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INSTITUTUM SUPERIUS THEOLOGIAE MORALIS

STUDIA MORALIA

XI

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RAYMOND OWEN MCEVOY, O.M.I.

JOHN COURTNEY MURRAY'S THOUGHT ON RELIGIOUS LIBERTY IN ITS FINAL PHASE

SUMMARIUM

Joannes Courtney Murray (Neo-eboracensis, 1904-1967) a bello mundano secundo impulsum accepit examinandi problema cooperationis christianorum catholicorum et protestantium in depellendis minis traditioni politicae occidentali impendentibus. Ab hac quaestione perductus est ad considerandum id quod in Statis Foederatis Americae (U.S.A.) maxime tali collaborationi obstetit: problema libertatis religiosae.

Primo tentamine, anno 1945 instituto, inidoneo reperto, opiniones eius gradatim maturuerunt primis annis post 1950; quibus pervenit ad conceptionem libertatis religiosae substantialiter conformem illi quae in Declaratione de libertate religiosa (Dignitatis humanae) Concilii Vaticani IIi continetur.

Sententiae patris Murray consessui ecclesiastico gratae non fuerunt, ita ut anno 1954 obstrictus fuerit desistere a scriptione de relationibus Ecclesiae et Status. Anno 1960 librum edidit, per aliquot annos praeparatum, quo adversarios indirecte confutavit, ostendens systema politicum americanum, cuius libertas religiosa est pars integralis, fundari in iure naturali. Jam a multis annis etiam atque etiam discrimen radicale inter conceptionem libertatis religiosae in traditione americana contentam eamque traditionis continentalis (Europae) exposuerat. Constitutio enim U.S.A., admittit incompetentiam Status in re religiosa et spondet de libertate civium in hac materia; eius habitus modo generico « benevolae neutralitatis » dici potest. E contra systemata politica 'continentalia', plenitudinem potestatis sibi vindicantia, ius libertatis religiosae suis civibus 'concedunt' atque effato 'separationis Ecclesia et Status' abutuntur tamquam telo, quo Ecclesiam a societate humana excludant. Itaque ecclesiasticae damnationes « libertatis religiosae » modo continentali conceptae non sunt traducendae in conceptionem americanam omnino diversam, quam Ecclesia potius ex animo recipere deberet.

Studiis per multos annos protractis de conditione americana J.C. Murray peridoneus exstitit qui advocaretur ut peritus in deliberationibus Concilii Vaticani IIi de libertate religiosa et relationibus Ecclesiam inter et Statum. In praeparatione « Declarationis » magnas partes habuit.

Quae postea scripsit hanc Declarationem commentantur; imprimis autem notionem « evolutionis doctrinae » exponunt, quam a multis, qui Declarationem oppugnant eamque controversiis cumulant, ignorari vel male intelligi putavit.

In hoc nostro articulo praecipue explicantur opiniones J.C. Murray de libertate religiosa in U.S.A., de comparationibus inter Declarationem Concilii et Constitutionem americanam, de evolutione doctrinae de libertate religiosa.

Introduction

John Courtney Murray, like many others during the Second World War, became greatly concerned with the threat that totalitarianism was posing to Western civilisation [1]. He felt that the spiritual substance of Western society had to be strengthened in order to meet the threat. As Catholics were unable to ward off the menace on their own he called for co-operation between Catholics, Protestants and all men of good will on the basis of natural law as the spiritual substance of society, as the rock on which a new world order with a just and lasting peace could be built.

With the end of the war in 1945 Murray turned his attention from the problem of co-operation to the related problem of religious liberty [2]. Without being able to articulate clearly why, he felt there was something wrong with the traditional

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[1] John Courtney Murray was born in Manhattan, New York City, in 1904. At the age of sixteen he joined the New York province of the Society of Jesus and was ordained in 1933. Having obtained a doctorate in theology at the Gregorian University in Rome he became professor of dogmatic theology at Woodstock, the Jesuit house of studies in Maryland, in 1937. He held this post until his death in 1967.

[2] « Whether one refers to this problem as that of the relation between Church and state or of religious liberty or of cooperation is essentially immaterial. All three problems finally, as Murray suggested, are simply aspectival ways of speaking of the same issue. » Cf. Thomas T. Love, *John Courtney Murray. Contemporary Church-State Theory*, New York, Doubleday & Co., 1965, p. 40.

teaching on this problem. Thomas T. Love sums up the traditional or conservative view on religious liberty as follows:

> (1) There is only one true Church or religion; it is the highest good for man; hence, the state must aid the Church positively and defend it from all attacks. This is to say that only the Catholic Church is to have full religious liberty.
>
> (2) All other so-called religions are in error and error does not have the right as truth. Error must not be freely propagated. ... The conservative wishes to *contain* error by legally prohibiting public assemblage and propagation.
>
> (3) If Catholics are in a *majority* (e.g., Spain, Colombia) they are to oppose the external and public freedom of those holding different religious beliefs. However, if Catholics are in the *minority* they are to ask for religious freedom... [3].

Naturally Protestants found it very difficult to accept this type of reasoning and Murray felt that the traditional method of argumentation was doing great harm to the work of the Church in the U.S. where the Church was being presented as the enemy of freedom. Besides, Protestant bodies were co-operating at this time to formulate a theory of religious freedom. Accordingly, as he considered Catholic literature on the subject to be inadequate and as he felt that mutual understanding between Catholics and Protestants on this issue was of supreme importance for their co-operation towards the common welfare, he set out to formulate a theory of religious freedom on the basis of natural law, a theory which because it had a natural-law basis should be acceptable to Protestants.

His attempt failed. The reason for its failure can be discerned in the duties he ascribed to the state. He wrote: « The fact that the organized social community and the public authority that governs it have obligations towards God follows from the fact that society owes it [*sic*] origin to God and has its end appointed by God » [4]. The state was not a god in its own right but an institution of nature and as such subject to the

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[3] *Ibid.*, p. 29.

[4] « Freedom of Religion. I: The Ethical Problem », *Theological Studies* (*TS*), 6 (1945), p. 266.

law of nature. Natural law imposed on the state, « that is, on organized society with its agencies of government »[5], certain major obligations. The state had the obligation to acknowledge God as its author, to worship him as he willed to be worshipped, and to subject its official life and action to his law. This absolute obligation included also the hypothetical obligation of accepting a higher belief, law, and mode of worship, if God revealed them as his will. The latter assertion was his downfall; for in all logic he had to conclude that the state had to accept the higher belief, law and mode of worship that God has in fact revealed. In other words, his natural-law reasoning led him to conclude that the very idea he had been trying to get away from, namely, the confessional state, was a demand of natural law. Murray recognised his failure and other articles he intended to write at this time on the topic of religious freedom never appeared.

In 1946 he was made editor of the Jesuit review *America*. This appointment gave him the occasion to write about items of topical interest connected with religious freedom, particularly about the question of state aid to Catholic schools. During this period, through his reflection on the First Amendment to the American Constitution[6], Murray got away from the notion of the confessional state and began to see the state as something in the secular or « lay » order. The First Amendment was for him a political not a theological document; it does not say that all religions are equal before God, only that they are equal before the law; it was concerned with defining the state, not the Church; it aimed at political unity, at social peace on the political level; the religious communities remained free to be divided but their divisions were not to disrupt civil life; it recognised man's existence as citizen and believer and limited the sphere of government to the domain of civic life. Immunity was granted to the religious conscience from any coercive measures exerted by any agency of government and

[5] *Ibid.*

[6] The First Amendment states: « Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof... ».

equality of all religious beliefs and religious bodies was recognised.

As the phrase « separation of Church and state » was frowned on in ecclesiastical circles, Murray was careful to point out that separation in the American context was entirely different from separation in the European context. American separation was not atheistic, morally neutral, totalitarian, anti-religious and anti-Catholic. America was a « lay » or « secular » state in a unique sense. It was for this reason, he claimed, that American Catholics were able to subscribe to the First Amendment in principle and not merely in practice. Religious freedom in the American sense was acceptable to Catholics on principle. This conclusion was contrary to the traditional teaching on Church-state relations which included civil intolerance as an intrinsic element.

In a series of major articles in 1948-49 [7], Murray set out to show that civil intolerance was not an essential part of Catholic doctrine or a necessary consequence of the dogma that the Catholic Church is the one true Church. In conformity with the movement of his thought in the years 1946-48, Murray began to differentiate clearly for the first time between the concepts « society », « state » and « government. » Society was the pre-political matter to which the state imparted a particular limited form, a political form. The state was not society but rather the public order as a living action in society, an action directed at a limited end which was temporal and external. Murray is now going beyond his undifferentiated 1945 definition of the state as organised society with its agencies of government. Government was not the state but a part of the order which is the state and a bearer of a portion of the action which is the state. He insisted that these three terms could not be used interchangeably. Moreover, he began to adopt an historical approach to the

[7] Cf. « Governmental Repression of Heresy », *Proceedings of the Catholic Theological Society of America,* Chicago, 1948, pp. 26-101; « St. Robert Bellarmine and the Indirect Power », *TS,* 9 (1948), pp. 491-535; « Contemporary Orientations of Catholic Thought on Church and State in the Light of History », *TS,* 10 (1949), pp. 177-234; « Current Theology on Religious Freedon », *TS,* 10 (1949), pp. 409-32.

problem of Church-state relations rather than the abstract approach he used in 1945. The problem for the theologian as he saw it now was to sift the Church's permanent and absolute principles governing Church-state relations from her transitory and time-conditioned application of them.

Of all the theories of Church-state relations Murray found the one proposed by John of Paris [8] the most satisfactory and he adopted its fundamental theses. John of Paris presented St. Thomas's natural-law concept of the state as a demand of nature, independent of grace and sin, essentially unmodified by the redemption. Authority in the state is of divine origin and not mediated by the Church; its end is the common temporal welfare, thus specifically « lay », not religious. The prince has a moral function within the confines of natural law but he has no direct function with regard to man's supernatural life.

The exclusively spiritual power of the Church was the second pivot of John's system. The Church is a visible kingdom but a purely spiritual one whose spiritual jurisdiction entails *de se* no temporal jurisdiction. The spiritual and temporal are distinct orders of reality. Political society is as autonomous as the social instinct which produces it. The harmony of the two powers is conditioned by the fidelity of each to its own end, each power in its own way favouring the performance by the other of the other's own functions. The exercise of the Church's power in the temporal order is exclusively spiritual, terminating at conscience. This exercise may have effects indirectly in the temporal order but the temporal order is not directly touched. All that the Church can demand of the state is that the state enforce within society the demands of justice and the Church can make this demand because the state is obliged by its own finality to make this contribution. Since religious unity is not a demand of justice, a political end, it follows that the Church cannot ask the state to co-operate in preserving religious unity. Consequently, civil intolerance is not one of the duties of the state.

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[8] John of Paris (d. 1306), one of Philip the Fair's theologians, was active in the controversy with Boniface VIII.

Anticipating objections to such a conclusion on the grounds that it was contrary to the teaching of the Popes, Murray claimed that only John of Paris's theory would harmonise with the core of Leo XIII's doctrine, namely, Leo's restatement of the Gelasian thesis emphasising the dualism of societies and powers and the autonomy of each society and power in its own sphere; secondly, Leo's insistence that an orderly relationship between the two powers requires respect for the nature of both powers and not merely for the Church; thirdly, Leo's requirement that the power and judgment of the Church should extend to whatever in human affairs is in any way sacred. Murray concluded that in contemporary Catholic thought on Church-state relations freedom of the Church — the basic principle underlying all the Church's relations with the secular powers down the ages — did not imply « religion of the state » or civil intolerance with the result that it was perfectly reconcilable with religious freedom.

Murray's sustained attack on what was accepted as the traditional doctrine of the Church was bound to provoke a reaction. Between 1950 and 1954 he was engaged in lively controversy with several eminent American theologians of the time, George Shea, Francis J. Connell and Joseph Clifford Fenton[9]. These objected to Murray's definition of the state and to his limitation of its functions, to his apparently low opinion of books on public ecclesiastical law which in their view faithfully reflected papal teaching. Spurred by this opposition Murray enlarged on what he had said were the Church's three permanent principles in her relations with the state: her freedom, the need for harmony of laws, and the necessity of co-operation.

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[9] Cf. George W. Shea, « Catholic Doctrine and 'The Religion of the State' », *American Ecclesiastical Review* (*AER*), 123 (1950), pp. 161-74; « Catholic Orientations on Church and State », *AER*, 125 (1951), pp. 405-16; Francis J. Connell, « The Theory of the 'Lay State' », *AER*, 125 (1951), pp. 7-18; « Reply to Father Murray », *AER*, 126 (1952), pp. 49-59; Joseph Clifford Fenton, « The Relation of the Christian State to the Catholic Church according to the *Pontificale Romanum* », *AER*, 123 (1950), pp. 214-18; « The Status of a Controversy », *AER*, 124 (1951), pp. 451-58; « Principles Underlying Traditional Church-State Doctrine », *AER*, 126 (1952), pp. 452-62; « Toleration and the Church-State Controversy », *AER*, 130 (1954), pp. 330-43.

Moreover, he clarified still further his fundamental political notions by defining four terms, civil society, body politic, state and government. Civil society he described as the total complex of organised human relationships on the temporal plane. Political society or the body politic is one element in this complex and aims at the common good, the good of the political body as such. Body politic connotes state which is a set of institutions combined into a complex agency of social control and public service. It belongs to the order of action rather than to that of substance. Its functions are not co-extensive with the functions of society; they are limited by the fact that it is only an element in society. State connotes government which is a reciprocal relationship between ruler and ruled [10].

However, towards the end of the controversy it was the authoritative nature of the traditional teaching of the Church that was emphasised. Murray's opponents appealed to the writings of Leo XIII in particular. Accordingly, Murray made a profound study of Leo and published his findings in five long articles [11]. He aimed at finding what the permanent and what the transient elements in Leo's doctrine were. He concluded that the permanent or doctrinal element in Leo's teaching centred round Leo's restatement of the Gelasian thesis: the distinction between Church and state in origin, end and means to the end; the rightful autonomy of each in its own sphere; the need for *concordia* or harmony in those areas in which both Church and state have a legitimate interest. On the other hand there were contingent elements arising from the polemic which Leo conducted with his opponents, the Liberals. This polemical part of Leo's work consisted in a refutation of the naturalistic and rationalistic basis of Liberalism. In Murray's view the

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[10] J.C. Murray, « The Problem of 'The Religion of the State' », *AER*, 124 (1951), pp. 327-52; « For the Freedom and Transcendence of the Church », *AER*, 126 (1952), pp. 28-48.

[11] « The Church and Totalitarian Democracy », *TS*, 13 (1952), pp. 525-63; « Leo XIII on Church and State: The General Structure of the Controversy », *TS*, 14 (1953), pp. 1-30; « Leo XIII: Separation of Church and State », *TS*, 14 (1953), pp. 145-214; « Leo XIII: Two Concepts of Government », *TS*, 14 (1953), pp. 551-67 [Part I]; « Leo XIII: Two Concepts of Government. II: Government and the Order of Culture », *TS*, 15 (1954), pp. 1-33.

concept of the confessional state in Leo XIII was more properly related to the polemical than to the doctrinal aspects of his teaching. Leo defended the concept of the confessional state because the Liberals were attacking it and striving thereby to make the Church irrelevant to society. However, despite his masterly exposition of Leo's doctrine it must be said that Murray never succeeded in answering satisfactorily the objections his opponents raised on the basis of Leo's affirmations. It is true, as Murray pointed out, that the concept of the confessional state is not in the logic of the Gelasian thesis; that is to say, one cannot conclude from the Gelasian premises to the necessity of the confessional state. As well, it is plausible to contest that Leo's defence of the concept arose from the Liberals' attack on it. However, the reasons adduced by Leo to support his approval of the concept would certainly seem to have been considered by him to be permanently valid principles. For example, Leo regarded the state as a creature which, like every other creature, owed a debt of honour to God; and this debt had to be paid in the way God wanted it to be paid, namely, according to the rites of the true Church. In short, it would seem that Murray failed to show that Leo did not hold the « traditional » theory of Church-state relations [12].

One of those who contributed an article to the controversy was Cardinal Ottaviani, head of the Holy Office [13]. He contended that the accepted teaching on Church-state relations was part of the Church's immutable doctrine and that people like Murray were undermining the traditional doctrine of the Church. Murray's writings had in fact been causing the Holy Office increasing concern. As a result, in 1955, Murray was ordered by his Jesuit superiors in Rome to submit to strict censorship and urged to abandon further writing on matters of Church and state. It can be said, however, that by 1954 Murray's theory of religious freedom was substantially complete. His future work will be

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[12] Cf., for example, Leo XIII, *Libertas*, *Acta*, VIII, 230-31; *È giunto*, *Acta*, IX, 146-47. Murray had great difficulty in « explaining » Leo's *Longinqua oceani*; see *TS*, 13 (1952), pp. 551-52, n. 58.

[13] Cardinal Ottaviani, « Church and State: Some Present Problems in the Light of the Teaching of Pope Pius XII », *AER*, 128 (1953), pp. 321-34.

concerned with enlarging on his previous ideas, clarifying them, trying to make them more acceptable and accepted, and in particular explaining the development of doctrine that had taken place since the nineteenth century. The years 1955-58 were a fallow period as far as his writing on religious freedom was concerned but in 1958 he began working on a book later published in 1960, entitled *We Hold These Truths. Catholic Reflections on the American Proposition* [14]. It was with this book that the final phase of Murray's thought on religious liberty began. *We Hold These Truths* was not indeed primarily concerned with the issue of religious liberty. It was an « effort to explore the content, the foundations, the mode of formation, the validity, etc., of the American Proposition, or as it is otherwise called, with nuances of meaning, the public consensus or the public philosophy of America » [15].

I. *Murray and the American Proposition*

One of the objects Murray had in mind when collecting the essays contained in *We Hold These Truths* was to answer the following question affirmatively: Is American democracy compatible with Catholicism? The Catholic had to recognise that a new problem had been put to the universal Church by the American treatment of pluralism. The problem of pluralism as it arose in America was in fact unique in the modern world, chiefly because pluralism was the native condition of American society. This fact created the demand for a new solution and the demand was met by the American Constitution.

> A new problem has been put to the universal Church by the fact of America — by the uniqueness of our social situation, by the genius of our newly conceived constitutional system, by the lessons of our singular national history, which has molded in a special way the consciousness and temper of the American people, within whose

[14] New York: Sheed & Ward, 1960; henceforth referred to as *We Hold These Truths*. This book consists of a series of essays in connection with America written over the previous decade. References are given only to this book and not to the original articles.

[15] *Ibid.*, p. viii.

midst the Catholic stands, sharing with his fellow citizens the same national heritage. The Catholic community faces the task of making itself intellectually aware of the conditions of its own co-existence within the American pluralistic scene [16].

Historically, the Church had accepted in practice the special situation of America, its political idea, and the institutions through which it works. But at the same time there seemed to exist an implied condemnation of the system in theory. The condemnation was based on the Church's stand against Jacobin democracy and failed to take into consideration that the American political system sprang from principles totally different from those underlying Jacobinism. « The question now is, whether this ambivalent attitude is any longer either intellectually or morally respectable, whether it takes proper account of the realities in the situation and of the special affirmation of the human that America has historically made » [17]. Murray consistently rejected this ambivalent attitude and by rejecting it he was of course reiterating his objection to the traditional theory of religious freedom.

In Murray's view, the American Proposition was at once doctrinal and practical. « It presents itself as a coherent structure of thought that lays claim to intellectual assent; it also presents itself as an organized political project that aims at historical success » [18]. However, neither as a doctrine nor as a project was the Proposition a finished thing. It required development, a progressive articulation, particularly today when « there is no element of the theorem that is not menaced by active negation, and no thrust of the project that does not meet powerful opposition » [19]. America had to be more clearly conscious of what it proposed and more purposeful in the realisation of the project proposed. It had to ask itself the question whether and to what extent it remained dedicated to the conception of itself formulated by its Founding Fathers.

Every proposition supposes an epistemology, and the epistem-

[16] *Ibid.*, p. 27.
[17] *Ibid.*, p. 183.
[18] *Ibid.*, p. vii.
[19] *Ibid.*, p. viii.

ology of the American Proposition was made clear in the Declaration of Independence in the phrase: « We hold these truths to be self-evident... » Murray thought that it could not be questioned that the « American Proposition rests on the forthright assertion of a realist epistemology. The sense of the famous phrase is simply this: 'There are truths, and we hold them, and we here lay them down as the basis and inspiration of the American project,...' » [20]. For the Founding Fathers, the life of man in society under government was « founded on truths, on a certain body of objective truth, universal in its import, accessible to the reason of man, definable, defensible. If this assertion is denied, the American Proposition is, I think, eviscerated at one stroke » [21]. The truths had to be assented to, consented to, and worked into the texture of institutions, if there was to be any hope of founding a true City in which men could dwell in dignity, peace, unity, justice, well-being, freedom.

It is from rational deliberative dialogue, from argument, that a community becomes a political community. And the three major themes or arguments are the affairs of government, the affairs beyond the limited scope of government, and the « constitutional consensus whereby the people acquires its identity as a people and the society is endowed with its vital form, its entelechy, its sense of purpose as a collectivity organized for action in history » [22]. This consensus is

> an ensemble of substantive truths, a structure of basic knowledge, an order of elementary affirmations that reflect realities inherent in the order of existence. It occupies an established position in society and excludes opinions alien or contrary to itself.
>
> This consensus is the intuitional a priori of all the rationalities and technicalities of constitutional and statutory law. It furnishes the premises of the people's action in history and defines the larger aims which that action seeks in internal affairs and in external relations [23].

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[20] *Ibid.*, pp. viii-ix.
[21] *Ibid.*, p. ix.
[22] *Ibid.*, p. 9.
[23] *Ibid.*, pp. 9-10.

All public argument must set out from this consensus about truths which are a patrimony, a heritage from history, a product of reason and experience. If there is no basic agreement there can be no argument. And argument is necessary both to preserve the consensus in the public mind and to renew its vitality in the light of experience.

What is the essential content of the American consensus? The first truth to which the American Proposition makes appeal is the sovereignty of God over nations as well as over individual men. It is this truth which sharply distinguishes the American from the Jacobin tradition. American secularism does of course dissent from this principle but the dissent serves to emphasise the American affirmation which puts the American Proposition in fundamental continuity with the central political tradition of the West. « But this continuity is more broadly and importantly visible in another, and related, respect, » namely, « the fact that the American political community was organized in an era when the tradition of natural law and natural rights was still vigorous. Claiming no sanction other than its appeal to free minds, it still commanded universal acceptance. And it furnished the basic materials for the American consensus »[24]. And these basic materials embraced principles bearing upon the origin and nature of society; the function of the state as the legal order of society; the scope and limitations of government; constitutionalism; the rule of law; the concept of government by law rather than by men; consent of the governed; popular participation in rule presupposing a sense of justice inherent in the people and free institutions to enable this sense of justice to express itself; the limited nature of the state and its distinction from society; governmental incompetence in the field of opinion; the need for a virtuous people for men to be politically free; the idea that man has certain original responsibilities precisely as man antecedent to his status as a citizen, from which responsibilities inalienable rights flow.

The original consensus of the American people was based on these principles. Does such a consensus still survive? Murray

[24] *Ibid.*, p. 30.

admitted the possibility that the American people in general do not think of politics and law the way their philosophers do — in purely positivist and pragmatist terms. The American university « long since bade a quiet goodbye to the whole notion of an American consensus, as implying that there are truths that we hold in common, and a natural law that makes known to all of us the structure of the moral universe in such wise that all of us are bound by it in a common obedience »[25]. It was true that the tradition of natural law as the basis of free and ordered political life was still adhered to by an important portion of the American people — the Catholic community. Consequently, « Catholic participation in the American consensus has been full and free, unreserved and unembarrassed, because the contents of this consensus — the ethical and political principles drawn from the tradition of natural law — approve themselves to the Catholic intelligence and conscience »[26]. But the Catholic voice in America is not the dominant one. Protestant Christianity, particularly in its left wing, inevitably evolved away from the tradition substantially handed on by the early American theorists and politicians, and it is not impossible that the tradition will some day be completely dissolved. If that happened, the guardianship of the original American consensus, based on the Western heritage, would pass to the Catholic community, the one community on the American pluralistic scene remaining faithful to the tradition of natural law.

Murray defined pluralism as follows:

> By pluralism here I mean the coexistence within the one political community of groups who hold divergent and incompatible views with regard to religious questions - those ultimate questions that concern the nature and destiny of man within a universe that stands under the reign of God. Pluralism therefore implies disagreement and dissension within the community. But it also implies a community within which there must be agreement and consensus[27].

Hence pluralism implies unity amid diversity. Such unity amid diversity is found to an eminent degree in America which

[25] *Ibid.*, p. 40.
[26] *Ibid.*, p. 41.
[27] *Ibid.*, p. x.

contains a large number of diverse religious communities, the integrity of whose religious convictions is guaranteed. Yet these communities live in civil unity. « The one civil society contains within its own unity the communities that are divided among themselves; but it does not seek to reduce to its own unity the differences that divide them. In a word, the pluralism remains as real as the unity » [28]. The legal form of the American solution to the problem of a plurality of conflicting religions within the one civil society is given in the First Amendment to the Federal Constitution: « Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof... ».

The question arises: What is the Catholic view of this solution? Murray stated unhesitatingly that the « American Catholic is entirely prepared to accept our constitutional concept of freedom of religion and the policy of no establishment as the first of our prejudices » [29]. Its validity in the American context and against the background of American history is wholeheartedly accepted by American Catholics who would even go so far as to say that it is essential to their state, « the foundation of their whole Constitution, with which, and with every part of which, it holds an indissoluble union » [30]. Murray saw the First Amendment as the most striking aspect of a more fundamental prejudice — « the prejudice in favor of the method of freedom in society and therefore the prejudice in favor of a government of limited powers, whose limitations are determined by the consent of the people » [31]. The Catholic community historically consented to the American solution to the problem of pluralism;

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[28] *Ibid.*, p. 45.

[29] *Ibid.*, p. 47. « Prejudice » is not used pejoratively here. Murray describes it: « A prejudice is not necessarily an error; to be prejudiced is not necessarily to be unreasonable. Certain pre-judgments are wholesome. Normally, they are concrete judgments of value, not abstract judgments of truth. They are not destitute of reason, but their chief corroboration is from experience. They are part of the legacy of wisdom from the past; they express an ancestral consensus » (*ibid.*).

[30] Murray was here quoting from Edmund Burke's *Reflections on the Revolution in France* where Burke argued in favour of Church Establishment as the first of the English prejudices.

[31] Murray, *We Hold These Truths*, p. 47.

it participates in the general prejudice stated in the First Amendment and it made this clear « often enough both in action and in utterances »[32].

Nevertheless Catholics' acceptance of the First Amendment is often called in question. The questioning springs from differences of interpretation of the First Amendment. Some see in it a religious content, dogmas, norms of orthodoxy, articles of faith. Others see in it only law, not dogma or religious articles. The First Amendment does not contain « articles of faith but articles of peace, that is to say, you may not act against them, because they are law and good law »[33]. The First Amendment does not enshrine an ecclesiology or a religious philosophy; it is simply good law. « This, I take it, is the Catholic view. But in thus qualifying it I am not marking it out as just another 'sectarian' view. It is in fact the only view that a citizen with both historical sense and common sense can take »[34]. Nor can it be said that Catholics accept the First Amendment merely on grounds of expediency.

> To speak of expediency here is altogether to misunderstand the moral nature of the community and its collective moral obligation toward its own common good. The origins of our fundamental law are in moral principle; the obligations it imposes are moral obligations, binding in conscience. One may not, without moral fault, act against these articles of peace[35].

In short, American experience has shown that the First Amendment is good law and it is accepted by Catholics as such. American experience demonstrated that political unity and stability are not necessarily dependent on the common sharing of one religious faith, that stable political unity can be strengthened by the exclusion of religious differences from the area of concern allotted to government, and that religion itself benefited by such legal limitation of governmental power.

By proffering this explanation of the First Amendment and

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[32] *Ibid.*, p. 48.
[33] *Ibid.*, p. 49.
[34] *Ibid.*, p. 56.
[35] *Ibid.*, p. 63.

of Catholics' acceptance of it Murray was killing two birds with one stone. On the one hand, he was rejecting the Protestant, Liberal Protestant, secularist interpretations of the First Amendment as doing the very thing it aimed at avoiding, namely, establishing a church or a view of religion. On the other hand, he was insisting against the Catholic Right that the First Amendment could be accepted in theory and not merely on grounds of expediency.

To drive home the latter point Murray appeals to a discourse of Pius XII to Italian jurists in 1953 [36].

> This discourse is a strong affirmation of the primacy of the principle of peace (or « union », which is the Pope's synonymous word) when it comes to dealing with the « difficulties and tendencies » which arise out of mankind's multiple pluralisms and dissensions. The « fundamental theoretical principle, » says the Pope (and one should underscore the word, « theoretical »; it is not a question of sheer pragmatism, much less of expediency in the low sense), is this: « within the limits of the possible and the lawful, to promote everything that facilitates union and makes it more effective: to remove everything that disturbs it: to tolerate at times that which it is impossible to correct but which on the other hand must not be permitted to make shipwreck of the community from which a higher good is looked for. » This higher good, in the context of the whole discourse, is « the establishment of peace » [37].

The Pope, Murray continues, went on to reject as the solution to the problem of religious pluralism the doctrinaire argument that religious and moral error have no rights and therefore must always be repressed when repression of them is possible.

> Can it happen that *in certain circumstances* He does not give men any mandate, does not impose any duty, and does not even communicate the right to impede or to repress what is erroneous and false A look at reality gives an affirmative response... The duty of repressing religious and moral error cannot therefore be an ultimate norm of action. It must be subordinated to higher and more general norms which in some circumstances permit, and even perhaps make it appear the better course of action, that error should not be impeded, in order to promote a greater good. [38]

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[36] Pius XII, *Ci riesce*, *AAS*, 45 (1953), pp. 794-802.

[37] Murray, *We Hold These Truths*, p. 61 and Pius XII, *Ci riesce*, p. 797.

[38] Pius XII, *Ci riesce*, pp. 798-99.

For Murray, the First Amendment was simply the legal enunciation of this papal statement. The conscience of the American community had given the government no mandate, imposed on it no duty, communicated to it no right to repress religious opinions or practices even though they are erroneous. The American government had to represent the truth of American society as it actually is and the truth is that it is religiously pluralist, with many religious confessions. « It will therefore only represent their freedom, in the face of civil law, to exist, since they do in fact exist. This is precisely the practical attitude which Pius XII recognizes as right, as the proper moral and political course » [39].

History shows the need for this practical attitude in America. « If history makes one thing clear it is that these clauses [the clauses of the First Amendment] were the twin children of social necessity, the necessity of creating a social environment, protected by law, in which men of differing religious faiths might live together in peace » [40]. Four factors in particular led to their necessity: the great mass of the unchurched, the multiplicity of denominations, the bad effects that persecution and discrimination had on business, and the widening of religious freedom in England. However, another historical force in the emergence of religious freedom must be considered, the drive for political freedom. The confusion of Church and state which the post-Reformation era brought forth led to limitations on freedom, either in the form of civil disabilities in the name of the established religion or in the form of religious disabilities imposed in the name of the civil law. The early Americans wanted to put an end to such confusion and reaffirm the ancient distinction of Church and state in a way adapted to America. The distinction, part of the English legal heritage, was within their easy reach and it was embodied in the Constitution in a manner « adapted to the peculiar genius of American government and to the concrete conditions of American society » [41].

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[39] Murray, *We Hold These Truths*, p. 75.

[40] *Ibid.*, p. 57.

[41] *Ibid.*, p. 66.

The enshrinement of the distinction of Church and state in the American constitution is in vivid contrast with another political system, Jacobinism or sectarian Liberalism or totalitarian democracy. Separation of Church and state in the latter system was in fact the most drastic unification of Church and state that history had known. The political assumed the primacy over the spiritual; the state fettered the Church which became a mere *instrumentum regni;* the state was juridically omnipotent and omnicompetent. In contrast, in the American system government is not juridically omnipotent. « Its powers are limited, and one of the principles of limitation is the distinction between state and church, in their purposes, methods and manner of organization » [42]. The theory underlying the American political system is part of Christian tradition and is « altogether defensible in the manner of its realization under American circumstances » [43].

The American affirmation of the distinction between Church and state is made through the imposition of limits on government which is confined to its own proper ends, those of temporal society. It is legally recognised that there is an area that lies outside the competence of government and within this area the Church is fully independent, immune from interference by political authority. Consequently, the Church has a guarantee of a stable condition of freedom as a matter of law and right. As a result the Church's experience in America has proved to be satisfactory « from the viewpoint of the value upon which the Church sets primary importance, namely, her freedom in the fulfillment of her spiritual mission to communicate divine truth and grace to the souls of men, and her equally spiritual mission of social justice and peace » [44]. The Church's freedom is guaranteed, both her freedom as a spiritual authority to teach, to rule, to sanctify, with all that these imply for their free exercise, and her freedom as the Christian people to have access to the teaching of the Church, to obey her laws, to receive her sacraments, and to live within her fold an integral supernatural

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[42] *Ibid.*, p. 68.
[43] *Ibid.*, p. 69.
[44] *Ibid.*, p. 75.

life[45]. This guarantee is an additional reason why Catholics wholeheartedly accept the American political system.

In Murray's view the tradition of natural law and natural rights furnished the basic materials for the original American consensus. He was convinced that his political philosophy based on the natural-law tradition was the political philosophy of the Founding Fathers of the American Republic and that both he and the Founding Fathers drew from the same well of Western political thought. Examination of the relationship of the American consensus to the American business system demonstrated to his enthusiastic satisfaction that the present-day American consensus could be understood and explained only in terms of natural-law theory. An investigation into the relationship between the consensus and American foreign policy led him to a much more pessimistic conclusion: the tradition of natural law was dead in America.

In 1959 Adolf A. Berle published a book concerning the relationship of the consensus to the powerful omnipresent American economy[46]. He asked questions such as the following: are there limits to the power of the relatively few who control the American economy without being responsible to the American people? if so, where do the limits come from and who imposes them? Murray summarised Berle's conclusions in four propositions:

> (1) There are truths (or principles of action or standards of judgment) that command the structure and the courses of the political-economic system of the United States. (2) We hold these truths; our Lords Spiritual have come to them, and We, the People, assent and consent to them; ... (3) These truths, in their application, join harmoniously with other truths in imparting a special character and identity to the American people in what concerns the economic order of their life, which they bring into accord, in general style, with the American idea of a free people democratically organized. (4) The life of these truths (or principles or standards) is sustained, as it was born, of argument and persuasion, which appeal for their validity to experience and reflective thought[47].

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[45] Cf. *ibid.*, p. 203.

[46] *Power Without Property*, New York: Harcourt, Brace & Co.

[47] Murray, *We Hold These Truths*, pp. 106-107.

These propositions gave rise to several philosophical questions in Murray's mind. The public consensus appears as the systematisation of experience; where are the elements derived from by which the experience is systematised? Again, the consensus presents itself as a body of thought; is the body of thought totally produced by or rather normative of the experience? In addition, the consensus is a set of principles or standards in terms of which judgment is passed on contingent facts; what is this non-contingent element of thought by which economic issues are judged, corrected and directed? Finally, since it is the function of the consensus to judge economic events, to correct economic processes, and to direct them to selected ends which are in conformity with the substance and general life-style of the American people, the economy is governed not merely by economic but by political and ultimately by moral decisions. The consensus that forms in the public mind the decision to be a democratic economy and enforces it on economic action contains an element of moral thought; in terms of what theory of morality is this moral experience, and its publicity, to be understood and explained? Murray replies:

> My proposition is that only the theory of natural law is able to give an account of the public moral experience that is the public consensus. The consensus itself is simply the tradition of reason as emergent in developing form in the special circumstances of American political-economic life [48].

The presuppositions of this tradition of reason — indeed they are not properly presuppositions since they are susceptible of verification — are that « man is intelligent; that reality is intelligible; and that reality, as grasped by intelligence, imposes on the will the obligation that it be obeyed in its demands for action or abstention » [49]. Our limited intelligences are capable of doing three things. « First, intelligence can grasp the ethical a priori, the first principle of the moral consciousness, which does not originate by argument, but which dawns, as it were, as reason itself emerges from the darkness of infant anima-

[48] *Ibid.*, p. 109.

[49] *Ibid.*

lism »[50]. Human reason that is conscious of itself is also conscious of the primary truth of the moral order that what is good is to be done and what is evil avoided. « Second, after some elementary experience of the basic situations of human life, and upon some simple reflection on the meaning of terms, intelligence can grasp the meaning of 'good' and 'evil' in these situations and therefore know what is to be done or avoided in them »[51]. That disrespect to parents is evil is an instance of this category. « Third, as the experience of reality unfolds in the various relationships and situations that are the reality of human life, intelligence, with the aid of simple reasoning, can know, and know to be obligatory, a set of natural-law principles that are derivative. These, in general, are the Ten Commandments, the basic moral laws of human life, ... »[52].

These three achievements require only common human experience and only a modicum of reflection and reasoning, so they are within the powers of human intelligence as such, at least in the case of most men. But there is a fourth area wherein moral judgments are called for. « It concerns particular principles which represent the requirements of rational human nature in more complex human relationships and amid the institutional developments that accompany the progress of civilization. This area is reserved for those whom St. Thomas calls 'the wise' (*sapientes*) »[53]. In this area, knowledge, experience, reflection and dispassionateness of judgment are required. For example, little reflection is needed to know the principle of justice, « to each his own », but how this principle applies to an industrial dispute is a much more difficult question.

The fundamental structure of human nature is permanent and unchanging. Correlatively constant are the elementary human experiences. « Therefore history cannot alter the natural law, in so far as the natural law is constituted by the ethical a priori, by the primary principles of the moral reason, and by

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[50] *Ibid.*, pp. 109-110.
[51] *Ibid.*, p. 110.
[52] *Ibid.*
[53] *Ibid.*, p. 111.

their immediate derivatives »[54]. But history does evoke situations that never happened before, involving human life in an increasing multitude of institutions of all kinds. In this sense the nature of man can be said to change and as it changes new problems are continually being put to the wisdom of the wise. However, the « basic issue remains unchanged: what is man or society to do, here and now, in order that personal or social action may fulfill the human inclination to act according to reason »[54]. The old problems get the same answers. The new problems get answers which may contain new specifications of old principles. And man's search for answers to old and new problems springs from his natural inclination to act according to reason.

This system of moral thought based on St. Thomas's exposition of natural law « renders a remarkable account of the origins and structure of the public consensus »[55] as described by Berle. Murray sets out the account under five headings. First, the consensus has as contents the more remotely derived principles of natural law which bear on human situations whose creation requires a process of historical development unlike « original » human situations. Consequently, they are reached by careful inquiry, by a thorough analysis of circumstances, and after much reflection. Second, the elaboration of the consensus is the task of the wise and the honest who are capable of this inquiry, analysis and reflection; the public in general need to be instructed by the wise. Third, the principles have inherent authority because the wise have found them to be in accord with reason. This quality of being in accord with reason is the non-contingent element in the body of thought that constitutes the consensus. Fourth, the wise, having discerned a demand or dictate of reason in the factual situation and instructed the people, put the reasonableness of their conclusions within the grasp of all. This reasonableness is the basis of the publicity of the experience; the people grasp and accept the conclusions because of their reasonableness. Finally, « the eco-

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[54] *Ibid.*, p. 113.
[55] *Ibid.*, p. 117.

nomic powers in society accept the judgments, directions, and corrections of the public consensus, at times to their disadvantage, even when these moral dictates are not backed by the coercive force of the supreme public power »[56]. The reason is that there is « in men, even when they are powerful, some natural inclination to act according to reason in what concerns their power... In a word, they are somehow inclined to be 'natural' men, who recognize and obey the remote principles of natural law that constitute the public consensus »[57]. In short, the constantly growing public consensus concerning the American economy is a testimony « to the slow and subtle operation of that rational dynamism, inherent in human nature, which is called natural law »; the processes of formation of the consensus are those characteristic of natural-law thinking; and the social authority of the standards developed by the consensus « is none other than the authority of natural law itself, that is, the high authority of right reason »[58]. The conclusion is that only the theory of natural law can explain the public consensus concerning the uses of the power of the American economy.

In a discussion of the moral principles underlying American foreign policy Murray came to a much less optimistic conclusion with regard to the fidelity of the American consensus to the tradition of natural law. If the public policies of the American government borrow their morality from the conscience of the people, on what theory of morality, he asked, « does the American people undertake to fulfill its traditional public moral right and duty, which is to judge, direct, correct, and then consent to, the courses of foreign policy? »[59]. The prevalent American theories of morality had little to offer. Scriptural fundamentalism which is at best a theory of interpersonal relationships is irrelevant to international relations which are not interpersonal. Moral ambiguism for which the calculus of the consequences of human decisions is so complicated that moral judgment

[56] *Ibid.*, p. 120.
[57] *Ibid.*, pp. 120-21.
[58] *Ibid.*, p. 121.
[59] *Ibid.*, p. 292.

becomes almost impossible can direct no policies for it can specify no ends towards which policy should be directed. Pragmatism whose only concern is with what will work fares no better; experience has shown that what is not true will fail to work so that what is required is the political truth that will base workable policies. Murray concludes gloomily:

> It would seem, therefore, that the moral footing has been eroded from beneath the political principle of consent, which has now come to designate nothing more than the technique of majority opinion as the guide of public action - a technique as apt to produce fatuity in policy and tyranny of rule as to produce wisdom and justice. It was not always so. In the constitutional theory of the West the principle of consent found its moral basis in the belief, which was presumed sufficiently to be the fact, that the people are the living repository of a moral tradition, possessed at least as a heritage of wisdom, that enables them to know what is reasonable in the action of the state - in its laws, its public policies, its uses of force. The people consent because it is reasonable to consent to what, with some evidence, appears as reasonable. Today no such moral tradition lives among the American people. ... the tradition of reason, which is known as the ethic of natural law, is dead [60].

Nevertheless, whatever about the tradition of natural law being dead in the hearts of the majority of the American people, Murray was reluctant to conclude that the doctrine of natural law as a doctrine was dead. On the contrary, he contended that rightly understood it was very much alive with resources that could make it « the dynamic of a new 'age of order' » [61]. Accordingly he set out to remove the misunderstandings that « have conspired to obscure the true identity of the doctrine » [62] and to present the true notion of it.

> The doctrine is accused of abstractionism, as if it disregarded experience and undertook to pull all its moral precepts like so many magician's rabbits out of the metaphysical hat of an abstract human « essence ». The doctrine is also interpreted as an intuitionism as if it maintained that all natural-law precepts were somehow « self-evident. » It is also derided as a legalism, as if it proclaimed a detailed

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[60] *Ibid.*, p. 293.

[61] *Ibid.*, pp. 334-35.

[62] *Ibid.*, p. 295.

> code of particularized do's and don'ts, nicely drawn up with the aid of deductive logic alone, absolutely normative in all possible circumstances, ready for automatic application, whatever the factual situation may be, The theory is also rejected for the presumed immobilism, as if its concept of an immutable human nature and an unchanging structure of human ends required it to deny the historicity of human existence and forbade it to recognize the virtualities of human freedom...
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> There is also the biologist interpretation, which imputes to natural-law theory a confusion of the « primordial », in a biological sense, with the « natural ». This is a particularly gross and gratuitous misinterpretation, since nothing is clearer in natural-law theory than its identification of the « natural » with the « rational, » or perhaps better, the « human ». Its whole effort is to incorporate the biological values in man, notably his sexual tendencies, into the fuller human order of reason, and to deny them the status of the primordial...
>
> There is also the objectivist-rationalist interpretation, which is the premise from which natural-law theory is criticized for its supposed neglect of the values of the human person and for its alleged deafness to the resonances of intersubjectivity. ...
>
> Finally, there is the charge that natural-law doctrine is not « Christian ». If it be meant that the doctrine in structure and style is alien to the general Protestant moral system, in so far as there is such a thing, the charge is true enough. [63]

Having indicated these common misunderstandings Murray went on to comment, in the light of contemporary problems, on the two interpretations of natural law that have historically been seen as the basis of political philosophy, namely, the « law of nature » of the Enlightenment and the « natural law » of the *philosophia perennis*. John Locke's theory of the law of nature had the « greatest fortune both in the Anglo-Saxon and in the French political world » [64]. The predominant characteristic of Locke's system was its individualistic atomistic social outlook. Sociality is not inherent in man's nature and all forms of sociality are purely contractual entered into because of their usefulness. All men are by nature free, equal, and independent and become subject to political power by their free consent, their motives for consenting being self-interest, self-preservation, and the preservation of their property. The government whose

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[63] *Ibid.*, pp. 295-96.

[64] *Ibid.*, p. 303.

power has been consented to by the individuals in the state is simply the arbiter or adjudicator between the rights of individuals.

The strength of Locke's philosophical theory lay in its usefulness as a political weapon. Locke's problem, besides his need to justify the Revolution of 1688, was

> to devise a law of nature that would support a political theory that would in turn support a businessmen's commonwealth, a society dominated by bourgeois political influence through the medium of the « watch dog » State whose functions would be reduced to a minimum, especially in the fields of business and trade [65].

His theory was well adapted to achieve these aims. By it Locke helped to create a stable and vigorous political community « largely because he restated, and did not quite succeed in denaturing, the great political truths that were the medieval heritage, ... » [66]. He reasserted the central medieval tradition of the supremacy of law over government, and of government by law which is reason, not will; he emphasised that government obtains its powers from the people, is responsible to them and must serve their common good; finally, he affirmed the people's right to participate in government. « These truths, that were not of Locke's own devising, furnished the essential dynamism of his system » [67]. The same is true of the theories of Rousseau and the other instigators of the French Revolution: their « obscure intuition » of natural law « furnished whatever positive, constructive dynamism there was behind their revolutionary, destructive efforts » [68]. The law of nature as used by them « was able to destroy an order of political privilege and inaugurate an era of political equality; but it was not able to erect an order of social justice or inaugurate an order of human freedom » [69]. This is seen by the fact that the problem of human liberty and social order is still very much with us. It can be solved only on the basis

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[65] *Ibid.*, p. 312.
[66] *Ibid.*, p. 313.
[67] *Ibid.*
[68] *Ibid.*, p. 317.
[69] *Ibid.*, p. 319.

of natural law for natural-law theory alone justifies, in terms of ultimates about the nature of man, the assertion that the rights claimed are indeed rights and therefore inviolable, and human rights and therefore inalienable.

What are these « ultimates » on which natural law is based? First of all, natural law supposes a realist epistemology that affirms that the real is the measure of knowledge and that intelligence can know the real, the nature of things as constant beneath all individual differences. Secondly, « it supposes a metaphysic of nature, especially the idea that nature is a teleological concept, ... » [70] and, in particular, « that there is a natural inclination in man to become what in nature and destination he is — to achieve the fullness of his being » [71]. Thirdly, it supposes a natural theology asserting that there is a God, eternal Reason, author of nature, « Who wills that the order of nature be fulfilled in all its purposes, as these are inherent in the natures found in the order » [72]. Finally, it supposes that man is free, that the order of nature is not an order of necessity, that the order of being that confronts man's intelligence is an order of « oughtness » for his will.

From these metaphysical premises of natural law it follows that it is a law immanent in the nature of man but transcendent in its reference. « It is immanent in nature in the sense that it consists in the dictates of human reason that are uttered as reason confronts the fundamental moral problems of human existence » [73]. In face of the basic situations of life certain imperatives « emerge » as it were from human nature. They are the product of its inclinations according as these are recognised by reason to be in conformity with rational nature. Appearing as dictates demanding obedience, these judgments are law. And because they follow from inclinations that reason recognises as authentically human, they are « natural law ». However, even though the dictates « emerge », they are not

[70] *Ibid.*, p. 327.
[71] *Ibid.*, p. 328.
[72] *Ibid.*
[73] *Ibid.*, p. 329.

created by reason. They are given to man just as nature itself is given. Reason discovers them. Man's reason reflects the reason of God; « therein consists its rightness and its power to oblige» [74]. The eternal law immanent in God stands above the natural law immanent in man. « The eternal law is the Uncreated Reason of God; it appoints an order of nature - an order of beings, each of which carries in its very nature also its end and purposes; and it commands that this order of nature be preserved by the steady pursuit of their ends on the part of all the natures within the order » [75]. Some creatures follow the order of the eternal law unconsciously. « But in the rational creature the immanent law is knowable and known; it is a moral law that authoritatively solicits the consent of freedom »[76]. This is not to say that what the moral law demands will be immediately evident in every situation. In reason's exploration of nature and its order a necessary and large part is reserved to experience, and what experience teaches is not of course immediately evident.

In the sphere of social relationships, there are « only two self-evident principles », « *suum cuique* », and « justice is to be done and injustice avoided ». Reason particularises these by determining what is one's own and what is just, « with the aid of the supreme norm of reference, the rational and social nature of man » [77]. The totality of such particularisations makes up the juridical order, the protection and sanction of which belong to the state.

This brings up the question of the function of natural law in political philosophy. Murray sums the major contents of the natural-law political ideal in six principles. « First, there is the supremacy of law, and of law as reason, not will ... Secondly, there is the principle that the source of political authority is in the community ... Thirdly, there is the principle that the authority of the rules is limited; its scope is only political, ... Fourthly, there is the principle of the contractual nature of the

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[74] *Ibid.*, p. 330.
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*, p. 332.

relations between ruler and ruled »[78]. Fifthly, there is the principle of subsidiarity which asserts the right to existence and autonomous functioning of various sub-political groups united in the organic unity of the state. The sixth and final principle is « that of popular sharing in the formation of the collective will, as expressed in legislation or in executive policy »[79]. It is a natural-law principle inasmuch as it asserts the dignity of the human person as an active co-participant in political decisions and in the pursuit of the end of the state.

Murray concludes that these resources of natural law could make it the dynamic of a new « age of order ». It would not be a detailed blueprint of the order, but only a skeleton law. Nevertheless, it can claim to offer all that is good and valid in competing systems while avoiding what is weak and false in them. It matches individualist Liberalism's concern for the rights of the individual, Marxism's concern for man as worker and for the just organisation of economic society, evolutionary scientific humanism's concern that experience and history be given their due place in the elaboration of moral theory. But it avoids the pitfalls of these systems, Liberalism's lack of realism concerning man's social nature, Marxism's absorption of man in matter and its determinism, evolutionary scientific humanism's succumbing to doctrinaire relativism. » In a word, the doctrine of natural law offers a more profound metaphysic, a more internal humanism, a fuller rationality, a more complete philosophy of man in his nature and history »[80].

The above much summarised account gives the essence of Murray's thought on natural law. Natural-law theory played a fundamental part in his thinking from the beginning[81]. It was basic to his political philosophy and hence to his theory of

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[78] *Ibid.*, p. 333.

[79] *Ibid.*, p. 334.

[80] *Ibid.*, p. 335.

[81] Cf. « Current Theology: Christian Co-operation », *TS*, 3 (1942), p. 430; « Current Theology: Cooperation. Some Further Views », *TS*, 4 (1943), pp. 109 ff; « Current Theology: Freedom of Religion », *TS*, 6 (1945), pp. 94 ff; « Freedom of Religion. I: The Ethical Problem », *TS*, 6 (1945), pp. 229-86; « For the Freedom and Transcendence of the Church », *AER*, 126 (1952), pp. 28-48.

religious freedom and to his favourable assessment of the American Catholic's position vis-à-vis the American proposition. His exposition was lucid, logical, and easily acceptable to one who accepts the philosophical framework into which he inserted the natural law, even though on occasion one might wish he was more explicit with regard to certain elements [82].

II. *Vatican II and After*

« 1962: The first session of the Second Vatican Council was held. It found John Courtney Murray where the Holy Office wanted him: absent in America.

« 1963: He vigorously attended the Council's second session, thanks to the intercession of an improbable advocate: the Archdiocese of New York. The first schema (or draft) of a declaration on religious liberty was presented on November 19. It would suffer through two years of bitter argument, five corrected versions, three exhaustive public debates, 120 speeches in the Aula, and more than 2,000 proposed Amendments » [83].

Murray threw himself enthusiastically into the work of the Council, helping to formulate the text on religious freedom, giving conferences on the problem to bishops, discussing, explaining, clarifying the issues involved. He collaborated in preparing the oral report made to the Conciliar Fathers on November 19, 1963. Shortly after this he wrote an important article in *America* emphasising that religious liberty was not merely an ethical or moral but also a constitutional problem and calling for an affirmation in the final text on religious liberty of the principle that government has no competence in religious affairs [84]. « This short article was indeed a programme which however had little influence on the preparation of the second conciliar draft ... But this programme was more widely applied

[82] With regard to the nature of the « elementary human experiences » for example.

[83] Emmet John Hughes, « A Man for Our Season », *The Priest*, 25 (1969), p. 391.

[84] « On Religious Liberty », *America*, 109 (Nov. 30, 1963), pp. 704-706. A French translation of this entitled « Liberté religieuse: la position de l'épiscopat américain » appeared in *Choisir*, Fribourg, janvier 1964, pp. 14-16.

later in the fundamental revision of the second conciliar draft made during the autumn session of 1964 »[85]. Murray had not participated in the inter-session revision of the text (Nov. 1963 - Sept. 1964).

However, the account given below will not be a detailed analysis of Murray's contribution to the Council. It will in the main be concerned with two points: firstly, his view of the Declaration on Religious Freedom in light of the American experience, and secondly his conception of the development of the doctrine on religious liberty which had taken place since the time of Leo XIII.

In his first article from the Council, Murray notes that an « issue of great interest, not least to the American Church, has been raised both in private and public. I mean the relation between the Church and political community with its government and order of law »[86]. The subject of Church and state was not on the agenda of the Council at this stage but he confidently predicted that it would gain a place as the demand for discussion of it was almost universal and the ecumenical and pastoral reasons for it imperative. The relation between the Church and the political community needed more exact formulation « especially since the political community has itself undergone such profound and far-reaching developments throughout history and not least in recent generations. When this issue does arise, as it certainly will, there will be great room and need for the utterance of the Church's experience in America and of the wisdom that has been the root of this experience »[87]. Some weeks later he was able to write:

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[85] Jérôme Hamer, O.P., « Histoire du texte », in *Vatican II: La Liberté Religieuse*, ed. by J. Hamer and Yves Congar, Collection Unam Sanctam, Les Editions du Cerf, Paris, 1967, p. 73. This volume will henceforth be referred to as Unam Sanctam 60. The French is: « Ce court article était tout un programme, qui cependant n'exerça qu'une influence réduite sur la préparation de la deuxième rédaction conciliaire. ... Mais ce programme a été plus largement appliqué plus tard dans la refonte fondamentale de la deuxième rédaction conciliaire, au cours de la session d'automne 1964 ».

[86] « The Church and the Council », *America*, 109 (Oct. 19, 1963), p. 453.

[87] *Ibid.*

> The issue of religious liberty is of the highest interest to me both as a theologian and as an American. It is, as it were, *the* American issue at the Council. The American episcopate is greatly pleased that the issue has finally appeared on the agenda of the Council, notwithstanding many efforts to block discussion of it [88].

Commenting on the inadequacy of the treatment by the texts presented of the limits to be placed on religious liberty, Murray appeals for the insertion in the final text of a principle of the American constitutional system: « the incompetence of government as judge or arbiter in the field of religious truth as also, for instance, in the field of art and science » [89]. Government, he maintained, would be acting *ultra vires* if it were to assert by law that a particular religion ought to be the religion of the national community [90]. « Together with my fellow countrymen, both Catholic and non-Catholic, I should like to see this principle asserted in the final conciliar text on religious freedom. It is, I think, essential in the final conciliar text on religious freedom in society. It completes the theological and ethical arguments by adding to them a sound political argument » [91].

Murray considered it « entirely clear from the history of the document that had it not been for the emphatic insistence of the American bishops acting in concert the document would not have come to such a successful conclusion as it did » [92]. Throughout its history, « the schema had the solid and consistent support of the American bishops, and their numerous

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[88] Murray, « On Religious Liberty », p. 704.

[89] *Ibid.*, p. 706.

[90] *Ibid.* Murray is speaking here of a theological judgment made by Government, not of the particular sociological problem posed by a religion which is de facto the majority religion in a country (cf. Hamer, Unam Sanctam 60, p. 72). Cf. also Murray's remarks, *The Documents of Vatican II*, ed. by Walter M. Abbott and Joseph Gallagher, London and Dublin: Geoffrey Chapman, 1966, (p. 685, n. 17 (henceforth referred to as *Documents*); « The Issue of Church and State at Vatican II », (henceforth referred to as « Issue of Church and State »), *TS*, 27 (1966), pp. 594, 595, 605; « Vers une intelligence due développement de la doctrine de l'Eglise sur la liberté religieuse », Unam Sanctam 60, p. 122.

[91] Murray, « On Religious Liberty », p. 706.

[92] John Courtney Murray, Edward Gaffney, « Religious Liberty and Development of Doctrine », an interview, *The Catholic World*, 204 (1967), p. 282. Henceforth referred to as « Development of Doctrine ».

interventions had considerable influence in determining its substance and language »[93]. Nor did they support it for merely pragmatic reasons.

> Undoubtedly, the support derived its basic inspiration from the American experience, from which the Church has learned the practical value of the free-exercise clause of the First Amendment. At the same time, American Catholics have understood that the practical value of this constitutional provision derives from the truth of the principle that it embodies. It is apparent from their interventions that the American bishops made important theoretical contributions toward the illumination of the principle[94].

Both as a principle and as a legal institution, religious freedom, meaning immunity from coercion in religious matters subject to the demands of public order, is less than two hundred years old. The right to religious freedom was first effectively proclaimed by the First Amendment as an integral element of constitutional government[95]. « The First Amendment may claim the honor of having first clearly formulated the principle and established the institution »[96].

« The object of content of the right to religious freedom, as specified both in the Declaration and in the American constitutional system, is identical »[97]. In the Declaration, the moral claim that every man makes on others — on individuals, groups, political or social powers — is, firstly, that no man is to be forced to act in a manner contrary to his personal beliefs and, secondly, that no man is to be forcibly restrained from acting in accordance with his beliefs. In assigning « a negative content to the right to religious freedom (that is, in making it formally a 'freedom from' and not a 'freedom for'), the Declaration is in harmony with the sense of the First Amendment to the

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[93] John Courtney Murray « Declaration on Religious Freedom: Commentary, « in *American Participation in the Second Vatican Council*, ed. by Vincent A. Yzermans, New York: Sheed & Ward, 1967, p. 668. Henceforth referred to as « Commentary ».

[94] *Ibid.*

[95] John Courtney Murray, « This Matter of Religious Freedom », *America*, 112 (Jan 9, 1965), p. 40.

[96] Murray, *Documents*, p. 689, n. 24.

[97] Murray, « Commentary », p. 668.

American Constitution »[98]. Nowhere in the Constitution or in the Declaration is the moral nonsense implied that a man has a right to do what is evil or to say what is false, as if error and evil could be the object or content of a right[99].

However, by defining religious liberty as an immunity « from coercion on the part of individuals or of social groups or of any human power »[100], the Declaration did not give a definition « as correct and clear as the Constitution on the central issue that the statute of religious freedom is essentially a self-denying ordinance on the part of government »[101]. In the American view, religious freedom is primarily an assurance against government and only secondarily an assurance against coercions attempted by other powers in society. Some conciliar Fathers wished to give the primacy to what is secondary in the American view and that is why the words « and of any human power » were used rather than « and of government ». This desire was mistaken in Murray's opinion for it

> belongs to the very definition of religious freedom to say that it is, in the first instance, an immunity against restrictive use of the power of government... If there be any human power which has the right to restrict the scope of religious freedom, this rightful power can reside only in government, which possesses a monopoly of coercive force in society to be used for the common good[102].

It follows that the primary element in religious freedom is an assurance against the use of coercion by government.

With regard to the extension of the right to religious liberty, both the Declaration and the American constitutional system embrace two concepts, freedom to believe and freedom to act.

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[98] Murray, *Documents*, p. 678, n. 5.

[99] *Ibid.* Also Murray, « Commentary », p. 669.

[100] Text of Declaration, *Documents*, p. 679.

[101] Murray, « Commentary », p. 669.

[102] *Ibid.* Cf. also Murray, « La Déclaration sur la liberté religieuse », *NRT*, 88 (1966), p. 51; « The Declaration on Religious Freedom » in *Vatican II: An Interfaith Appraisal*, ed. by John M. Millar, C.S.C., Notre Dame and London: Notre Dame Press, 1966, p. 569; « Osservazioni sulla dichiarazione della libertà religiosa », *Civiltà cattolica*, 116 (1965), p. 545; Unam Sanctam 60, p. 116. The first two articles will henceforth be referred to as « Déclaration » and Notre Dame respectively.

The more critical aspect of the question concerns freedom to act. In the U.S., « the free exercise of religion is conceived in the broadest possible terms, even to the defense of sheer religious eccentricity. The terms of the Declaration are generous, although they naturally lack the fullness of detail that litigation has produced in the United States ... » [103]. Again, the Declaration agrees with American jurisprudence on the questions of corporate religious freedom and of the freedom of religious bodies to show the relevance of their teachings to the organisation of society and to the inspiration of the whole of human activity.

In the Declaration, the foundation of the right to religious liberty is the dignity of the human person.

> The dignity of the person is not a legal or political principle; it is the foundation of all legal and political principles. So it is presented in the Declaration of Independence upon whose conception of man the whole of the American constitutional system is erected: « We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights... » [104].

The notion of inalienable rights was already contained in the medieval doctrine of man. The failure to recognise religious liberty as one of these rights was « an aberration in the organic development of the liberal tradition of the West » [105]. The American constitution rectified this deviation. The Declaration belatedly accords recognition to the validity of the American development. « The right to religious freedom is not the creature of expedience or even of history alone. It is not a gracious grant of government in concession to social circumstances. It is a requirement of the dignity of the human person » [106].

The Declaration's « religious » argument to clarify the point that religious freedom is a matter of principle differs from the American « political » approach. « American constitutional history gives extensive evidence of the centrality of the principle of equality before the law as the essential basis of religious free-

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[103] Murray, « Commentary », p. 670.

[104] *Ibid.*, p. 671.

[105] *Ibid.*

[106] *Ibid.*

dom »[107]. The Declaration appeals to other arguments « that may fairly be characterized as religious in some broad sense - the moral obligation to seek the truth, the function of conscience in mediating the divine law, the social nature of man ..., and the transcendent nature of the religious act »[108]. Only then is the political affirmation made that government would be going beyond its powers if it presumed to command or inhibit religious acts[109]. There were several reasons for this approach of the Council: a desire to avoid « political » arguments on the part of some and the complicated problem of Church and state on the part of others; the inability of some Fathers to distinguish between equality of religions before the law and their equality before God, conditioned as they were to see things in light of the Continental experience of nineteenth-century laicism. If the major political argument for religious freedom, equality before the law, had been pressed, there would have been even greater opposition to and confusion concerning the Declaration than there was. In fact, trouble enough came from the Declaration's statement: « Finally, government is to see to it that the equality of citizens before the law, which is itself an element of the common welfare, is never violated for religious reasons whether openly or covertly »[110]. « The inclusion of this cardinal principle — as a principle in itself, and especially as constitutive of the common good — was due to Anglo-American interventions, from bishops who had an understanding, whether sophisticated or intuitive, of the common-law tradition »[111]. Moreover, its inclusion gives a footing from which to enlarge the Declaration's argument in order to « make a more balanced and convincing case for religious freedom by appealing to political as well as to religious or moral principle »[112].

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[107] *Ibid.*, p. 672.

[108] *Ibid.*, pp. 672-73.

[109] Declaration, n. 3, *Documents*, p. 681.

[110] Declaration, n. 6, *Documents*, p. 685.

[111] Murray, « Commentary », p. 673.

[112] *Ibid.* Cf. also *Documents*, p. 680, n. 7: « American theorists are generally disposed to relate religious freedom to a general theory of constitutional government, limited by the rights of man, and to the concept of civic equality.

The Declaration and the American constitutional system recognise that the exercise of the right to religious freedom is subject to limitation in particular cases. Government has the duty to protect society against possible abuses committed on the pretext of freedom of religion. However, its action cannot be arbitrary or unjust but must be governed by « juridical norms that are in conformity with the objective moral order » [113]. American courts have made and are constantly making efforts to define these norms. Examples of norms are: « In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine, which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all »; and « action in the name of religion may claim protection only when it is 'not injurious to the rights of others' » [114].

In the Declaration the norm for the limitation of the right to religious freedom is the concept of public order. This concept is often used but less often defined in constitutional law. The Declaration defines it and thus « makes a contribution to the science of law and jurisprudence » [115].

> First, the requirements of public order are not subject to arbitrary definition - at the hands, say, of tyrannical governments, which might abuse the concept for their own ends. The public order of society is a part of the universal moral order; its requirements must be rooted in moral law. Second, public order exhibits a threefold content. First, the order of society is essentially an order of justice, in which the rights of all citizens are effectively safeguarded, and provision is made for peaceful settlement of conflicts of rights. Second, the order of society is a political order, an order of peace, (« domestic tranquillity » is the American constitutional phrase). Public peace, however, is not the result of repressive action by the

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The Declaration, however, lays less stress on this political argument than it does on the ethical foundations of the right itself. In any event, the elements of the political argument are stated in later Articles (6 and 7). And one is free to construct the argument in the form which may seem more convincing ».

[113] Declaration, n. 7, *Documents*, p. 686.

[114] Murray, « Commentary », p. 674 citing *Watson vs. Jones*, 1872 and *Davis vs. Beason*, 1890.

[115] Murray, *Documents*, p. 686, n. 20.

police. It is, in the classic concept, the work of justice; it comes about, of itself, when the demands of justice are met, and when orderly processes exist for airing and settling grievances. Third, the order of society is a moral order, at least in the sense that certain minimal standards of public morality are enforced at all [116].

The coercive power of government may be used to protect and vindicate these three basic elements of the common welfare. The difficulty lies in finding ways of ensuring that this necessary coercive power is not abused by government. The Declaration without going into detail simply specifies the moral requirement that public order be just. Unfortunately the concept of justice is liable to abuse.

The American constitutional tradition is more satisfactory. Public order, or the public peace, will be just if their demands are enforced in accord with the requirements of the Fourteenth Amendment - that due process of law be observed and that the equal protection of the laws be extended to all. These procedural safeguards are matters of justice. Moreover, public order will be just in a substantive sense if it remains always an order of due and rightful freedom. Freedom always remains the supreme value protected by the First Amendment: ... There is no real clash of claims here. On the contrary, the higher principle always holds that the primary thing due in justice to the people is their freedom [117].

The Declaration also « lays strong stress on freedom as a protected value in society, together with the value of justice, even though the two values are not explicitly related » [118]. Having given the elements of public order, the text continues: « For the rest, the usages of society are to be usages of freedom in their full range. These require that the freedom of man be respected as far as possible, and curtailed only when and in so far as necessary » [119]. Murray comments: « This is the traditional rule of jurisprudence in the liberal tradition of politics. It is also the basic principle of the free society - the highest principle that controls the action of 'free government'. From the point of

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[116] *Ibid.*

[117] Murray, « Commentary », p. 675.

[118] *Ibid.*

[119] Declaration, n. 7, *Documents,* p. 687.

view of the American tradition, the significance of its inclusion is obvious » [120]. The Declaration incorporates the essence of the liberal tradition of the West, the tradition of a free man in a free society, the theory of constitutional government. « Thus the political tradition that the Declaration affirms is the political tradition within which the American commonwealth came into being and in which our Constitution and the First Amendment took shape. It is an important endorsement, therefore, of the Anglo-Saxon political tradition which is the tradition of the United States » [121].

The Declaration can thus be said to vindicate what Murray had been arguing for years, that the American constitutional system, despite its guarantee of religious freedom, is acceptable to Catholics on principle and not merely on grounds of expediency. Not only is the American system acceptable but the tradition incorporated in it is the liberal tradition of the West to which the Catholic Church had contributed so much. The American political tradition is in fact the Catholic political tradition reaffirmed in the Declaration after years of oblivion. The Declaration was truly the vindication of Murray's ideas.

Murray's awareness of and interest in the problem of the development of doctrine is clear from early in his writings [122]. Indeed, his difficulties with other American theologians are reducible to disagreements about development of doctrine whether the doctrine was expressed in papal encyclicals or in books of public ecclesiastical law. The problem lay in having the

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[120] Murray,« Commentary », p. 676.

[121] Murray, « Development of Doctrine », p. 281.

[122] Cf. for example *TS*, 4 (1943). p. 275; *TS*, 5 (1944), pp. 50 ff.; *Proceedings*, 1948, pp. 29-30, 34-37, 52, 54-55, 62-65, 68, 79-80, 84-86, 89, 98; *TS*, 9 (1948), pp. 492, 502, 533; *TS*, 10 (1949), pp. 191, 194, 422; *AER*, 124 (1951), pp. 336-37. In *TS*, 10 (1949), p. 422, he says: « Both authors thus imply that we confront here a problem in the development of doctrine. In other words, we see rising in this area the same problem that is central in all other areas of theological thought today; for I take it that the central problem of today is not 'faith and reason' but 'faith and history'. It is not so much with the essential categories of philosophy as with the existential category of time that theologians are today preoccupied ».

trend away from classicism to historical consciousness accepted by theologians in general. The valid insights contained in this trend were not officially accepted by the Church until Vatican II.

Murray briefly describes the two approaches to truth [123]:

> Suffice it to say here that classicism designates a view of truth which holds that objective truth, precisely because it is objective, exists « already out there now » (to use Bernard Lonergan's descriptive phrase). Therefore it also exists apart from its possession by anyone. And in further consequence, it exists apart from history, formulated in propositions which are verbally immutable. If there is to be talk of development of doctrine, it can only mean that the truth, remaining itself unchanged in its formulation, may find different applications in the contingent world of historical change.
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> In contrast, historical consciousness, while holding fast to the nature of truth as objective, is concerned with the possession of truth, with man's affirmations of truth, with the understanding contained in these affirmations, with the conditions - both circumstantial and subjective - of understanding and affirmation, and therefore with the historicity of truth and with progress in the grasp and penetration of what is true [124].

The Church opposed the movement towards historical consciousness because the « insight into the historicity of truth and the insight into the role of the subject in the possession of truth were systematically exploited to produce almost every kind of 'ism', unto the destruction of the notion of truth itself - its objective character, its universality, its absoluteness » [125]. But sessions of the Council made it clear that despite resistance classicism was giving way to historical consciousness. The Council called itself « pastoral ». That is not to say that it was not concerned about doctrine, but its pastoral concern about doctrine was

> illuminated by historical consciousness, that is, by concern for the truth not simply as a proposition to be repeated but more im-

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[123] An excellent account of the two different ways of approaching the problem of religious freedom in particular is given by Murray in *The Problem of Religious Freedom*, London-Dublin: Geoffrey Chapman, 1965. This book appeared originally in *TS*, 25 (1964), pp. 503-75.

[124] « The Declaration on Religious Freedom », *Concilium*, Vol. 5, No. 2, May 1966, p. 7. Henceforth referred to as *Concilium, 1966*.

[125] *Ibid.*

portantly as a possession to be lived; by concern therefore for the subject to whom the truth is addressed; hence also by concern for the historical moment in which the truth is proclaimed to the living subject; and consequently by concern to seek that progress in the understanding of the truth which is demanded both by the historical moment and by the subject who must live in it.

In a word, the fundamental concern of the Council is with the development of doctrine [126].

The Declaration on Religious Freedom was « a pastoral exercise in the development of doctrine » being based on a progress in doctrine which has in fact occurred since Leo XIII and carrying the progress a step further by discarding « an older theory of civil tolerance in favour of a new doctrine of religious freedom, which is more in harmony with the authentic and more fully understood tradition of the Church » [127].

The Declaration stated that it intended « to develop the doctrine of recent Popes on the inviolable rights of the human person and on the constitutional order of society » [128]. Murray saw in this statement an « avowal that the tradition of the Church is a tradition of progress in understanding the truth » [129]. The fact that a development had taken place in Catholic doctrine on religious freedom from Leo XIII to our time « is commonly admitted and cannot be questioned » [130]. It was questioned until Vatican II. In fact, the Declaration was

the most controversial document of the whole Council, largely because it raised with sharp emphasis the issue that lay continually below the surface of all the conciliar debates - the issue of the development of doctrine. The notion of development, not the notion of religious freedom, was the real sticking-point for many of those who opposed the Declaration even to the end. The course of the development between the *Syllabus of Errors* (1864) and *Dignitatis humanae personae* (1965) still remains to be explained by theologians. But the Council formally sanctioned the validity of the development

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[126] *Ibid.*, p. 8.

[127] *Ibid.*

[128] Declaration, n. 1, *Documents*, p. 677.

[129] *Documents*, p. 677, n. 4.

[130] « ... est communément admis et ne peut être mis en doute ». Murray, « Déclaration », p. 59.

itself; and this was a doctrinal event of high importance for theological thought in many other areas [131].

In 1864 Pius IX wrote the following:

> Starting out from this totally false idea of social government they are not afraid to promote that opinion which is extremely hurtful to the Church and to the salvation of souls and called a *deliramentum* by Our Predecessor Gregory XVI, namely, that « freedom of conscience and of religion [*cultuum*] is a right proper to every man, that it should be proclaimed by law and guaranteed in every rightly constituted society, that citizens have a right to full liberty - limited by neither ecclesiastical nor civil authority - by which they can make known their opinions either by word of mouth or in print or in any other way » [132].

« Almost exactly a century later, the Declaration on Religious Liberty seems to affirm as Catholic doctrine what Gregory XVI and Pius IX considered a *deliramentum*, ... » [133]. That is the problem. It is easy to show there is no contradiction between the two affirmations, that what earlier Popes condemned is not what the Declaration affirmed: freedom of religion in the nineteenth century was based on principles entirely different from those on which the Declaration is based and so had a quite different meaning. But it is regrettable that the Church in the nineteenth century failed to uncover under the surface of error what « was reasonable, just and humanly desirable in the great movement towards civil and political liberties, ... However, what is important is to know whether the

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[131] Murray, *Documents*, p. 673.

[132] *Quanta cura, Acta Pii IX*, Pars prima, Vol. III, p. 690: « Ex qua omnino falsa socialis regiminis idea haud timent erroneam illam fovere opinionem catholicae Ecclesiae, animarumque salute maxime exitialem a rec. mem. Gregorio XVI Praedecessore Nostro *deliramentum* appellatam, nimirum 'libertatem conscientiae, et cultuum esse proprium cuiuscumque hominis ius, quod lege proclamari, et asseri debet in omni recte constituta societate, et ius civibus inesse ad omnimodam libertatem nulla vel ecclesiastica, vel civili auctoritate coarctandam, quo suos conceptus quoscumque sive voce, sive typis, sive alia ratione palam publiceque manifestare, ac declarare valeant' ». The quotation from Gregory XVI is from *Mirari*, Aug. 15, 1832.

[133] Murray, Unam Sanctam 60, p. 111. Murray's account of the development of the doctrine on religious liberty will be taken for the most part from this article.

progressive movement of the Church's thought from *Quanta cura* to the Declaration can be made intelligible »[134].

An understanding of the Church's development on religious freedom is unattainable a priori or simply by applying some general theory on development of doctrine. It is necessary to study the contingency and historical details of the development of each particular doctrine and to discern the factors at work. Murray gives some examples. Firstly, there is the case of going from an undifferentiated to a differentiated concept. St. John spoke of the Son being « from » the Father. To remove the accusation of subordinationism from some theologians it was necessary to distinguish the ways the Son was « from » the Father, by an eternal procession and by a temporal mission. Secondly, a development can include a dialectical process by which previous interpretations of an affirmation which are incompatible with the original meaning of the affirmation itself are perceived and corrected. This happened in the series of pre-Nicean authors in the process that led to the *homoousios*. Thirdly, a change of perspective can bring out a truth which was not clearly perceived or previously established. The *Filioque* dogma came from Augustine's change in perspective from Gregory of Nyssa's insistence on the distinction and order of the divine persons to greater attention to the *Deus Trinitas*. Finally, progress was often made in response to error.

These developmental factors can be looked for in the development of the concept of religious freedom. However, the case of religious freedom has its own peculiarities. The Declaration treats of a human right, of a requirement of personal dignity. But the requirements of human dignity did not appear in history all of a sudden. Man penetrated the truth about his dignity and its requirements only progressively in light of changing social circumstances. Moreover, the Declaration also treats of the political relation, of the citizen's juridical situation vis-à-vis the civil power and its functions with regard to the human person. But the political relation has not been

[134] *Ibid.*, p. 113.

univocal throughout history, and the functions of the civil power, particularly with regard to religious questions, have undergone many changes down the centuries. « Throughout the entire development of the notion of religious liberty, the relativities of history as well as the dynamisms of thought have played an important role » [135].

The one serious objection raised against the Declaration concerned its definition of the functions of the civil power. Some contended that since the true religion is a necessary element of the common good government has duties in its regard, that it is bound to protect its rights and to be tolerant or intolerant towards religious error according as the common good demands. This objection was real for it could and did appeal to texts of the magisterium, principally to Leo XIII. That is why Leo XIII must be studied in order to understand the development of the doctrine on religious liberty [136].

Leo's contribution to the development can be synthesised in five points. The first and fundamental premise of his doctrine is the following: « ... the whole man must be in a real and continual dependence on God. So man's liberty cannot be understood apart from its submission to God and subjection to His will » [137]. Leo was here fighting the ideas that in private life the sole master was the *conscientia ex-lex* and that in public life the only lord was the lawless will of the people. His predominant doctrinal intention was « to reunite what man had separated — God's power and man's power which is his liberty » [138]. Hence he insisted on the need to submit to God's law, to the imperatives of the objective moral order, if man's liberty was to be understood. This insistence led him to neglect

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[135] *Ibid.*, p. 115.

[136] For other shorter treatments of Leo's thought given by Murray, cf. « Déclaration », pp. 63 ff.; *The Problem of Religious Freedom*, pp. 52 ff.; *Concilium*, 1966, pp. 8, 9; « Issue of Church and State », pp. 581 ff.; « Freedom, Authority, Community », *America*, 115 (Dec. 3, 1966), pp. 734, 735.

[137] Leo XIII, *Libertas*, *Acta*, VIII, p. 241: « ... summa est, necessitate fieri, ut totus homo in verissima perpetuaque potestate Dei sit: proinde libertatem hominis, nisi obnoxiam Deo eiusque voluntati subiectam, intelligi minime posse ».

[138] Murray, Unam Sanctam 60, p. 119.

the characteristics of the juridical order in which men are linked to each other and to the authorities that rule society. « The greatest lacuna in the Leonine corpus is a complete treatise on human law and jurisprudence. Consequently, it is difficult to draw from Leo XIII a clear and complete exposé of what a human right is »[139]. Leo was concerned with affirming vigorously that man can have no rights against God and the objective moral order.

Leo's second major doctrinal concern follows from the first. When it reaches man, God's power has the form of the spiritual power of the Church on the one hand and the civil power on the other. Leo was led to insist on this Gelasian dyarchy against the Liberal monism of the time. However, he developed the Gelasian doctrine beyond its medieval context. It is a question no longer of two powers in one society but of two societies, two laws and two powers. This new conception gave rise to all Leo's great themes concerning religious liberty: the fundamental principle of the liberty of the Church[140], the transcendence of the Church as a society over civil society and its political forms, the purely spiritual character of the ministry of the Church in its object and means, the proper auto-

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[139] *Ibid.* It is to be noted that Murray here regrets the lack of a treatise on law because the notion of a human right in Leo's thought is consequently unclear and incomplete. In his previous analysis of Leo's doctrine he regretted the lack because as a result it was difficult to see what the « state » meant for Leo (cf. *TS*, 14 (1953), p. 20). There would seem to be a change of perspective rather than a change of opinion here, as in Murray's view the primary element in the common good, which is the concern of the State, is the legal protection and promotion of a whole order of personal rights and freedoms (cf. Murray, « On Religious Liberty », p. 705).

[140] Murray points out (Unam Sanctam 60, p. 121) that the Declaration « faithfully reflects and develops » Leo's doctrine when it states: « The freedom of the Church is the fundamental principle in what concerns the relations between the Church and governments and the whole civil order » (Declaration, *Documents*, p. 693). « This doctrine is traditional; it is also new. Implicit in it is the renunciation by the Church of a condition of legal privilege in society. The Church does not make, as a matter of right or or divine law, the claim that she should be established as the 'religion of the state'. Her claim is freedom, nothing more » (*Documents*, p. 693, n. 53). Cf. also *Concilium*, 1966, p. 6; *Documents*, p. 673; *The Problem of Religious Freedom*, p. 32; « Issue of Church and State », pp. 588, 589, 593; « The Declaration on Religious Freedom: Its Deeper Significance », *America*, 114 (April 23, 1966), p. 593.

nomy of civil society, the state's lack of competence in religious matters.

If these themes, consequences of the Gelasian thesis which is the deeper level of Leo's doctrine, are alone considered, then « it is exact to say that the essential political doctrine of the Declaration of Vatican II is contained implicitly, even though still rather obscurely, in the work of Leo XIII » [141]. The trouble is that Leo's doctrine has another level on which he defends the classical confessional state granting it power to judge religious matters with the consequent power to decide whether it should be tolerant or intolerant towards religious error. At first sight this secondary doctrine in itself and in what it implies seems incompatible with his principal doctrine. Leo himself did not see any incompatibility and could not see any from within his own perspectives. A change of perspective was necessary to bring the incompatibility to light. This change took place through the increasing awareness of the human person's dignity and the correlative change in political perspectives which permitted a clearer perception of governments' functions. Leo made a great contribution towards bringing about these changes of perspective but his own perspectives were rooted by historical factors in the culture of his time with the result that a theory of tolerance came naturally to him.

> All this raises no difficulty from the point of view of a theology of the magisterium. In the first place, Leo XIII was defending a political proposition, not a truth of faith or a truth linked to the faith. Secondly, we are not suggesting he was in error. On the contrary, his proposition concerning the powers and functions of the state was reasonable and prudent in the circumstances [142].

The circumstances were of course the conditions prevailing in the Catholic nations of nineteenth-century Europe: the ignorance and economic misery of the masses, and the increasing power of sectarian Liberalism which aimed at establishing by the power of the state a new order having a naturalist ethic,

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[141] Murray, Unam Sanctam 60, p. 126.

[142] *Ibid.*, p. 127.

a totalitarian concept of the state, and atheistic conception of society. It was to counteract this new political and cultural movement that Leo adopted the idea of the ethical society whose characteristic was a concept of the common good as an ensemble of truths and moral values to be found in the common patrimony of mankind and in the Catholic faith. Secondly, he was strongly influenced by the historical notion of personal paternalistic political power which is linked both theoretically and historically to the institution of hereditary monarchy. Correlative to this paternalistic concept of political power was the idea of the citizen as a kind of child and as simply the object of power whose sole duty was to obey. Thirdly, following from these premises, Leo assigns to government the care of the entire common good and neglects the distinction between society and state. Fourthly, his doctrine on public religion is a logical conclusion from these premises.

For Liberalism of the time religion was a purely private affair with no relevance to society or the state. Society and government were officially atheist. The legal institution of religious liberty was the symbol of that official atheism, to the extent that it reduced all religions and the Church itself to the status of private institutions. In opposition to this theory Leo argued in a way that led to his theory of the Catholic confessional state. Religion, he contended, is essential to the common good of society and is particularly indispensable to the maintenance of the ruler-subject relation. He accepted — apparently uncritically and as valid at least in a Catholic nation-state — the idea that in a nation-state there can only be one public religion. And for Leo there could only be one religion, the Catholic religion, the truth of which could be easily discerned, at least in Catholic countries. It follows that in the interests of the common good rulers should protect and preserve the Catholic religion.

Murray comments:

> However, this conclusion — that government should preserve and protect the Catholic religion — follows only because of Leo XIII's particular historical and political premises... In the ethical society-state where the mode of government is personal and paternalistic

> and has as subjects ignorant masses [143], the entire care of the global common good, including religion, falls to the government...
>
> ... The government consequently has to take care not merely of the freedom of the Church (its only function in the Leonine development of the Gelasian doctrine) but also of the Church itself, of its faith and its moral teaching (a function that is derived only from particular historical and political premises) [144]. There is here a contradiction concerning the competence of government in religious affairs. But Leo XIII does not see it [145].

Murray is here making the same point as he made as far back as 1949 when he wrote that the « concept of the confessional state in Leo XIII is more properly related to the polemic than to the doctrinal aspects of his teaching », the doctrinal part being his elaboration of the Gelasian thesis and the polemical part his refutation of Liberalism [146].

Setting out from his historically conditioned concept of the functions of government with regard to the goods of the spirit, Leo granted extensive power to government to repress error and evil. It was in this context that he condemned the modern liberties. These were vitiated in their root by theological, ethical and political error and were perverse in their consequences within the cultural conditions of the Catholic nations of the time. Leo granted they could be tolerated to avoid a greater evil or to obtain a greater good. « It is hard to see how Leo XIII, on the basis of his own political premises and in the context of his time, could arrive at a different conclusion » [147]. Always, however, the value he attributed to legal intolerance and repression was minimal and relative — truth and goodness would have to triumph by other more important means. But in the circumstances of his time recourse to the historical conception of government entrusted with a direct duty to truth and goodness and hence to the true reli-

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[143] « ... où le mode de gouvernement est personnel et paternaliste, et s'exerce sur des masses incultes, ... ».

[144] « ... (fonction qui découle uniquement de ses prémisses historiques et politiques particulières) ».

[145] Unam Sanctam 60, p. 131.

[146] Cf. *TS*, 10 (1949), p. 232.

[147] Murray, Unam Sanctam 60, p. 133.

gion was a necessity. There was nothing else to have recourse to. It remains, however, that this historical conception was « in contradiction with the more fundamental Leonine doctrine ... — the Leonine development of the Gelasian thesis »[148].

Finally, one can ask: in what sense are the seeds of future development to be found in Leo XIII's doctrine? There are three germinal principles. The first principle is the Leonine development of the Gelasian doctrine. Leo constantly insisted on the need for harmony between the two powers, the two orders of law and the two societies. This doctrine was traditional. What was new was the foundation Leo assigned to the need for harmony: the integrity of the human person, of the *civis idem et christianus*. Conflict between the two powers would be felt in the depths of the personal conscience. This perspective was a change from that of the Middle Ages when the basis of the need was social unity and, later, national unity. Leo put the human person and the unity and interior integrity of the personal conscience at the centre of the problem. From this principle sprang the later doctrine of Pius XII, which is fundamental to the Declaration, on the human person as foundation and end of the social order. One can also say that from it, although more remotely, stemmed Pius XII's doctrine on the human person as subject or agent of the social process by the exercise of his rights and the carrying out of his duties. This doctrine is equally essential in the Declaration.

The second principle is man's dignity as the foundation of human rights. « In *Rerum Novarum*, in 1891, the Church turned its attention for the first time to the socio-economic rights of man »[149]. The experience of totalitarianism in the twentieth century was needed before the Church attended fully to the political and cultural rights of man. And it was only with the Declaration that religious liberty was recognised as a human right. The beginning of this developmental process was made with *Rerum Novarum's* insistence on the dignity of the human

[148] *Ibid.*, p. 134.

[149] *Ibid.*, p. 136.

person. The third principle is also found in *Rerum Novarum*. For the first time Leo clearly distinguishes society from the state and begins to develop the juridical conception of the state whose primary function is the protection and promotion of the socio-economic rights of man. The sense of human dignity is fundamental to this evolution: the primacy of the person over the state, the inalienable dignity of man. Later Popes and the Declaration will perfect this juridical concept of the state. « The legitimate conclusion is that between Leo XIII and the Second Vatican Council there was an authentic development of doctrine, ... » [150]. The progress cannot be explained simply in terms of principles and applications of principles. The fact is that the Church's understanding of the principles themselves increased.

Under the shock of the post-World War I totalitarian experience, a new doctrinal and pastoral line of thought made its appearance in the Church's teaching on the social and political order. In *Mit brennender Sorge* against naziism, Pius XI notes that naziism denies that man as a person has inalienable rights from God. In *Divini Redemptoris* he points out that the basic vice of communism is its lack of recognition of the human person's rights, dignity and liberty [151]. The new menace was not merely to the liberty of the Church but to the very dignity of the human person. That is why Pius XII declared that his aim was « to give back to the human person the dignity God had bestowed on it in the beginning » [152]. Besides, he came to recognise that this aim was in harmony with the aspirations of humanity: the excesses of totalitarian tyranny had awakened in it a new personal and political consciousness.

In light of this awakening, Pius XII abandons the Leonine concept of the ethical society-state with its double notion of

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[150] *Ibid.*, p. 138.

[151] Pius XI, *Divini Redemptoris*, *AAS*, 29 (1937), pp. 65-106; *Mit brennender Sorge*, *ibid.*, pp. 145-67.

[152] Pius XII, Radiomessage, Christmas 1942, *AAS*, 35 (1943), p. 19: « Chi vuole che la stella della pace spunti e si fermi sulla società, concorra da parte sua a ridonare alla persona umana la dignità concessale da Dio fin dal principio; ... ».

the common good and of the quasi-paternal function of government. He makes his own and enlarges the Leonine intuition of man as the centre of the social order. « Man, far from being the object and as it were a passive element of social life, is on the contrary and ought to remain its subject, foundation and end » [153]. This notion is in direct contradiction to totalitarian ideology. Moreover, Pius XII had the further intuition that the dignity of man can be safeguarded only by the establishing of a juridical order in national and international society [154]. The human person should have juridical security, a sphere of right defended against all arbitrary attack [155]. And he concluded that the primary function of government is « to safeguard the inviolable sphere of the rights of the human person and to facilitate the fulfilment of his duties » [156].

Thus Pius XII finally accepted the idea of constitutional government and brought the Church back to « the authentic tradition of Western and Christian constitutionalism, ... » [157]. And by accepting it, « Pius XII made his first important contribution to the Church's doctrine on religious liberty » [158]. Constitutional government is in fact the necessary political corollary to religious liberty as a juridical notion, a human, civil, personal and collective right. As long as the Church defended the notion of government as the representative of transcendent religious truth and of the people with regard to religious truth, an affirmation of religious liberty was impossible. The reason was that, in the name of the religious truth which it represented and protected, the government could put in a counterclaim to the citizen's claim to immunity in religious matters

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[153] Pius XII, Radiomessage, Christmas 1944, *AAS*, 36 (1945), p. 12: « ... lungi dall'essere l'oggetto e un elemento passivo della vita sociale, ne è invece, e deve esserne e rimanerne, il soggetto, il fondamento e il fine ».

[154] *Ibid.*, pp. 19 ff.

[155] Pius XII, Radiomessage, Christmas 1942, *AAS*, 35 (1943), p. 14.

[156] Pius XII, Radiomessage, Pentecost 1941, *AAS*, 33 (1941), p. 221: « Tutelare l'intangibile campo dei diritti della persona umana e renderle agevole il compimento dei suoi doveri vuol essere ufficio essenziale di ogni pubblico potere ».

[157] Murray, Unam Sanctam 60, p. 141.

[158] *Ibid.*, p. 142.

and exclude from public life dissident beliefs. That is why Pius XII's return to the authentic and older tradition was a decisive step on the way to the Declaration.

Pius XII's second contribution was a clarification of the Church's essential requirements vis-à-vis civil society and government. The traditional sole requirement of the Church, her liberty, was somewhat obscured in Leo XIII by his defence of the confessional state and of a regime of privilege for the Church. Pius XII nowhere claims legal privileges for the Church. He affirms the Church's right to liberty and seeks only from concordats that they ensure for the Church « a stable situation, *de jure* and *de facto,* in the state with which they are made » and that they guarantee the Church's « full independence to accomplish its divine mission » [159]. These being the only essential demands the Church makes on the state, the way is opened for the affirmation of a general right to religious liberty in society, for as the Declaration pointed out the institution of religious liberty does not refuse these demands but rather ensures that they will be met [160].

In *Ci riesce* Pius XII made a third contribution to the development of the doctrine on religious liberty by clarifying a question of jurisprudence. The thesis-hypothesis school of thought maintained as a rule of jurisprudence that error and evil ought to be repressed by the government when possible and tolerated only when necessary. Pius XII rejects this: « So the assertion that religious and moral evil ought always to be repressed when possible because tolerance of it is *de se* immoral cannot have an absolute and unconditional value » [161]. This statement cleared the way for the Declaration's rule of jurisprudence: necessity, not possibility, is the criterion for

[159] Pius XII, *Ci riesce, AAS,* 45 (1953), p. 802: « I Concordati debbono quindi assicurare alla Chiesa una stabile condizione di diritto e di fatto nello Stato, con cui sono conclusi, e garantire ad essa la piena indipendenza nell'adempimento della sua divina missione ».

[160] Cf. Declaration, n. 13, *Documents,* p. 694.

[161] *Ci riesce,* p. 799: « Quindi l'affermazione: Il traviamento religioso e morale deve essere sempre impedito, quanto è possibile, perché la sua tolleranza è in sé stessa immorale - non può valere nella sua *incondizionata assolutezza* ».

use of coercion against forms of public action that claim to be religious [162].

The Declaration's refusal to accept the common good as the limiting norm for the exercise of religious liberty is also supported by Pius XII's doctrine. In Pius's juridical conception of the state, the primary component of the common good is necessarily juridical, namely, the protection and promotion of the human and civil rights of the citizen. Accordingly, the common good itself requires that the exercise of civil rights be as free as possible and restrained only in cases of justified necessity. Consequently the Declaration adopts the narrower criterion, the demands of public order. A beginning of this criterion is found in Pius XII's suggestion: All states should permit their citizens to exercise « their own beliefs and moral and religious practices to the extent that they are not contrary to the penal laws of the state » [163].

John XXIII in *Pacem in terris* sums up and carries further the doctrine of his predecessors. The concept of constitutional government is described more clearly and completely; the dignity of the human person as the foundation of society and the state is affirmed more vigorously; a complete and ordered catalogue of the human rights that follow from man's nature is presented. Leo XIII had tirelessly repeated the three spiritual forces sustaining human society — truth, justice and love. Pius XII perfected this tradition in understanding and

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[162] Declaration, n. 7, *Documents*, p. 686.

[163] Murray is making a rather liberal use of this text. Pius XII was not « suggesting » this as a rule of jurisprudence in this place but raising the question whether it could be accepted by Catholics. Murray could legitimately claim, however, that Pius answered the question in the affirmative. The text is: « Secondo le probabilità e le circostanze, è prevedibile che questo regolamento di diritto positivo verrà enunciato così: Nell'interno del suo territorio e per i suoi cittadini ogni Stato regolerà gli affari religiosi e morali con una propria legge; nondimeno in tutto il territorio della Comunità degli Stati sarà permesso ai cittadini di ogni Stato-membro l'esercizio delle proprie credenze e pratiche etiche e religiose, in quanto queste non contravvengano alle leggi penali dello Stato in cui essi soggiornano.

« Per il giurista, l'uomo politico e lo Stato cattolico sorge qui il quesito: possono essi dare il consenso ad un simile regolamento, quando si tratta di entrare nella Comunità dei popoli e di rimanervi? » (*Ci riesce*, pp. 797-98).

form by determining what the truth sustaining society was — a truth about the human person, concrete in its requirements, namely, justice for the person and love between persons. John added a fourth spiritual force, liberty. This addition was new but fully traditional.

> Tradition had always affirmed that the human quality of a society depends on the liberty of the Church, ... Understanding the tradition more profoundly, John XXIII asserts that the human quality of a society depends on the freedom of men: « This society should be realised in freedom, that is to say, in the way proper to rational beings, who assume responsibility for their actions »[164]. That is why, he concludes, society should insist on the usages of freedom (*libertatis consuetudinem teneat*[165])[166].

Full freedom is the dynamic behind the progress of the social order towards a more human equality among men. Finally, freedom is the first requirement of truth, justice and love.

This accent on personal freedom leaves behind definitively and completely the nineteenth-century problematic. The legitimate autonomy of persons, implicit in Leo's doctrine on the two societies, laws and powers, is henceforth explicit. The authentic laicity of the public life of a people is also explicitly affirmed. So the state of the question of religious freedom was modified and it was thus made possible to distinguish between religious liberty as a juridical notion and legal institution in a free society under a government of limited powers and the false laicising ideology that formerly vitiated the notion and the institution.

The right to religious liberty had been affirmed by Popes before Vatican II. Pius XI had declared: « The believer has an inalienable right to profess his faith and to practise it in the forms proper to it. Any law oppressing or preventing the profession or practice of this faith is in contradiction to a natural right »[167]. Pius XII included in his list of fundamental

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[164] John XXIII, *Pacem in terris, AAS*, 55 (1963). p. 266.

[165] *Ibid.*, p. 297.

[166] Murray, Unam Sanctam 60, p. 144.

[167] *Mit brennender Sorge, AAS*, 29 (1937), p. 160: « Der gläubige Mensch hat ein unverlierbares Recht, seinen Glauben zu bekennen und in den ihm

rights of the person « the right to worship God, privately and publicly, including works of charity » [168]. And John XXIII stated: « Everyone has the right to honour God according to the right norm of his conscience and to profess his religion in private and public life » [169]. But despite their apparent clarity these statements left in the minds of many questions which were answered only by the Declaration.

> It answers them by adopting the new state of the question, a fruit of history, by situating itself in the new perspective, and by making the necessary and appropriate distinctions. These distinctions — and indeed the simple fact of making distinctions where none had been made before — are the usual way that a progress in doctrine is achieved [170].

Vatican II issued no formal document on the relations between Church and state. Nevertheless, while carrying out its relatively restricted doctrinal intention « to develop the doctrine of recent Popes on the inviolable rights of the human person and on the constitutional order of society » [171], the Declaration on Religious Liberty « made certain significant contributions towards a development of doctrine in regard to the Church-state issue. In its turn, the Constitution on the Church in the World Today confirmed, and in certain respects advanced, this development » [172]. Murray set out to analyse it [173].

« In general, the development consisted in a transformation of the state of the question » [174]. Leo XIII had transformed the

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gemässen Formen zu betätigen. Gesetze, die das Bekenntnis und die Betätigung dieses Glaubens unterdrücken oder erschweren, stehen im Widerspruch mit einem Naturgesetz ».

[168] Radiomessage, Christmas 1942, p. 19: « ... il diritto al culto di Dio privato e pubblico, compresa l'azione caritativa religiosa ».

[169] John XXIII, *Pacem in terris*, *AAS*, 55 (1963), p. 260: « In hominis iuribus hoc quoque numerandum est, ut et Deum, ad rectam conscientiae suae normam, venerari possit, et religionem privatim publice profiteri ».

[170] Murray, Unam Sanctam 60, pp. 146-47.

[171] Declaration, n. 1, *Documents*, p. 677.

[172] Murray, « Issue of Church and State », p. 581.

[173] *Ibid.*, pp. 580-606.

[174] *Ibid.*, p. 581.

earlier state of the question, namely, the relation between ecclesiastical and political authority, into a question of the relationship between the Church and the whole of human society « in the whole range of its institutional life - social, economic, and cultural, as well as political » [175]. Leo was concerned with the establishment of a Christian order in the whole of society and the orderly relationship he called for between the two powers was a subordinate aspect of this goal. Vatican II pursued and prolonged this line of development [176], the prolongation coming from « a broadening of the perspectives in which the question is viewed » [177]. Firstly, for Leo « human society » meant concretely nineteenth-century Europe; for Vatican II it meant quite literally the whole world. Secondly, for Leo religion meant Christianity and Christianity meant the Catholic Church which for him was the teacher and nurse of Christian civilisation and the origin and support of the unity of Catholic European peoples; this outlook was related to his historical outlook which was retrospective and regarded the Middle Ages as the « golden age of Christian unity, of harmony between the two powers, and of the obedience of princes and peoples to the authority of the Church » [178]; Leo consequently called for a return insofar as possible to this golden age. Vatican II's perspectives on the other hand were based on the present signs of the times — a rising consciousness of the dignity of the human person with a correlative mounting movement towards the unity of the human family — and looked to the future; moreover, Vatican II was ecumenical and so recognised the contributions made by other religious communities and by the world itself to the fulfilment of the signs of the times. So for Vatican II the terms of the problematic were not the Catholic Church and human society in Europe but religion in its full ecumenical sense and human society throughout the entire world. The narrow issue of Church and state was si-

[175] *Ibid.*, p. 582.

[176] Cf. especially *Gaudium et spes*, nn. 33-45, *Documents*, pp. 231-248.

[177] Murray, « Issue of Church and State », p. 582.

[178] *Ibid.*, p. 583.

tuated by the Council within this widened problematic. The earlier state of the question was thus again transformed and the way was opened to a development of doctrine. « It can hardly be said that the Council itself wrought out the development. Nevertheless, it offered certain guidelines »[179]. Murray found these in the Declaration and in the Constitution *Gaudium et spes*.

Leo XIII had tended to assume, as the historical premise of the Church-state question, the religious unity of the Catholic nations and the historic rights acquired by the Church in them. The Declaration, in contrast, « acknowledges the fact of the religiously pluralist society as the necessary historical context of the whole discussion »[180]. Again, the Declaration leaves behind Leo's statist and moralist view of society and adopts Pius XII's personalist constitutional conception. As a consequence, the view that government has the function of defending and promoting religious truth was dropped[181]. Government's function, in the Declaration, « appears as the protection and promotion, not of religious truth, but of religious freedom as a fundamental right of the human person »[182]. Moreover, the Declaration states that the freedom of the Church is « the fundamental principle in what concerns the relations between the Church and governments and the whole civil order »[183]. « The import of this statement is considerable. It opens the way to a new structure of Catholic doctrine on Church and state - to a renewal of the tradition whose great exponent was Gregory VII: ... »[184]. Leo XIII, by his insistence on this principle, was the Gregory VII of the nineteenth century but, oddly enough, post-Leonine canonists seemed to have the unity of the Church rather than the freedom of the Church as their fundamental principle. The Declaration, however, « made vital

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[179] *Ibid.*, p. 585.

[180] *Ibid.*, and Declaration, nn. 4, 14, 15, *Documents*, pp. 681-683, 695.

[181] Cf. Declaration, nn. 3, 6, *Documents*, pp. 681, 683-85.

[182] Murray, « Issue of Church and State », p. 587.

[183] Declaration, n. 13, *Documents*, p. 693.

[184] Murray, « Issue of Church and State », p. 587.

contact with the profound doctrine of Leo XIII, and through him with the genuine tradition »[185]. And it describes the freedom of the Church as an immunity from coercive constraint or restraint by any human power in society or state whether in the exercise of spiritual authority or in communal living of the Christian life[186]. It distinguishes the theological foundation of the Church's right to religious freedom, Christ's mandate, from the political foundation, « the basic truth about the dignity of the human person and about the necessary freedom of his life — especially his religious life, both personal and corporate — in society »[187]. The assertion of the former rules out indifferentism. The assertion of the latter leaves intact the transcendence of the Church and the due autonomy of the secular order: no secular government is empowered to judge matters of theological truth and may accept no titles other than those presented on secular grounds.

« It is clear therefore that the Council renewed traditional doctrine on the relation of Church and state by restoring, in continuity with Leo XIII, the principle of the freedom of the Church to its fundamental place in the structure of the doctrine »[188]. Consequently, the issue of Church and state may no longer be argued in terms of « union » and « separation », « thesis » and « hypothesis ». The Council clearly considered legal establishment involving privileges for the Catholic Church and disabilities for other churches to be a matter of historical circumstances, not of doctrine. And, henceforth, special recognition given to a religious community in a state must not entail civil disabilities for non-members of that community[189]. In future, Catholic doctrine on Church and state will be unitary, not disjunctive: religious freedom is a basic human and civil right. Moreover, the terms of the issue, « Church » and « state », were accurate « when a single structure of spiritual

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[185] *Ibid.*, p. 588.

[186] Declaration, n. 13, *Documents*, p. 694.

[187] Murray, « Issue of Church and State », p. 591.

[188] *Ibid.*, pp. 593-94.

[189] Declaration, n. 6, *Documents*, p. 685.

authority confronted a single structure of temporal authority » [190]. This historical situation no longer exists, and today « the literal terms of the issue are rather 'religion and government', religion in a historical-pluralist sense, and government in the constitutional sense ... » [191]. The relationship between religion and government was primarily defined by the Declaration in terms of freedom. However, while affirming the independence of « Church » and « state », the Declaration excludes either a hostile or an indifferent attitude toward religion on the part of government [192]. It advocates governmental recognition and favour of religion since religion is a fundamental element of the common temporal good of society, but the question what these mean in the concrete is left vague as the answer depends largely on circumstances.

The Constitution *Gaudium et spes* deals with the question of Church and state in terms roughly of a sharpened distinction between society and state. Part 1, chapter 4, deals with the Church's relation to and function in human society; Part 2, chapter 4, treats of the narrower question, Church and state.

The first major concern of the Constitution when dealing with the Church-and-society problematic was to reaffirm the Leonine distinction between the two societies and also the transcendence of the Church to the temporal order. The Church's mission is religious, not political, economic or social, so the Church is not bound to any particular human culture or to any political, economic, or social system. Her wish is « to develop freely under any kind of government which grants recognition to the basic rights of person and family and to the demands of the common good » [193]. In this statement the Council, going beyond Leo XIII's thesis of the indifference of the Church to political forms and accepting and prolonging the views of Pius XII and John XXIII, « makes a political com-

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[190] Murray, « Issue of Church and State », p. 596.

[191] *Ibid.*

[192] *Ibid.*, p. 596 and Declaration, n. 6, *Documents*, p. 685.

[193] Murray, « Issue of Church and State », p. 599 and *Gaudium et spes*, n. 42, *Documents*, p. 242.

mitment, however discreet, to constitutional government — or, if you will, to the juridical state — whose basic inspiration is a consciousness of the dignity of the person and a recognition of human rights. Only under this manner of government is the freedom of the Church, together with the freedom of man himself, assured » [194].

The second major concern of the Constitution is to make clear that transcendence to the world does not mean isolation from the world.

> Pursuing the saving purpose which is proper to her, the Church not only communicates divine life to men, but in some way casts the reflected light of that life over the entire earth. This she does most of all by her healing and elevating impact on the dignity of the person, by the way in which she strengthens the seams of human society and imbues the everyday activity of men with a deeper meaning and importance [195].

« From now on, the Church defines her mission in the temporal order in terms of the realization of human dignity, the promotion of the rights of man, the growth of the human family towards unity, and the sanctification of the secular activities of this world » [196].

The Constitution's treatment of the Church's relations to the political community « does no more than state a few general principles. At that, these are stated in such a way as to exhibit nuances of development » [197]. The Church's transcendence to the political community and its various forms is again asserted [198]. The reason given for this transcendence, that the Church « is at once a sign and a safeguard of the transcendence of the human person » [199], is « pregnant with implications » [200] which are not fully explicitated in the text:

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[194] Murray, « Issue of Church and State », pp. 599-600.

[195] *Gaudium et spes*, n. 40, *Documents*, p. 239.

[196] Murray, « Issue of Church and State », p. 601.

[197] *Ibid.*, p. 602.

[198] *Gaudium et spes*, n. 40, *Documents*, p. 239.

[199] *Ibid.*, pp. 287-88.

[200] Murray, « Issue of Church and State », p. 602.

> It suggests the central significance of the Church for the political order. It suggests the *locus standi* of the Church in the face of the state - the order of public law and administration. It suggests the essential basis of the Church's claim to freedom in the face of all public powers. It implies that the Church may neither be enclosed within the political order nor be denied her own mode of spiritual entrance into the political order. It indirectly asserts the rightful secularity of the secular order, at the same time that it asserts the necessary openness of the secular order to the transcendent values whose pursuit is proper to the human person [201].

The Constitution calls for co-operation between Church and state. This is in line with Leo XIII's idea of concord but there is a nuance. For Leo the reason for the necessary concord was that the two authorities rule over the same one man who is Christian and citizen. For the Council, however, the reason is that both authorities, by a different title, stand in the service of the personal and social vocation of the same men [202]. There must then be co-operation, but the concrete forms of co-operation are to be instituted « depending on the circumstances of time and place » [203]. Murray sees in this statement an implicit rejection of the thesis-hypothesis theory and an explicit recognition that « the contingent relativities of history, and not any logical deductions from abstract principle, must determine the institutional forms of Church-state co-operation » [204]. He had of course been arguing this for years prior to the Council.

Finally, the Constitution affirms the principle of the freedom of the Church. Its explanation of what this freedom means is not as complete as that given in the Declaration but it lays more emphasis on a point also made in the Declaration, namely, the Church's freedom of spiritual entrance into the order of politics. « The mode of entrance is purely spiritual, since it takes the form simply of moral judgment on political affairs, and since the grounds of judgment are metapolitical,

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[201] *Ibid.*, pp. 602-603.

[202] *Gaudium et spes*, n. 76, *Documents*, p. 288.

[203] *Ibid.*

[204] Murray, « Issue of Church and State », p. 603.

[205] *Ibid.*, p. 604.

having to do with the rights of man and the salvation of souls » [205]. Hence the Constitution goes on to state that the Church does not put her trust in privileges granted by civil authority and is prepared to renounce rights legitimately acquired historically. « The implicit disavowal of the ancient recourse to the secular arm is clear enough » [206]. The privileges in question are not specified but « it may be permissible to see a reference to the modern right to legal establishment asserted within the nation-state, and to other consequent legal privileges. Thus the doctrine of *Dignitatis humanae* would be fittingly completed » [207]. Murray concludes:

> The simple conclusion here is that the two conciliar documents, *Dignitatis humanae* and *Gaudium et spes*, have made a joint contribution toward the renewal of traditional doctrine with regard to the ancient issue of Church and state. Previous confusions of the historical with the doctrinal have been sorted out. The systematization based on the distinction between thesis and hypothesis has been dismantled. The relevant principles have been stated with a new purity, which was made possible by the new perspectives in which the whole issue was viewed. New theological insights made available by secular experience (notably the experience of the relation between religious freedom as a human right and the freedom of the Church), have resulted in genuine and fruitful development of doctrine [208].

In conclusion one can say that in the final phase of the development of his thought Murray enlarged upon, clarified and solidified his previous position rather than broke new ground, his theory on religious liberty being essentially complete by 1954. This assertion is especially true of his conceptions, firstly, of natural law as the basis of political philosophy and, secondly, of the compatibility of the American constitutional system with Catholic doctrine; he strove from early in his career to have his ideas on these two points accepted. It is probable, however, that under the stimulus of Vatican II his thought developed

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[206] *Ibid.*, p. 605.

[207] *Ibid.*

[208] *Ibid.*, p. 606.

considerably on the question of development of doctrine. That he was aware of the problem long before the Council convened is evident from even a cursory perusal of his major articles between 1948 and 1954, but the greater ease and confidence with which he handles the concept in the 'sixties is no less evident.

After years of intermittent serious illness, John Courtney Murray died on August 16, 1967. In 1964, when he felt that death was not far off, he remarked to friends: « I have only one prayer left — that God lets me live through the Council... just to see it to the end — win or lose, vindicated or not. »[209] His prayer was answered and he saw his vindication with the promulgation on December 7, 1965, of the Declaration on Religious Liberty.

[209] Hughes, « A Man for Our Season », p. 301.