

## AN ISSUE OF THE FIRST IMPORTANCE: REFLECTIONS ON THE 50TH ANNIVERSARY OF *DIGNITATIS HUMANAЕ*

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### ABSTRACT

It is said that John Henry Newman was the “father of the Second Vatican Council” because of his work on doctrinal development and the claims of human conscience. Of the sixteen documents produced by the council, *Dignitatis Humanae* (“Declaration on Religious Liberty”) was recognized from the outset as a development of doctrine. Importantly, it was the second shortest of all the council’s documents. Yet, for the past fifty years there has been lively debate about whether the development is consistent with previous church teachings and whether it is coherent on its own terms. This essay does not attempt to resolve all of the disputed issues regarding either consistency or coherence of the doctrine. Rather, I show, first, how and why *Dignitatis Humanae* was written in such a manner as to be surprisingly silent about its own place in the history of human rights as well as church teachings about church-state relations. Second, I attempt to interpret the silences in order to better situate ongoing debate about *Dignitatis Humanae*.

KEYWORDS: Religious liberty, right of conscience, corporate religious liberty

### INTRODUCTION

Fifty years ago—in the interlude between the first and second sessions of the Second Vatican Council—Pope John XXIII issued the encyclical *Pacem in Terris*, listing some twenty-five human rights in the language of natural law. Included in the list was a right that caught the attention of everyone, not least the bishops who were preparing for the next session of the council: “Also among man’s rights is that of being able to worship God in accordance with the right dictates of his own conscience, and to profess his religion both in private and in public.”<sup>1</sup> The notes of his team of writers in the Vatican show clearly that the sentences on the right of religious liberty received more internal discussion and debate than any other theme of the encyclical during its drafting process.<sup>2</sup> Interestingly, the pope did not allow his encyclical to be vetted by the Holy Office precisely because of the sentences on religious liberty. Instead, he wanted it to go straight into

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1 John XXIII, *Pacem in Terris* [Encyclical on establishing universal peace in truth, justice, charity, and liberty] (April 11, 1963), §14. Every magisterial and conciliar document quoted or referenced can be found in both the original language and the English translation at the [Vatican.va](http://www.vatican.va) website under Resource Library, Supreme Pontiffs, or Roman Curia. Unless otherwise noted, citations reference the online documents.

2 For the preparation of the document and internal discussions of the drafters, see Alberto Melloni, *Pacem in terris: Storia dell’ultima enciclica di Papa Giovanni* (Rome: GLF Editori Laterza, 2010).

publication without curial interference. Indeed, the pope unilaterally used the papal office to declare a right of religious liberty ahead of the council’s own deliberations.

At the commencement of the council in the fall of 1962, the subject of religious liberty had been slated for inclusion in three different documents, all of which were initially drafted as schemata: (1) as a subsection of a document on the nature of the church, under “relations between church and state,” (2) as a subsection of a document on “ecumenism,” specifically under “freedom of cult,” and (3) as a subsection in the document on the church’s relations to non-Christian religions. In effect, what turned out to be the most important issue of the council, and indeed what the Catholic magisterium today routinely calls “the first freedom” and the “most fundamental freedom”—even “the hermeneutical key” to the council—was buried inside the schemata of other documents.<sup>3</sup> It was an important issue, to be sure, but in the first set of schemata, it was not one of the first importance.<sup>4</sup>

What is more, the preparatory schemes seemed to be at odds with one another. The document on the church held that if all or most members of a society profess the Catholic religion, so too must the state. In this case, the religious liberty of non-Catholics could be tolerated for the sake of the common good. On the other hand, in situations where non-Catholics are the majority, the state must follow the natural law in every respect, leaving Catholics free to profess their own religion and the church free to accomplish its mission. The bishops at work on the preparatory scheme of the document on ecumenism complained that ecumenism cannot make any significant advances so long as the church claims natural rights for her own members vis-à-vis the state but recognizes a much weaker claim of toleration on the part of non-Catholics when both are similarly situated in the position of being either a majority or a minority.<sup>5</sup>

Pope John’s encyclical untangled both of these problems. First, by recognizing a natural and human right to religious liberty, the opposition between grounds for toleration and those of natural right was resolved, at least on paper. Second, the problem of religious liberty being consigned to subsections of other documents was exposed. The pope’s encyclical practically guaranteed that the subject of religious liberty would be a freestanding document suitable to an issue of the first importance.

*Dignitatis Humanae* (“Declaration on Religious Freedom”)<sup>6</sup> is the second shortest conciliar document: forty-six hundred words in Latin, which amounts to about eight single-spaced pages in

3 “That is our American heritage, our most cherished freedom. It is the first freedom because if we are not free in our conscience and our practice of religion, all other freedoms are fragile. If citizens are not free in their own consciences, how can they be free in relation to others, or to the state?” United States Conference of Catholic Bishops, *Our First, Most Cherished Liberty: A Statement on Religious Liberty* (Washington, DC: USCCB, 2012). “[Religious freedom] is indeed the first of human rights, not only because it was historically the first to be recognized but also because it touches the constitutive dimension of man, his relation with his Creator.” Pope Benedict XVI, “Address of His Holiness Pope Benedict XVI to the Members of the Diplomatic Corps” (Vatican City, January 10, 2011).

4 The schemata of 1962 were redrawn after the first session of the Second Vatican Council. For an important firsthand report based upon contemporaneous notes of the discussions leading to the new schemata, see Yves Congar, *My Journal of the Council*, trans. Mary John Ronayne and Mary Cecily Boulding (Collegeville, MN: Michael Glazier Books, 2012), 223–27.

5 For the history of the document see Monsignor Pietro Pavan’s work. Pavan, who taught at the Lateran University, headed the pope’s team of writers for *Pacem in Terris*. Later, he wrote a very useful account of the origin and evolution of the document *Dignitatis Humanae*. Pietro Pavan, “Declaration on Religious Freedom,” in *Commentary on the Documents of Vatican II*, ed. Herbert Vorgrimler, trans. Hilda Graef (New York: Herder and Herder, 1989), 4:49–86.

6 Second Vatican Council, *Dignitatis Humanae* [Declaration on religious freedom] (December 7, 1965).

the usual format. Even so, it took four years to compose. The final draft was signed only twenty-four hours before the council was adjourned. Why such protracted labor on a document that was hardly the length of a student term paper?

During the drafting process, some bishops worried about the strictly philosophical questions (drawing proper distinctions between subjective and objective meaning of “conscience”); some bishops worried about practical items (the effect of the declaration on concordatory states); others worried about ideologies (indifferentism and laicism); still others about how to interrelate canonical, international, and natural rights. Many bishops wanted the document to clearly rehearse and to settle the broken history of church-state relationships going back more than seventeen hundred years.

Gradually, by trial and error, the commission charged with the task of formulating the position, as well as the bishops who debated various drafts on the floor of the council, realized that the declaration could not do all of these things. By the time of the final vote in December 1965, more than two thousand suggested corrections had been considered. Almost every sentence of the declaration had been corrected multiple times.

This editorial process had the good effect of producing an exceedingly tight and carefully reasoned statement. In Roman tradition, a *declaratio* differs from a *constitutio* and a *decretum*. Constitutions and decrees have binding force upon the whole church. A declaration, on the other hand, is reserved for matters and persons who are not under the public law of the church. Therefore, *Dignitatis Humanae* was supposed to be short and to the point. The downside was that a strong line of historical narrative had to be left for another time.

#### A WEAK NARRATIVE

As we look back over fifty years, the terse and direct approach of *Dignitatis Humanae* remains both its genius and its weakness. Its genius, because the council managed to untangle itself from nearly two millennia of various and complicated political Christendoms and to deliver a clear and principled statement that has stood the test of time. Yet its weakness was evident at the outset. The absence of historical narrative made *Dignitatis Humanae* vulnerable to radical-discontinuity interpretations on both the progressive and traditionalist sides of the theological spectrum. These interpretations and arguments are ongoing. Half a century later, the literature is immense, and by turns both fascinating and redundant. In this essay, however, I put it to one side in order to broadly sketch my own understanding of historical markers.

It is often said that John Henry Newman was the “father of the Second Vatican Council” because of his work on doctrinal development and the claims of human conscience.<sup>7</sup> In that very spirit, John XXIII reminded the bishops in his opening allocution that “history is the teacher of life.”<sup>8</sup> Several documents produced by the council, most notably *Gaudium et Spes* (“The Church in the Modern World”),<sup>9</sup> boldly attempted to situate the church under new historical skies. So it

7 Ian Ker, *Newman on Vatican II* (Oxford: Oxford University Press, 2014), 1. Note, however, that the online concordance detects no mention of Newman in any of the sixteen conciliar documents. *Vatican Ecumenical Council II: Documents*, I IntraText CT ed. (Eulogos, 2007), <http://www.intratext.com/IXT/ENG0037/>.

8 John XXIII, “Gaudet Mater [Address on the occasion of the solemn opening of the Most Holy Council]” (Vatican City, October 11, 1962).

9 Second Vatican Council, *Gaudium et Spes* [Pastoral Constitution on the Church in the modern world] (December 7, 1965).

is all the more interesting that *Dignitatis Humanae*, which represented so clearly a development of doctrine, remained quiet about its place in history. It provides very few historical markers. Except for a few modern papal encyclicals, it cites no scholarly theological or philosophical authority for its position after Gregory the Great—that is to say, after the sixth century, just before the emergence of political Christendom among the peoples formed by Latin Christianity. The document sidesteps not only authorities crucial to medieval Christendom, but also the Catholic political Christendom that was reconstituted after the Council of Trent. *Dignitatis Humanae* is completely silent about both the medieval schools and the significant work of later scholastic philosophers, theologians, or jurists.

Midway into *Dignitatis Humanae*, we read: “The declaration of this Vatican Council on the right of man to religious freedom has its foundation in the dignity of the person, whose exigencies have come to be are fully known to human reason through centuries of experience.” The “leaven of the Gospel,” it says, “has long been about its quiet work in the minds of men.”<sup>10</sup> The “centuries of experience” are not summarized.

The only clear historical markers in *Dignitatis Humanae* are two sentences in the opening section: “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”; and “Over and above all this, the council intends to develop the doctrine of recent popes on the inviolable rights of the human person and the constitutional order of society.”<sup>11</sup> A concluding section notes approvingly that such a right has already been adopted in domestic constitutions and international documents.<sup>12</sup> In sum, these sentences indicate the council’s recognition of a broad dignitarian movement in the moral and legal culture, particularly on the issue of religious liberty; that recent pontifical teachings have responded to it, and that the council intends to clarify and develop that response; and that a right to religious liberty has already been adopted in some national and international laws. Apparently, the drafters believed that a fuller picture could be fashioned later.<sup>13</sup>

Just as important as the question of what *Dignitatis Humanae* does *not* say is the order of what it *does* say. *Dignitatis Humanae* is arranged into two parts: First, under the heading of religious liberty “in general” (“*ratio generalis*”), *Dignitatis Humanae* proceeds to give a moral-juridical treatment of human dignity according to the natural law.<sup>14</sup> Second, “in the light of Revelation” (“*sub luce Revelationis*”), *Dignitatis Humanae* proceeds to give a theological treatment of religious liberty as it pertains specifically to the institution and mission of the Catholic Church.<sup>15</sup>

Most readers do not realize that these two parts reverse the historical order of discovery. Part two of *Dignitatis Humanae* is prior to part one not only in the order of time and discovery but also in the development of doctrine. This curiosity was noted in some internal discussions, namely

10 Second Vatican Council, *Dignitatis Humanae*, §§ 9, 12.

11 *Ibid.*, §1.

12 *Ibid.*, §15.

13 The relator of the commission, Bishop de Smedt, commented that the relation of *Dignitatis Humanae* to past popes is “a matter for future theological and historical studies to bring to light more fully.” “*Congregatio Generalis CLXIV*, 19 Nov. 1965,” *Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani Secundi* (Vatican City: Typis polyglottis Vaticanis, 6 vols. 1970–1978), vol. 4, part 8, 719.

14 Second Vatican Council, *Dignitatis Humanae*, §§ 2–8.

15 *Ibid.*, §§ 9–15.

that the document was trying to coherently put together (to clarify, or even to develop, so to speak) two distinct lines of thought and teaching about religious liberty.<sup>16</sup>

The first is an ecclesiological vector, which, from ancient until modern times, takes its bearing from the formal object of faith: God revealing. That is to say, what God reveals about the form, the constitution, the functions and ends of the church. On that ground, the church can locate in a faithful and theologically responsible way the dignity and obligations of its liberty. The modern rendition of this ecclesiological vector had already been formulated a century before the Second Vatican Council, indeed at Vatican I (1870), and then articulated canonically in the Code of Canon Law (1917). This ecclesiological or institutional line of development was still being deepened and reworked at the Second Vatican Council, but it was settled in its essentials.

The second is a moral-juridical vector, which has come to light both in the historical and moral experience of modern people and in the teachings of recent popes. Its formal or proximate object is human dignity as it can be known both in the internal dynamism of our own acts and judgments of conscience and in the human experience according to historical, philosophical, and other wisdoms. It should be called *moral-juridical* because *Dignitatis Humanae* insists that the council affirms not only the ground(s) of the moral principle regarding religious liberty, but also the urgency of providing suitable recognition of it in civil and international law. Organically, this is the second part of the doctrinal development—but part one of the document.

It is important to be clear about these two different vectors and how they work together. In his first encyclical after becoming pope, John Paul II himself made this very point. Under the heading “The Church’s Mission and Human Freedom,” he insists that “both the first and the second part of the document” must be read together. Indeed, he first treats the second part, the ecclesiological vector, and then treats the moral-juridical vector.<sup>17</sup>

This recommendation of reading both parts together and, reading the first through the second, deserves attention because Archbishop Wojtyła had a significant hand in the formulation of *Dignitatis Humanae*.<sup>18</sup> It is also a useful hermeneutic because *Dignitatis Humanae* does not include many historical markers for how the two vectors flowed together. To understand how religious liberty became for the Catholic Church an issue of the first importance, we should look at each vector, beginning with part two of the document. Then we can say a few things about how the Christological and ecclesiological vector of religious liberty went through the thickness of history in search of a corollary principle pertaining to the moral-juridical order.

16 Again, according to the Relator: “the special object of our Declaration is to clarify the *second part* of the doctrine of recent Supreme Pontiffs [*enucleatio secundae partis doctrinae recentiorum Summorum Pontificum*].” “*Congregatio Generalis*,” vol. 4, part 8, 719 (emphasis added). Clearly, the commission understood that the documentary parts are different from the historical parts.

17 John Paul II, *Redemptor Hominis* [Encyclical at the beginning of his papal ministry] (March 4, 1979), §§ 12, 17.

18 During the council, the Polish ecclesiastics would meet in the apartment of Monsignor Malinski to exchange ideas about the goals of the council. On one occasion, Archbishop Wojtyła was invited to chat with friends. Asked for his opinion about the document on religious liberty, he said,

It is the end of the Constantine era, which was characterized by a strict accord between the Altar and the Throne, between the Church and the State, illustrated in its highest point by the birth of the Holy Roman Empire in the 9th century. We face a grave problem: to elaborate new forms for relations between the Church and the State, [especially] the right of the Church to religious liberty.

Mieczysław Malinski, *Mon Ami Karol Wojtyła* [My friend Karol Wojtyła] (Paris: Centurion, 1980), 190–91. Wojtyła saw that the church becomes the champion of religious liberty first by preserving its own liberty and then by affirming the liberty of others.

## THE ECCLESIOLOGICAL VECTOR

The Catholic Church began its modern thinking about religious liberty just where everyone else did, at the end of the Religious Wars. The treaties of Augsburg (1555) and Westphalia (1648) were devised to ameliorate the breakdown of public order after the demise of Latin political Christendom. The treaties did so by erecting a system of sovereignty.

In the external frame, sovereignty meant the relationship of one sovereign to another, based on the principle of noninterference. The aim was not to achieve social, political, or religious unity so much as a *modus vivendi*—a way for ruling powers to get along, provided that each sovereign could enjoy his own domestic liberty to rule. Here is the beginning of liberalism—John Stuart’s Mill’s “harm principle” before it was applied to ordinary individuals.

The internal face of sovereignty consisted of absolute, perpetual, and indivisible power exercised over a geographically homogenous territory. It would be anachronistic to speak of social unity, because these principalities did not think in such terms. The regime aimed at political unity, and at religious unity of a sort. Religious unity was to be solved according to the principle *cuius regio eius religio* (Whoever rules, his religion). It could, and sometimes did, include weak policies of religious toleration.

At the beginning of modern times, the Catholic practice of religious liberty was about the same as the Protestant, for both understood the opportunities and constraints for religious liberty within the system of sovereignty. What is required for religious liberty? No one could be in doubt—a friendly sovereign, who, in exchange for protection of religion demanded a quasi-episcopal authority over the temporalities of that religion: buildings, cemeteries, rents on land, veto power over catechisms, the ringing of church bells, the appointment of clergy. To be sure, this regime took on different cultural complexions and legal variations depending upon the particular kingdom. But the core remained the same in England, in France, in Spain and her colonies, in Prussia, Russia, and Austria. Freedom of religion is nothing other than the freedom of the sovereign himself. The liberty is that of his religion—or at the least the religion in which he has an interest.

Two things especially marked the Catholic situation. In his papal bull of *Zelo Domus Dei*, Pope Innocent X declared the Peace of Westphalia “null and, void, invalid, iniquitous, unjust, condemned, rejected, absurd, without force or effect.”<sup>19</sup> Yet the Catholic Church was most deeply dependent upon this regime. Compared to other churches and sects, Catholicism was a rather more complex religion, having more institutions and doctrines. Furthermore, it had more peoples. After the discovery of the New World in 1492, the missions of the Catholic Church were on five continents. Far flung, thousands of miles from Europe, the missions were dependent on the navies, treasuries, and colonial governments of Catholic sovereigns. In principle, it was against the settlements of 1648, but in practice it became deeply enmired, at least so long as the sovereigns were Catholic and did not lead their kingdoms into patent schism. This is exactly what happened after the revolutions of 1789 and 1848. Only when the Westphalian system was capsized by the revolutions could the church begin to think of corporate religious liberty as an issue of the first importance, which is to say an issue that is freestanding, separable from diplomatic and political maneuvering within a legitimate, or at least an acceptable regime of church-state relations.

The infamous *Syllabus of Errors* (1864) was the beginning of an important change that culminated rather quickly in the defense of ecclesiastical liberty at Vatican Council I (1870). The *Syllabus*, published after the revolutions of 1848 and the loss of the Papal States, listed eighty

19 Henry Bettenson and Chris Maunder, eds. *Documents of the Christian Church*, 4th ed. (Oxford: Oxford University Press, 2011), 231.

propositions that must be rejected. The core of that list effectively dismissed the common law of Christendom since Westphalia.<sup>20</sup> Among other things, it rejects the idea that “[t]he Church is not a true and perfect society, entirely free—nor is she endowed with proper and perpetual rights of her own, conferred upon her by her Divine Founder; but it appertains to the civil power to define what are the rights of the Church, and the limits within which she may exercise those rights.” So, too, it rejects the proposition “that the ecclesiastical power ought not to exercise its authority without the permission and assent of the civil government.”<sup>21</sup>

Interestingly, the *Syllabus* also included a set of erroneous propositions relieving the state of moral limits that proceed from the natural law.<sup>22</sup> But this line of natural law thinking for limits on state power fell well short of anything resembling the moral-juridical right of religious liberty developed later.<sup>23</sup> Even so, what prevailed was a very strong vector of thought and official decrees regarding corporate, ecclesiastical liberty.

Hence, six years later, at Vatican Council I the bishops affirmed that the Roman Church, head and members, constitute a “single corporate body.”<sup>24</sup> This is a rather traditional piece of ecclesiology. But two things made it new in relation to religious liberty. First, by recognizing the universal jurisdiction of the Holy See, the temporal sovereigns were excluded from the various ways of joint governance that characterized so many centuries of Catholic Christendom. Here, the council rejects the idea that the church “should be dependent on the civil power, which leads them to maintain that what is determined by the apostolic see or by its authority concerning the government of the church, has no force or effect unless it is confirmed by the agreement of the civil authority.”<sup>25</sup> Second, in contrast to the time of the Reformation, the solemn doctrinal affirmations and negations were not formulated against the ecclesiologies of other forms of Christianity. Instead, they were formulated in defense of church liberty *as against the state*.

This is nothing other than the second part of *Dignitatis Humanae*, which declares that the freedom of the church “is the fundamental principle [*“principium fundamentale”*] in what concerns the relationships between the Church and governments and the whole civil order.”<sup>26</sup> *Dignitatis*

20 Pius IX, *Syllabus of Errors* (December 8, 1864). The *Syllabus* was attached to Pius IX’s encyclical *Quanta Cura* [Encyclical on condemning current errors] (December 8, 1864). The core of the church-state discussion consists of §§ 19–55 of the *Syllabus*. Online versions of *Quanta Cura* and the *Syllabus* are available in English through the EWTN document library: <https://www.ewtn.com/ewtn/library/search.asp>.

21 Pius IX, *Syllabus of Errors*, §§ 19, 20.

22 *Ibid.*, §§ 56–64.

23 See *ibid.*, §§ 1–18, and especially §§ 77–79, which reiterate the traditional position that in Catholic countries the church should hold a privileged position in the public law. *Dignitatis Humanae* does not absolutely abjure special recognitions, such as provided by concordats or constitutional preambles. Second Vatican Council, *Dignitatis Humanae*, § 6. But such recognitions must abide both principles of liberty: the *principium fundamentale* in *Dignitatis Humanae* § 13, which is to say no quid pro quo that compromises the integrity of the apostolic constitution, and the natural or human right sketched in *Dignitatis Humanae* part one.

24 First Vatican Council, *Pastor Aeternus* [First dogmatic constitution on the Church of Christ] (July 18, 1870), chapter 3, in *Decrees of the Ecumenical Councils*, ed. Norman P. Tanner (Washington, DC: Georgetown University Press, 1990), 2:813–15.

25 *Ibid.*, chapter 3.

26 Second Vatican Council, *Dignitatis Humanae*, § 13. At Vatican Council II, the *principium fundamentale* is repeated in a document on the episcopal authority of the bishops, *Christus Dominus*: “In discharging their apostolic office, which concerns the salvation of souls, bishops per se enjoy full and perfect freedom and independence from any civil authority. Hence, the exercise of their ecclesiastical office may not be hindered, directly or indirectly, nor may they be forbidden to communicate freely with the Apostolic See, or ecclesiastical authorities, or their subjects.” Second Vatican Council, *Christus Dominus* [Decree concerning the pastoral office of bishops in the Church] (October 28, 1965), § 19.

*Humanae* takes this position for granted, even though it was hardly a century old. In doing so, it unnecessarily hides the full scope of development of doctrine concerning religious liberty, for it was Vatican I that ushered the church out of the webs of the older Westphalian system. Without this moment of resolve about its own corporate liberty, it is hard to see how the second phase of development in view of an individual right would have happened for the Catholic Church. *Dignitatis Humanae* is clear enough about the ecclesiology that undergirds the corporate liberty. The law and constitution of the true religion are not given to France or England, but given to the baptized, elected by God to be his people. These people are constituted in a communion under apostolic authority by Jesus Christ. Thus, temporal sovereigns (baptized or unbaptized) have neither competence nor right to exercise apostolic (ordinary) powers: Teaching, ruling, sanctifying. It would be a sacrilege, the misuse of a holy thing, to bargain away church liberty in the interests of civil “religion.” The “sacred freedom” of the church was “purchased [by Christ] with His Blood.”<sup>27</sup> The teachings of two councils and two codes of canon law forbid ecclesial authorities to out-source apostolic powers. One might quibble about what counts as out-sourcing, but the burden of doubt today would certainly fall on any action that even hints of such compromise.

In summary, we can make three points about the ecclesiological vector. First, *Dignitatis Humanae* does not reject in principle every or any strong cooperation between the church and the state. Indeed, it remains mostly silent on particular configurations of church-state regimes, whether past, present, or future.<sup>28</sup> If we interpret *Dignitatis Humanae* in the way I propose, namely reading *Dignitatis Humanae* part two as a development antecedent in historical time to part one, and if we read that vector of ecclesiological liberty as having been formulated chiefly in contrast to the powers of the state, then we can conclude that the Westphalian church-state regime (or anything like it, such as in the former Communist bloc) must be put aside. The key point is that this was done a century before Vatican II and that the council presupposed that development.

Second, it is important to emphasize that the position on ecclesiastical liberty was not assembled from principles of natural law. Rather, it depends upon the formal object of faith, which is God revealing—namely, what the church believes about Christ’s institution of its constitution and mission. Thus, part two of *Dignitatis Humanae* is not merely a theological reflection on the natural right to religious liberty laid out in part one. The two perspectives, of course, should be coherent. Yet the distinct corporate form of the church, with its proper origins, ends, and modes of authority cannot be deduced or otherwise unfolded from within the natural law. It is precisely on this ground that the church could plausibly insist that its liberty does not fall under the jurisdiction of the temporal magistrate. If the church were a mode of civil religion, functioning as the “religious” or “cultural” sphere of temporal polity, it would remain under that part of the natural law that the state has an obligation and competence to enforce and to direct.

Third, historical contingencies shaped the church’s articulation and defense of its own liberty before it turned to a natural right consideration of individual religious liberty. It is a matter of historical record that, compared to the Enlightenment thinkers and to many of the free-church Protestants, the church was slow to formulate an alternative to the Westphalian regime. But this had some good consequences even if unintended at the outset. Beginning with a strong doctrine

27 Second Vatican Council, *Dignitatis Humanae*, § 13.

28 In a paper prepared for the Vatican, I map more than a dozen different church-state arrangements onto *Dignitatis Humanae*. F. Russell Hittinger, “Political Pluralism and Religious Liberty: The Teaching of *Dignitatis Humanae*,” in *Universal Rights in a World of Dignity: The Case of Religious Freedom*, Acta 17, eds. Mary Ann Glendon and Hans F. Zacher (Vatican City: Pontifical Academy of Social Sciences, 2012), 39–55, 677–80, <http://www.pass.va/content/scienze-sociali/en/publications/acta/religiousfreedom.html>



of corporate religious liberty, it avoided certain weaknesses of the Enlightenment defense of religious liberty. The problem with the Enlightenment approach (and it remains today a problem) is that it could give only a very weak account of corporate religious liberty. The US Constitution never mentions it; for its part, the UN Universal Declaration does not recognize the corporate dimension as something distinct from what individuals do in manifesting their religion.<sup>29</sup> The weak account has two prongs: (1) corporate religion as an aggregation of individual consciences; (2) corporate religion as a utility, within a larger system of checks and balances. Thus, it stops well short of affirming that a religious union of hearts and minds constitutes, at least for its members, an inherently valuable social form, deserving of legal protection.

### MORAL-JURIDICAL VECTOR

The ecclesiological vector reports to the world, in the fashion of a “declaration” the church’s corporate liberty and obligations as they are understood according to the formal object of faith, which is what God reveals. It is not a complete account of religious liberty, not even vis-à-vis the state. For one thing, its obligatory force falls chiefly upon the church and its members, and perhaps under special, but contingent, circumstances governments entering into treaties with the church. Thus the church went in search of a natural right distinct from, but complementary to, the divine right and obligations incumbent on the members of the church.<sup>30</sup>

During the pontificate of Leo XIII (1878–1903), the magisterium quickly discovered that it was not enough only to defend the corporate liberties of the church. For the church herself includes and overlaps with other social forms—chiefly marriage, which is a sacrament in addition to a natural social form, but also families, schools, missions, voluntary associations. It was therefore necessary to defend not only the proposition that the state is not the church, but also the natural-law grounds for the liberty of societies that are not reducible to citizenship in the state yet at the same time deserve the recognition and protection of government. The church took a scissors-like approach to the state, limiting and contextualizing citizenship according to higher and lower social orders—from below, by marriage and family and voluntary associations, and from above, by the church.

By the 1930s, this line of teaching was called Catholic Social Doctrine, and it was from this tradition that the moral-juridical vector emerged as an analogical counterpart to the defense of ecclesiastical liberty. As early as *Rerum Novarum* (1891),<sup>31</sup> natural-law arguments were devised to bridge the nature and scope of marital and familial obligations, the origins and ends of human labor in support of human life, and the right to form voluntary associations to facilitate these ends. So, soon after Vatican Council I, magisterial interest in corporate liberties had spilled over into societies other than the church. In this context, too, emerged sharp formulations of the principles of solidarity and subsidiarity. Just as it would be wrong to substitute for what an individual can do for himself, so too it would be wrong for a higher social power to erase, absorb, or disempower another society. Rather, in giving assistance, the giver (usually the state) must respect the

29 Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), § 18.

30 For a useful study of the consistency and coherence of the moral-juridical vector, along with an updated bibliography of disputants, see Barrett H. Turner, “*Dignitatis Humanae* and the Development of Moral Doctrine: Assessing Change in Catholic Social Teaching on Religious Liberty” (PhD. Diss., Catholic University of America, 2015).

31 Leo XIII, *Rerum Novarum* [Encyclical on capital and labor] (May 15, 1891).

corporate forms, and the solidarity and agency of many societies.<sup>32</sup> One of the most important sentences of *Dignitatis Humanae*, to which John Courtney Murray rightly called attention, acknowledges that political authority may limit the external acts of human liberty to maintain the common good, provided that public order be controlled “by juridical norms which are in conformity with the objective moral order.” “For the rest,” however, “the usages of society are to be the usages of freedom in their full range: that is, the freedom of man is to be respected as far as possible and is not to be curtailed except when and insofar as necessary.”<sup>33</sup> This principle was explicitly put forward in *Rerum Novarum* with respect to voluntary associations.<sup>34</sup>

Thus, when John XXIII issued *Pacem in Terris*, all but three of the twenty-five discrete human, or natural, rights enumerated in that document were drawn from previous magisterial statements. Affirming a right to religious liberty was but a short step if we consider it in the light of the church’s defense of its own liberty and in the light of the persistent defense of what *Dignitatis Humanae* would call the “usages of society” in Catholic Social Doctrine. Exactly how to formulate the natural right so that, on the one hand, it is formulated in a way distinct from the theological duties and rights of the church under divine revelation, and on the other hand retaining a superordinate dignity in comparison to the broad range of liberties already affirmed with regard to individuals and societies was a hurdle.

Now we can return to where we began, with *Pacem in Terris*:

Also among man’s rights is that of being able to worship God in accordance with the right dictates of his own conscience, and to profess his religion both in private and in public. According to the clear teaching of Lactantius, “this is the very condition of our birth, that we render to the God who made us that just homage which is His due; that we acknowledge Him alone as God, and follow Him. It is from this ligature of piety, which binds us and joins us to God, that religion derives its name.”<sup>35</sup>

The version in part one of *Dignitatis Humanae* reads:

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, within due limits.

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 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.

32 For more detailed account of the evolution of Catholic Social Doctrine, see my article, “The Coherence of the Four Basic Principles of Catholic Social Doctrine: An Interpretation,” in *Pursuing the Common Good*, Acta 14, ed. Margaret S. Archer and Pierpaolo Donati (Vatican City: Pontifical Academy of Social Sciences, 2008), 75–123, <http://www.pass.va/content/scienze-sociali/en/publications/acta/commongood.html>. Regarding the scissors like argument for corporate liberties in general, see my chapter, “Toward an Adequate Anthropology: Social Aspects of Imago Dei in Catholic Theology,” in *Imago Dei: Human Dignity in Ecumenical Perspective*, ed. Thomas Albert Howard (Washington, DC: Catholic University of America Press, 2012), 39–78.

33 Second Vatican Council, *Dignitatis Humanae*, §7. See John C. Murray, “The Declaration on Religious Freedom,” in *Bridging the Sacred and the Secular: Selected Writings of John Courtney Murray, S.J.*, ed. J. Leon Hooper (Washington, DC: George Washington University Press, 1994). Murray’s essay is also available online at the Woodstock Murray archives, <http://www.library.georgetown.edu/woodstock/murray/1966b>.

34 Leo XIII, *Rerum Novarum*, §§ 50–52.

35 John XXIII, *Pacem in Terris*, § 14.

... Therefore 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 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, provided that just public order be observed.<sup>36</sup>

Both the pope and the council cite Lactantius, an advisor to the Emperor Constantine who died at about the time of the Council of Nicea. In the section of the *Divine Institutes* cited by John XXIII, Lactantius comments in a general way on ancient wisdom shared by Gentiles, Jews, and Christians, namely that it belongs to the supreme good of humankind to know and serve God: “Truly religion is the cultivation of the truth.”<sup>37</sup> For its part, *Dignitatis Humanae* cites a different section from the same work, where Lactantius explains that the specifically Christian understanding of the Cross of Christ is the ultimate completion of acts of religion.<sup>38</sup> Appropriately, this appears in part two of *Dignitatis Humanae*, which deals with religious freedom under the light of divine revelation.

These two uses of Lactantius provide a clue to how Pope John and the council were thinking through the question of how to formulate the human right, with a corresponding duty, distinct from rights which flow from duties incumbent upon faith in divine revelation. The pope and the council put the natural right squarely in what the tradition called the natural duty (or virtue) of religion. It is not mentioned in *Dignitatis Humanae*, at least not just as such.<sup>39</sup> Traditionally, it was understood to be a species of justice insofar as what can be known about God, even dimly and from afar, engenders duties of conscience, specifically internal acts of devotion and external acts of cult.<sup>40</sup> It is counted as a natural rather than a theological virtue. It has its anthropological source in the openness of the human intellect to reality as a whole, not only the divine as first cause but also under the aspect of happiness, human perfection. Such pursuit is an inchoate duty of rational creatures because it stands so close to the good(s) perfective of human action. To worship superstitiously is not merely unworthy of God but proximately unworthy of the human person.

Take for example the saying of Epictetus “Were I a swan, I should do after the manner of a swan. But now, since I am a reasonable being, I must sing to God: that is my work: I do it, nor will I desert this my post, as long as it is granted me to hold it; and upon you too I call to join in this self-same hymn.”<sup>41</sup> The locus classicus in medieval scholasticism for the anthropological premise is Thomas Aquinas’s discussion of human inclinations and the first precepts of natural law. “[T]here is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society.”<sup>42</sup> Over and above human inclinations to preserve oneself in being according to one’s

36 Second Vatican Council, *Dignitatis Humanae*, § 2 (citation omitted).

37 Lactantius, *Divine Institutes*, book 4, chapter 28.

38 *Ibid.*, book 5, chapter 19.

39 It does make an appearance in the *Catechism of the Catholic Church*, 2nd ed. (Vatican City: Libreria Editrice Vaticana, 2000), §§ 2084–135.

40 Thomas Aquinas gives two accounts of religion in the *Summa Theologiae*. In the first part of part II, questions 80–81, he treats it as a natural rather than a theological virtue. In the first part of part II, questions 98–103, he covers it quite differently, here in terms of the historical succession of laws, from the natural law, human positive law, and Mosaic law. Aquinas, *Summa Theologiae*, part I-II, questions 80–81, part I-II, questions 98–103. It is a complicated topic because while Aquinas recognizes a natural duty to give due to God he does not hold that there is any such thing as a natural religion.

41 Epictetus, *The Golden Sayings of Epictetus*, The Harvard Classics: 1909–14, ed. Charles Eliot, trans. Hastings Crossley (New York: Collier & Sons, 1909), vol. 2, part 2, § 1.

42 Aquinas, *Summa Theologiae*, I-II, question 94, article 2.

kind, and the inclination to copulate, procreate, and to form a society for the nurture and education of the child stands an inclination specific to our rational nature, to know the truth about God. This is not an innate knowledge but rather a natural inclination to grasp the human good of such acts of truth seeking in reference to an ultimate good. Just as Epictetus suggested, such a rational inclination and its proper acts could not be alienated without loss of dignity.

The formulation of the human right of religious liberty therefore found its way from *Pacem in Terris*, with its focus upon personal acts of pursuing and assenting to the truth about God, to part one of *Dignitatis Humanae*. Its ground is a wisdom drawn from human nature and “centuries of experience.” The human acts of pursuing, assenting to, and acting rightly upon the truth are of their very nature personal acts that cannot be outsourced. Such acts perfect the human person precisely because they are free and upright. That stem of rational inclination persists despite ignorance and sin, and, as such it indicates an end that transcends “terrestrial and temporal affairs.”<sup>43</sup>

The council did not feel pressed to investigate the secrets of the human heart nor engage in comparative religion. For purposes of the natural right, the ground is the dignity of the human person searching, finding, and acting upon duties that ensue in conscience. The concrete historical situation of such pursuits, the diverse social processes of formation of religious quests, the successes and dead ends encountered in religion, and the distinction between revealed and natural theology are important issues. Even so, the distinctions and investigations will uncover two ways the vibrant stem of rational inclination is developed: by human wisdom and by the theological virtue of faith. In *Dominus Iesus*,<sup>44</sup> Cardinal Ratzinger notes that

For this reason, the distinction between *theological faith* and *belief* in the other religions, must be *firmly held*. If faith is the acceptance in grace of revealed truth, which “makes it possible to penetrate the mystery in a way that allows us to understand it coherently”, then belief, in the other religions, is that sum of experience and thought that constitutes the human treasury of wisdom and religious aspiration, which man in his search for truth has conceived and acted upon in his relationship to God and the Absolute.<sup>45</sup>

The Christian distinctions, in other words, are compatible with (without being reduced to) the anthropology of *homo religiosus* found in many wisdom traditions, which, as Lactantius said, acknowledge that the supreme good of man is to know and serve God.

43 Second Vatican Council, *Dignitatis Humanae*, § 3.

44 Gerard V. Bradley, “Pope John Paul II and Religious Liberty,” *Ave Maria Law Review* 6, no. 1 (2007): 33–59. Not only is this a very lucid article on *Dignitatis Humanae*, but it alerted me to the importance of Ratzinger’s work in *Dominus Iesus*.

45 Congregation for the Doctrine of the Faith, *Dominus Iesus* [Declaration on the unicity and salvific universality of Jesus Christ and the Church]. (August 6, 2000), § 7, quoting John Paul II, *Fides et Ratio* [Encyclical on the relationship between faith and reason] (September 14, 1998), § 13. In *Fides et Ratio*, John Paul observes that “All men and women, as I have noted, are in some sense philosophers and have their own philosophical conceptions with which they direct their lives. In one way or other, they shape a comprehensive vision and an answer to the question of life’s meaning; and in the light of this they interpret their own life’s course and regulate their behaviour.” John Paul II, *Fides et Ratio*, § 30. And, what is relevant to *Dignitatis Humanae* part one, that they do so both by a personal quest and within communal traditions: “On the one hand, the knowledge acquired through belief can seem an imperfect form of knowledge, to be perfected gradually through personal accumulation of evidence; on the other hand, belief is often humanly richer than mere evidence, because it involves an interpersonal relationship and brings into play not only a person’s capacity to know but also the deeper capacity to entrust oneself to others, to enter into a relationship with them which is intimate and enduring.” John Paul II, *Fides et Ratio*, § 32. Together, and applied to *Dignitatis Humanae* (1) the natural inclination to know the truth about God is a kind of natural philosophical act, but not necessarily a scientific one; (2) its formation is ordinarily in the context of communication with others.

The natural right is chiefly anthropological, consisting in what human persons and their communities say and do about their actions with regard to God. Divine right, which is taken up in part two of *Dignitatis Humanae*, consists in revelation, or what God says to man about himself. Both have a ground in the freedom and duty covered by the human right. So, for example, the minister of the sacrament has a duty and liberty under two aspects: the first as a natural right in civil society vis-à-vis public authority, just as spelled out in *Dignitatis Humanae* part one; the second is quite different, for in Catholic theology no person just on their own recognizance has a right to exercise such sacramental and ordinary powers independent of the corporate nature of the church as understood in the light of divine revelation. If these two exercises of religious freedom remain distinct as well as coherently related, then *Dignitatis Humanae* has done its work successfully.

## CONCLUSION

*Dignitatis Humanae* is the most prominent example in modern times of a divine right in search of a companion right in the moral-juridical domain. It is unusual because, since the Enlightenment, the quest for natural rights was marked by the hope of replacing divine rights, or at the very least deferring such claims. Under modern historical skies, the Catholic Church proceeded against that grain. To see this more clearly we read *Dignitatis Humanae* backwards. It is not the usual hermeneutic, but by the same token it is not flippant. For it shows that the first phase of development depended upon a defense of corporate ecclesial liberty, spelled out for the purpose of distinguishing the church from the state. The second phase, which was the moral-juridical quest for a natural (human) right grounded in human nature, limits the State from below. The development of Catholic teaching was not a single but rather a double vector.

This peculiar path of development, which took place over the better part of a century, yielded a strong position on corporate religious liberty, both in the ecclesiological and in the moral-juridical lines. Church liberty, rightly considered, was framed theologically for the good reason that the church's constitution is not woven together by principles of natural law and natural right. Nor can it be located by aggregating the religious consciences of individual believers. The liberty of this institution, therefore, had to be corporate all the way down. On Catholic theology, the church is not just a set of juridical and constitutional powers to be drawn and defended against the state. Pope Pius XII's encyclical *Mystici Corporis* (1943) and the council's Constitution *Lumen Gentium* (1964) deepened the account of the church as a living spiritual and social corporate body.<sup>46</sup>

On our reading, the ecclesiological setting quickened a sense of corporate religious liberties once the magisterium turned its attention to the social and civil spheres. The result can be seen in the sections of part one of *Dignitatis Humanae* given to the rights of religious communities.<sup>47</sup> It covers churches, families, schools, associations, and properties as full social implications of the human person as a truth seeker and communicator. Indeed, the corporate aspects of religion are much better developed than in other statements and instruments of human rights since 1948. Fifty years later, the corporate religious liberties are at the center of political and legal debate.

For a document written so tersely, *Dignitatis Humanae* manages to deliver a rather high anthropology as the ground of the natural right. When he signed the document, Pope Paul VI referred to it

46 Pius XII, *Mystici Corporis* [Encyclical on the mystical body of Christ] (June 29, 1943); Second Vatican Council, *Lumen Gentium* [Dogmatic Constitution on the Church] (November 21, 1964).

47 Second Vatican Council, *Dignitatis Humanae*, §§ 4–6.

as a “theocentric and theological concept of man and the universe.”<sup>48</sup> Whatever one might think, it is not a minimalist account of human dignity. The church lagged behind in formulating this natural right, but for that very reason it had time to slowly and carefully decide how to formulate and explain the anthropological ground. Fifty years later it remains to be seen whether common opinion, as well as legal and political institutions, can bear the weight of that anthropology.

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48 Paul VI, “Address of Pope Paul the VI during the Last General Meeting of the Second Vatican Council,” (Vatican City, December 7, 1965).