberty as long as he does not interfere with the corresponding liberty of others. Islamic Shari'ah would cease to be the yardstick for human rights; rather, human rights would become the yardstick for Islamic Shari'ah.

To accept this latter consequence might be the most difficult aspect of the paradigmatic change in question. But it is a consequence which affects all religions alike; they all will have to examine the compatibility of their rules with human rights. No religious community will be spared this self-examination. To bring one's own rules in line with human rights is both a demand of justice and a question of credibility. And in the long run a question of survival, at least from a human perspective.

Vol. II, Freiburg 1967, pp. 703 et seqs. Cfr. also DAVIES, M., *The Second Vatican Council and Religious Liberty*, Long Prairie, Minn., 1992. However, since the most conservative groupings in the Church do not want to accept that *Dignitatis humanae* presents a revolution of the Church's teachings on human rights (a qualification made by *Yves Congar*) and since the Lefebvre movement declared it to be heretic, some commentators have attempted to demonstrate that there is in fact no contradiction between *Dignitatis humane* and the papal statements on these issues made up to and in the nineteenth century. Any such attempt, however, is doomed to failure because it starts from a certain preconceived idea of the irreversibility of the Churc's doctrine which in itself is not well founded and the character of which must be characterised as ideological.

[49] In the teachings of the Catholic Church, religious freedom now seems safely enshrined. "[...] Religious freedom, which is still at times limited or restricted, remains the premise and guarantee of all the freedoms that ensure the common good of individuals and peoples. It is to be hoped that authentic religious freedom will be granted to all people everywhere. The Church strives for this in all countries, especially in those with a Catholic majority, where she has greater influence. But it is not a question of the religion of the majority or the minority, but of an inalienable right of each and every human person. On her part, the Church addresses people with full respect for their freedom. Her mission does not restrict freedom but rather promotes it. *The Church proposes; she imposes nothing*. She respects individuals and cultures, and she honours the sanctuary of conscience. [...]". JOHN PAUL II, Encyclical Letter *Redemptoris missio* of 12 July 1990, AAS, vol. 83 (1991), pp. 249-340, nº 39. (Italics supplied).