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NATURAL LAW THEORY AND THE DECLARATION ON RELIGIOUS FREEDOM OF THE SECOND VATICAN COUNCIL

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Introduction

THERE ARE FEW AREAS of human activity which have been the cause of as much hatred, war and civil discrimination as religious belief and practice. The record of history indicates that man experiences a great insecurity which gives rise to feelings of aggressive hostility when he confronts a religious belief alien to his own. Freedom to practice religion according to one's own conscience has been advocated by many philosophers, theologians and persecuted religious minorities, but civilized man has consistently practiced gross religious intolerance. This has been true even in the so-called "golden ages" of western civilization. The reaction of the Athenians to Socrates' comments about the gods, the crude attempts of great Roman emperors such as Marcus Aurelius, Decius and Diocletian to destroy Christianity, the slaughter of Christians by Jewish fanatics at Caesarea in 556, the massacres of Jews by Christians in the Armleder of 1336-38, the burning of English Protestants under Queen Mary, the drawing and quartering of Papists in Elizabethan England, the proscription of non-Catholic missionary activity in Colombia, and the forced destruction of Mormon polygamy in the United States are but a few indicators of this tendency in the story of

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western man. Rare in history has been the example of a man like the Pharisee Gamaliel, who, when the Sanhedrin was about to order the execution of the Christian Apostles, could counsel the leaders of Israel:

> keep away from these men and let them alone. For if this plan or work is of men it will be overthrown, but if it is of God you will not be able to overthrow it.[1]

In recent centuries there has been a more general verbal acceptance of the idea that religious freedom should be protected by the state, at least in the western world. At present the laws of most western nations provide constitutional protections against coercions or restrictions of religious belief and practice.[2] Whatever the reasons for this development, it raises the hope that western man will someday overcome religious intolerance. Dr. Sterling Brown, President of the National Conference of Christians and Jews, has said that "at first it may only be a principle, but in due time it will also be true [that religious freedom will prevail] in practice if the present trends continue."[3] Among the trends noted by Dr. Brown was the advocacy of religious freedom by the Bishops of the Roman Catholic Church meeting in the twenty-first Ecumenical Council. The Declaration on Religious Freedom (*Dignitatis Humanae*) (the Declaration), promulgated by Pope Paul VI on December 7, 1965, is significant because it places the world's largest religious denomination on the side of the proposition that the state must guarantee freedom of religious belief and practice for all of its subjects regardless of what they believe. "It is necessary," the Bishops wrote, "that religious freedom be everywhere provided with with an effective constitutional guarantee" (article 15). The only limitation placed on this is the right of the state to "defend itself against possible abuses," to "provide effective safeguard of the rights of all citizens and for the peaceful settlement of conflicts of rights"—but the state can act in these areas only in a non-partisan, non-arbitrary and judicial manner (article 7).

That such thoughts would come from the Fathers of the Second Vatican Council is particularly significant in that Roman Catholicism as an institution has a long history of promoting intolerance of other religious groups. When Christianity first gained official toleration in the Roman Empire (Edict of Milan, 313), and then secured a preferred status under Theodosius, signs of intolerance towards others were already present. Gradually Jews came under various proscriptions. Heretics such

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[1] Acts of the Apostles 5:38-39.

[2] Of course constitutional protections on paper can be meaningless in reality. For example, the Constitution of the U.S.S.R. forbids any "direct or indirect restriction of rights" because of social, national, cultural or racial associations. FUNDAMENTAL LAW OF THE RUSSIAN SOCIALIST FEDERATED SOVIET REPUBLIC art. 123, ch. X (U.S.S.R. 1918) (Constitution of the Communist Party States, Hoover Institution, Stan. Univ. 1969). Yet a flow of recent books and articles indicates that these constitutional "protections" have little value for Soviet Jews. *See, e.g.*, E. FLANNERY, THE ANGUISH OF THE JEWS 231 (1965); J. TELLER, THE KREMLIN, THE JEWS AND THE MIDDLE EAST (1957); Decter, *The Status of Jews in the Soviet Union*, 41 FOREIGN AFFAIRS 422 (1963).

[3] Times-Review, Dec. 23, 1966, at 7 (newspaper of the Catholic diocese of La Crosse, Wisconsin).

as Arians, Nestorians, Monophysites and Manichaeans frequently found themselves under civil as well as ecclesiastical disabilities. Many early Christian writers insisted that a person cannot be compelled to accept the Christian faith,[4] but the right to believe something other than official doctrine was often limited. The Code of Justinian placed unbelievers under further disabilities, for example, it "stripped Judaism of its explicit legality."[5]

In the medieval period, Catharist communities were destroyed with ecclesiastical approval. Christian Europe engaged in a series of bloody "crusades" to drive the infidel from the holy land. Heretic-hunting bishops allowed Jan Hus and Jeanne d'Arc to be burned at the stake. The Inquisition used physical torture to discover "false" Christians among converted Jews. This was part of the price which western civilization paid to maintain its Catholic unity free from alien influences.

The Reformation witnessed the growth of fanatic intolerance within the Christian church. Catholic-Protestant disputes became so disruptive of the political, social and economic life of Europe that compromises aimed at reducing friction in society soon came about. These compromises usually involved the simple imposition of a single form of Christianity on a given people; religious freedom did not exist except for the prince who chose the religion which his subjects were to follow.

Set against even these few examples, the importance of the Declaration can be easily seen. What is perhaps not so easily seen is the importance of the underlying theoretical basis for religious freedom given by the Declaration. The constant reappearance of religious intolerance in Christian history makes it imperative that the legal basis for religious freedom flow from firm roots. Should it be based merely in the needs of the day, should it merely be a device to condemn the anti-religious activities of the Communist states, then the Declaration's statement of the right to religious freedom would have little historical impact. If the roots are so firm that the Church has made a doctrinal commitment to religious freedom, then Catholic states will find it difficult to deny religious freedom without placing themselves outside the Church. This paper is an attempt to survey various theories about the legal basis for religious freedom and compare them to the approach used in the Declaration.

Legislative History of the Declaration

When the Bishops met in Rome to organize the Second Vatican Council, the proposed agenda did not include the drafting of a separate statement on religious freedom. Discussion of the subject among Catholics had largely centered on Catholic-Protestant dialogue over the status of Reformation churches in Latin America and over church-state relationships in countries such as the United States. It was therefore to be expected that any consideration of

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[4] *E.g.*, Ambrose of Milan, Letter 21, PL 16, 1005; Augustine of Hippo, Letter 23, PL 33, 98; Letter 34, PL 33, 132.

[5] E. FLANNERY, *supra* note 2, at 66-67, *citing* Code of Justinian 1-3-54; 1-10-2; 1-5-13, Novella 131; 1-5-12; 1-5-21.

religious freedom would be made in connection with the ecumenical movement. The first two texts of what eventually became the Declaration on Religious Freedom were chapters in preliminary drafts of the Decree on Ecumenism. Within an ecumenical framework, an analysis of religious freedom became extremely difficult because the Council was badly divided over the rights of individual conscience in relation to objective truth. The basis for religious freedom at this point was charity rather than natural law–natural right.[6] John Courtney Murray noted that the decision to create a separate document on religious freedom released the discussion from "its previous formal preoccupation with ecumenical relationships."[7] In the third draft, the study was placed in a natural law framework; this provided the basic structuring of the document through three subsequent re-draftings.

The final draft takes the position that "the right to religious freedom has its foundation in the very dignity of the human person" (article 2). Anyone acquainted with Catholic theological vocabulary would immediately recognize these words as pointing toward a natural law basis for the right.[8] There has been a noticeable move away from traditional natural law thinking among Catholics in recent years,[9] but the Declaration (as well as parts of the Pastoral Constitution on the Church in the Modern World and the Declaration on Christian Education) shows that the theory of natural right is likely to continue playing an important role in contemporary Catholic thought.

The Enlightenment Theory of a Natural Right to Religious Freedom and the Declaration

Enlightenment philosophy forms an important historical backdrop to the theory of religious freedom contained in the Declaration. Of course, explicitly Christian theological developments also were influential as will be shown subsequently. But as Dr. Jerald C. Brauer, the Dean of the Divinity

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[6] Murray, *The Declaration on Religious Freedom: A Moment in Its Legislative History*, in RELIGIOUS LIBERTY: AN END AND A BEGINNING 15, 22-23 (J. Murray ed. 1966).

[7] *Id.* at 27. This is not to say that the document does not retain great ecumenical value (see Littell, *A Response*, in THE DOCUMENTS OF VATICAN II 697 (W. Abbott ed. 1966)) or influence on church problems of authority and conscience. *See* Murray, *Freedom, Authority, and Community*, 115 AMERICA 734 (1966).

[8] Papal natural law teachings on various subjects are illustrative of this point. *See, e.g.*, Encyclical Letter of John XXIII, *Pacem in Terris*, April 11, 1963, AAS 55 at 257 (1963); Encyclical Letter of John XXIII, *Mater et Magistra*, May 15, 1961, AAS 53 at 401 (1961); Encyclical Letter of Pius XI, *Quadragesimo Anno*, May 15, 1931, AAS 23 at 190 (1931); Encyclical Letter of Pius XI, *Casti Connubii*, Dec. 31, 1930, AAS 22 at 546 (1930).

[9] *See, e.g.*, A. DONDEYNE, CONTEMPORARY EUROPEAN THOUGHT AND CHRISTIAN FAITH (1958); L. DUPRES, KIERKEGAARD AS THEOLOGIAN: THE DIALECTIC OF CHRISTIAN EXISTENCE (1963); McKenzie, *Natural Law in the New Testament*, 9 BIBLICAL RES. 1-13 (1964); Walgrave, *Is Morality Static or Dynamic?*, Arntz, *Natural Law And Its History*, in V CONCILIUM THEOLOGY IN THE AGE OF RENEWAL, MORAL PROBLEMS AND CHRISTIAN PERSONALISM 22, 39 (F. Böckle ed. 1965); Wassmer, *Is Intrinsic Evil A Viable Term?*, 5 CHI. STUDIES 307 (1966).

School at the University of Chicago, has observed:

> religious freedom emerged . . . not so much from the principles and activities of the traditional Christian churches, but primarily from the philosophy of the Enlightenment and from the necessities of historical circumstances.[10]

John Courtney Murray, the American Jesuit who had been widely proclaimed as the principal author of the Declaration, indicated the debt which the document owes to Enlightenment philosophy of natural right as this is embodied in the first amendment of the Constitution of the United States:[11]

> Religious freedom is a freedom from coercion; it is an immunity; its content is negative. Historically, the First Amendment to the Constitution of the United States launched this conception. The freedoms of the First Amendment, including the "free exercise of religion," were understood to be certain specified immunities; moreover, they were essentially related to the concept of constitutional government, which is twofold in its import. First, the powers of government are limited by a higher order of human rights; and second it is "to secure these rights [that] governments are instituted among men (Declaration of Independence)." The political or civil freedoms of the First Amendment . . . were not claims on society and government for positive action, but assurances against positive coercive action . . . . hence the object of religious freedom as a juridical conception is not the actualization of the positive values inherent in religious belief, profession, and practice. . . . The object of the right is simply the assured absence of constraints and restraints on individuals and groups in their efforts to pursue freely the positive values of religion.[12]

The ideas described by Murray, and adopted in the Declaration, grew out of the Enlightenment. From the classical *jus naturale* the Enlightenment philosophers evolved a theory of natural right. This evolution is noticeable in the writings of Grotius, Pufendorf, Vattel, Montesquieu and Wolfe. However, it was John Locke who most influenced this development. Locke did not cut himself off completely from medieval theories of natural law,[13] but he pictured the content of natural law as a catalogue of rights inherent in all human beings.[14] Both Locke and Rousseau believed that natural rights become civil rights in social man. The right to religious freedom was an example of a natural right, and its constant citation by the Enlightenment philosophers indicates its importance in their thinking.

Locke and the other natural rights advocates of the Enlightenment met considerable opposition, notably from Thomas

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10 Brauer, *Religious Freedom as a Human Right*, in RELIGIOUS LIBERTY: AN END AND A BEGINNING 45, 48 (J. Murray ed. 1966).

11 Father Murray had been the leading proponent of the American approach to church-state relations among Catholic theologians. *See* J. MURRAY, WE HOLD THESE TRUTHS (1960).

12 Murray, *supra* note 6, at 27-28.

13 His thinking shows the influence of Joseph Hooker, who had developed an Anglican-Thomistic natural law doctrine. Scott-Craig, *John Locke and Natural Rights*, II SOUTHERN METHODIST UNIVERSITY STUDIES IN JURISPRUDENCE 29 (1955).

14 J. GOUGH, JOHN LOCKE'S POLITICAL PHILOSOPHY (1950); W. VON LEYDEN, ESSAYS ON THE LAW OF NATURE (1954).

Hobbes and David Hume, but unquestionably prevailed in the minds of the American founding fathers. Adams, Paine, Henry, Priestly, Yates, Hamilton and Wilson all proclaimed their devotion to the natural rights of man.[15] Thomas Jefferson made the classic statement of the Enlightenment theory of natural right in the Declaration of American Independence:

> We hold these truths to be self-evident, that all men . . . are endowed by their Creator with certain[16] unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men. . . .[17]

That Jefferson thought of freedom from coercion in religious practice as one of these unalienable rights, a dimension of "liberty," is without doubt.[18]

The Enlightenment doctrine of the natural right to religious freedom could be summarized in three points:

1. The right to believe and practice religion, or not to believe, is inherent in man as a thinking, willing being.
2. The right to practice religion freely forbids the state to coerce the individual.[19]
3. The natural right to religious freedom becomes a civil (constitutional) right and requires the state to protect the citizen against religious coercion. The state, however, has no affirmative duty toward religion.

Does the Declaration see the right in the same light as many commentators have maintained? The Declaration proclaims that "the right to religious freedom has its foundation, not in the subjective disposition of the person, but in his very nature" (article 2), that this right requires "immunity from external coercion as well as psychological freedom" (article 2), and that "this right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed. Thus it is to become a civil right" (article 2). These ideas certainly sound of the Enlightenment.

However, there are some commentators who detect basic departures from this pattern. Professor Denenfeld of Western Michigan University has written that the Declaration "differ[s] sufficiently in its fundamental means and purposes to be out

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15 Manion, *The Natural Law Philosophy of the Founding Fathers*, 1 NAT. L. INST. PROC. 3 (1947). Wright, *American Interpretations of Natural Law*, 20 AM. POL. SCI. REV. 524 (1926).

16 Jefferson's phrase was "inherent and unalienable rights." Congress substituted the word "certain" for "inherent." THOMAS JEFFERSON ON DEMOCRACY 13 (S. Padover ed. 1954).

17 Declaration of Independence.

18 *See* An Act for Establishing Religious Freedom. This act, written by Jefferson, became law in Virginia in 1785. The text is found in 2 BOYD, THE PAPERS OF THOMAS JEFFERSON 545 (1950). For further discussion, see T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA (W. Peden ed. 1955).

19 There is a similarity between Enlightenment thought and the "negative natural law" of Lao-Tze, the teacher of Confucius. His *tao*, the way of nature, is for each man to work out his destiny free of any interference from the state. Hu Shih, *The Natural Law in the Chinese Tradition*, 5 NAT. L. INST. PROC. 119, 125-29 (1951). American lawyers are familiar with such ideas since this philosophy dominated Supreme Court thinking in contract law during the nineteenth century.

of harmony with the genius of the Constitution."[20] Certainly it is true that there are ideas in the Declaration with which the Enlightenment philosophers would have taken issue. The Declaration recognizes the idea of an established religion "in view of peculiar circumstances obtaining among certain peoples" (article 6), as long as freedom of practice is maintained equally for all. The statement that "government . . . ought to take account of the religious life of the people and show it favor" (article 3) would seem to be quite foreign to first amendment thinking. In spite of these statements, however, the overall impression created by the Declaration is of a strictly impartial state whose function is to prevent coercion of religious belief and practice. John Cogley, the Religion Editor for the *New York Times*, has observed that "in the Declaration . . . there are bumpy stretches; the screeching of conservative brakes is heard almost every time the text turns a new theological corner."[21] Unquestionably, the compromises required to achieve agreement among several thousand men from every nation on earth resulted in some imbalances in the text. But this reader's analysis of the text convinces him that the thinking of the Declaration is at least a first cousin to the Enlightenment philosophy embodied in the first amendment.

[20] Denenfeld, *The Counciliar Declaration and the American Declaration*, in RELIGIOUS LIBERTY: AN END AND A BEGINNING 120 (J. Murray ed. 1966).

[21] Cogley, *After the Council*, THE CRITIC, April-May 1966, at 51, 52.

Scholastic Natural Law, Thomism, and the Declaration

Christians have frequently used the phrase: "the natural law is written on the heart of man."[22] The phrase is based on Saint Paul's statement to the Romans: "the gentiles who have no law do by nature what the law prescribes . . . they show the work of the law written on their hearts."[23] Professor Julius Stone of the University of Sidney thought that Paul "left the overall impression that God's dictates are not to be understood in terms of human understanding, and are not rational in terms of human reason."[24] Indeed, the most influential of the early Christian writers, Augustine of Hippo, did not think of natural law as having a purely rational basis. He saw natural law as a transcription of the will and knowledge of God into the spiritual faculties of man,[25] a transcription intended to aid man in following the eternal law which is in God.[26]

In the Middle Ages, Christian philosophers began to move toward a more specifically rational approach to natural law. Influenced by the writings of Aristotle, the

[22] Encyclical Letter of Pius XI, *Divine Redemptoris*, March 19, 1937, AAS 29 at 65, 76 (1937). *See also* Address by Pius XII, Dec. 24, 1941, AAS 34, at 16 (1942). The great disciple of Luther, Philip Melanchthon, used the phrase. *See* P. MELANCHTHON, THE LOCI COMMUNES 110 (C. Hill trans. 1944).

[23] Letter to the Romans 2:14-15.

[24] J. STONE, HUMAN JUSTICE 43-44 (1965), *citing* I Cor. 1:19-28, 2:14, 3:19; 1 Tim. 6:16.

[25] Augustine of Hippo, *Of Disputed Questions* 53, 2.

[26] Augustine of Hippo, *Against Faustum* 22, 27.

Mohammedan philosophers Avicenna and Averroes,[27] and Jewish thinkers such as Abraham Ibn Daud and Moses Maimonides,[28] the scholastics built a whole system of natural law morality. The dominant feature of this philosophy was the emphasis given to the role of "right reason" in determining the natural rights and duties of man. Natural law is that part of God's design for the universe which can be known to man by his own reason without the aid of Judaeo-Christian revelation. This bore a resemblance to Cicero's "right reason which applies to all men a true law, unchangeable and eternal, which accords with human nature."[29] But whereas the Roman stoics found a statement of this law in the *jus gentium*, the scholastics deduced the content of natural law from the goods which they believed human life should achieve. Some commentators have described the basic principle of scholastic natural law, "*bonum est faciendum, malum vitandum,*" as a "tautology,"[30] but the medieval scholastics were quite precise in stating what goods man should achieve and what evils he should avoid.[31]

The greatest of the scholastics, St. Thomas Aquinas, suggested that

> there is in man an inclination to good . . . which is special to him: thus man has a natural inclination to know the truth about God, to live in society, and so whatever pertains to this inclination pertains to natural law, *e.g.*, to shun ignorance, to avoid offending those among whom one has to live.[32]

It is the inclination to know the truth about God, and to do so in a social world, which is the basis for religious freedom in the thinking of contemporary Thomists. Jacques Maritain has written:

> With respect to the state, to the temporal community, and to the temporal power he [man] is free to choose his religious path at his own risk, his freedom of conscience is a natural, inviolable right.[33]

Aquinas himself, however, never alluded to religious freedom as that right is proposed in the Declaration. He felt that the rights of Jews to exercise their religion must be protected by the Christian state because of the truth found in Judaism.[34] But the

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[27] *See* II F. COPELSTON, THE HISTORY OF PHILOSOPHY 190-99 (1950).

[28] *See* I. HUSIK, A HISTORY OF MEDIEVAL JEWISH PHILOSOPHY (1916); Freehof, *The Natural Law in the Jewish Tradition*, 5 NAT. L. INST. PROC. 15 (1951).

[29] M. CICERO, DE REPUBLICA III 22 (circa 51 B.C.).

[30] *See* Nielson, *The Myth of Natural Law*, in LAW AND PHILOSOPHY: A SYMPOSIUM 122, 124 (S. Hook ed. 1964). Some modern Thomists are so reluctant to specify concrete goods that they deserve the criticism. *See, e.g.*, Ryan, *The Traditional Concept of Natural Law: An Interpretation*, in LIGHT ON THE NATURAL LAW 13 (I. Evans ed. 1965).

[31] *Cf.* T. FARRELL, THE NATURAL LAW ACCORDING TO ST. THOMAS AQUINAS AND SUAREZ (1930); E. GILSON, MORAL VALUES AND MORAL LIFE, THE SYSTEM OF ST. THOMAS AQUINAS (1931); Stevens, *The Relationship of Law and Obligation* 29 PROC. AM. CATH. PHIL. ASS'N 195 (1955).

[32] ST. THOMAS, SUMMA THEOLOGICA I-II, q. 94, art. 2.

[33] J. MARITAIN, THE RIGHTS OF MAN 46 (1958).

[34] ST. THOMAS, SUMMA THEOLOGICA II-II, q. 10, art. 11.

rites of other non-Christians were to be tolerated in a Christian state only if the good of avoiding "scandal or disturbance" was more important than stamping out activities which are "neither truthful nor profitable."[35] However, Thomas opposed the forced baptism of either Jews or pagans.[36] He rejected any toleration of Christian heretical activity. If heretics did not renounce their "forgery" of Christianity they were to be excommunicated by the church and "deliver[ed] . . . to the secular tribunal to be exterminated from the world by death."[37] He also believed that a prince forfeited his right to rule when he renounced the Christian faith.[38]

The Declaration ignores the various distinctions made by Aquinas. The content of religious belief is made totally irrelevant to the right to practice what the individual's belief requires:

> nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits (article 1).

Religious freedom is said to consist in

> those internal, voluntary and free acts whereby man sets the course of his life directly toward God. No merely human power can either command or prohibit acts of this kind (article 4).

and requires that the state permit community activities or group rites to all beliefs (article 5). The only instance in which the state has a right to limit religious practices is to prevent abuses relating to public order—but certainly the religious content of the belief is irrelevant.

It should be pointed out in fairness to contemporary Thomists that all the leading inheritors of the scholastic tradition today maintain that religious freedom is a natural right belonging to all regardless of the content of their belief.[39] While ignoring Thomas' own views on toleration of non-believers and heretics, the Thomists have constructed a right to religious freedom based on man's duty to pursue the truth about God.

The Declaration adopts the scholastic idea that natural right can be known "by reason itself" (article 2). It describes the right as flowing from man's search for "truth in matters religious" (article 2), thus following the scholastic principle of deducing natural rights and duties from the goods man should be seeking. In describing the imposition of "profession

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35 *Id.*

36 *Id.* at art. 12.

37 *Id.* q. 11, art. 3. It has been pointed out that Aquinas' views on heretics flowed from the common medieval belief that a Christian who knowingly rejects his faith must have a *mens rea.* Rommen, *A Defense of Natural Law*, in LAW AND PHILOSOPHY: A SYMPOSIUM 105, 119 (S. Hook ed. 1964).

38 ST. THOMAS, SUMMA THEOLOGICA II-II, q. 12, art. 2.

39 *See, e.g.*, J. COGLEY, NATURAL LAW AND MODERN SOCIETY (1961); A. D'ENTREVES, NATURAL LAW (1964); LIGHT ON THE NATURAL LAW (I. Evans ed. 1965); J. FUCHS, NATURAL LAW (1965); J. MARITAIN, FREEDOM IN THE MODERN WORLD (1935); H. ROMMEN, THE NATURAL LAW (1947); J. WU, FOUNTAIN OF JUSTICE: A STUDY IN THE NATURAL LAW (1955); Maritain, *Governmental Repression of Heresy*, in PROC. CATH. THEO. SOC. AM. 26 (1949).

or repudiation of any religion" on people by the state as a "wrong" (article 6), the Declaration approaches the Thomistic notion of an unjust law, *i.e.*, one which "inflicts unjust hurt on its subjects."[40] The theory that a state which hurts its citizens by depriving them of fundamental rights has done a wrong, with the result that its positive law may not be binding, was one of the scholastics' greatest contributions to western jurisprudence, and the Declaration inclines toward this view without expressly adopting it.

Neo-Kantian Natural Law and the Declaration

The transcendental method of Immanuel Kant, based on the categorical-imperative, states that concepts of choice and freedom are the a priori basis of law.[41] Law is not drawn from reason, intuition or experience but from man's right to be free and choose. For Kant, the idea of deducing natural right by reason or inducing it from history or experience was nonsense.

In Catholic circles the most influential neo-Kantian has been Georgio Del Vecchio, the former President of the faculty of Jurisprudence at the University of Rome, who describes a

> transcendental faculty or vocation which asserts itself psychologically in the consciousness of one's own liberty and responsibility, converts itself immediately into a supreme norm of the subject, the ethical imperative. . . . Act not as a means or vehicle of the forces of nature, but as an autonomous being, having the quality of a beginning and an end . . . human actions are considered no longer in their empirical nexus, but in their transcendental dependence with regard to the . . . absolute being of the subject. They are not merely explained as phenomena of nature, but they are evaluated as expressions of liberty, that is, in comparison with that criterion which is given by the intimate being of the subject, and constitutes its proper and characteristic law.[42]

Thus, for Del Vecchio, freedom is primary. It is not merely a means to another good, but is itself the source of "natural law."

It is apparent from the study made of the Declaration above that the Bishops did not value freedom for its own sake as the neo-Kantians would. Man must be free in order that he can pursue the truth (article 2) not for the sake of freedom itself. The Bishops would no doubt agree with Del Vecchio that every man must have "liberty of conscience . . . [because] by his very nature . . . [man] is a subject of right . . . and the fundamental right of liberty . . . [is] inalienable."[43] But they would do so because of the good of truth rather than the a priori good of freedom of choice.

It is interesting that even Del Vecchio would grant the right of the state to limit such rights as freedom of religion "on the basis of law, that is, with the virtual participation of all."[44] In describing the right of

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[40] ST. THOMAS, SUMMA THEOLOGICA I-II, q. 96, art. 4 (reply to objection 3).

[41] I. KANT, METAPHYSISCHE ANFANGSGRUNDE DER RECHTSLEHRE (1797).

[42] G. DEL VECCHIO, PHILOSOPHY OF LAW 439-40 (T. Martin trans. 1953).

[43] *Id.* at 449-52.

[44] *Id.* at 452.

the state to prevent abuses under the pretext of religious freedom the Declaration insists that such restraints not be "arbitrary" but "controlled by judicial norms" (article 7).

The Declaration and Socio-Historical Reality as a Basis of Religious Freedom

In the several decades before Vatican II Catholic legal philosophers carried on a constant debate against those who advocated a "positivist" or "existential" basis for law. The search for universal values flowing from the ontological order of things was thought to be incompatible with the development of law on the basis of social experiment or historical reality. Professor J. W. Smith has described the former as a model of "logico-mathematical deduction" and the latter as "piecemeal inductive engineering."[45] As late as the 1950's there were few Catholic writers who saw any hope of a reconciliation of the two views, although some non-Catholic writers held such a hope.[46]

In the sixties, new trends in Catholic natural law thinking began to become apparent.[47] The influence of Teilhard de Chardin started to persuade Catholics that man himself is the artisan of the world. Theologians such as Ignace Lepp,[48] Marc Oraison,[49] and Werner Schöllgen,[50] opened natural law morality to experiment, induction and historical considerations, and philosophers such as Gabriel Marcel made existentialism respectable among Catholics. By 1965 it was not unusual to find a Catholic sociologist telling a group of Catholic theologians that

> the idea of natural law . . . does not take account of the distance between underlying natural capacities and dispositions and the historical decisions which intervene between those capacities and the concrete community.[51]

The ferment in Catholic circles over the problem of birth limitation no doubt aided

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[45] J. SMITH, THEME FOR REASON 6 (1957).

[46] *See, e.g.*, C. CURTIS, LAW AS LARGE AS LIFE (1959); Jenkins, *The Matchmaker; Toward a Synthesis of Legal Idealism and Positivism*, 22 J. LEG. EDUC. 1 (1959); Pound, *The Revival of Natural Law*, 17 NOTRE DAME LAW. 287 (1942).

[47] *E.g.*, Nogar, *The Emergence of the Person in Natural Law Theory*, 5 CHI. STUDIES 81 (1966).

[48] "We . . . do not regret the 'good old days' when life was lived under the illusion of the given universality of the moral law, but we enthusiastically take up the challenge of realizing ourselves." I. LEPP, THE AUTHENTIC MORALITY 62 (B. Murchland trans. 1965).

[49] "The realities governing every life are too fluid, too dynamic, to be enclosed within the strict boundaries of a system, for this is precisely to destroy their existential character." M. ORAISON, LOVE OR CONSTRAINT? 120 (U. Morrissey ed. 1961).

[50] "The question . . . [is] whether, and how, the essentially dynamic character of reality is compatible with permanent, essential attributes; whether the static way of looking at things, from the standpoint of natural law, needs to be supplemented with the introduction of historical considerations which give to actuality its peculiar and otherwise unrecognizable value and importance . . . a satisfactory argument can be made which permits such a synthesis of timeless principles and historically determined norms of reference. W. SCHÖLLGEN, MORAL PROBLEMS TODAY 18 (E. Quinn trans. 1963).

[51] Schmitz, *The New Freedom and the Integrity of the Profane*, 11 PROC. SOC. CATH. COLLEGE TEACHERS SACRED DOCTRINE 13, 40 (1965).

the move toward a more dynamic theory of natural law.[52]

The Declaration reflects some of these developments. It begins with the observation that there is a growing "demand for freedom in human society" (article 1). The wording of article 1 leaves the impression that the Bishops are "search[ing] into the sacred tradition and doctrine of the Church" to find a basis for religious freedom *because* of the "demand" for religious freedom which has evolved among modern men. This is a remarkable admission by the Church that history, as much as its own principles, has opened up its understanding of this dimension of natural law. Indeed, article 15 is largely devoted to the socio-historical condition of contemporary man as an argument for religious freedom. The Bishops approve "the fact . . . that men of the present day want to be able freely to profess their religion" (article 15). They denounce the fact

> that forms of government still exist under which, even though freedom of religious worship receives constitutional recognition, the powers of government are engaged in an effort to deter citizens from the profession of religion.

From these existential facts, and the realization that "men of different cultures and religions are being brought together in closer relationships," the Bishops conclude that "it is necessary that religious freedom be everywhere provided with an effective constitutional guarantee" (article 15).

Christological Natural Law

Karl Barth, certainly one of the most influential voices of modern Protestantism, has suggested that natural rights exist only within the framework of Christ's salvic act.[53] Christological natural law has its roots in the Reformation tradition which sees nature as essentially corrupted by sin. If nature has been corrupted then there is no natural good for man unless Christ restores it to him. Emil Brunner, the best known contemporary Protestant natural law advocate, rejects this "Christological ethics as a collection of phantasms which at best are of no use,"[54] but Barth's statement is probably most representative of Protestant thought. Catholics have consistently rejected the Christological natural law; they believe that while sin deprived man of supernatural grace and wounded human nature it did not destroy natural good. Catholic theologians insist that man possesses natural rights simply because he is a man—redemption is not the source of these natural rights.

As could be expected, the Declaration does not employ Christological natural law to reach the conclusion of religious freedom. Its basis is the "inviolable rights of the human person" (article 1) rather than redemption. The teaching of Jesus gives

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52 *See, e.g.*, WHAT MODERN CATHOLICS THINK ABOUT BIRTH CONTROL (W. Birmingham ed. 1964); L. DUPRES, CONTRACEPTION AND CATHOLICS (1965); G. GRISEZ, CONTRACEPTION AND NATURAL LAW (1964); J. NOONAN, CONTRACEPTION (1965); T. ROBERTS, CONTRACEPTION AND HOLINESS (1964).

53 K. BARTH, RECHTFERTIGUNG UND RECHT I (1944).

54 E. BRUNNER, DOGMATIK II 374 (1950).

man a greater insight into the dignity of the human person, but his salvic act is not the source of natural rights.

Revealed Natural Law

Throughout human history the idea that a divine revelation is the source of man's knowledge of his natural rights and duties has constantly reappeared. For example, the Moslem theory of natural law is based on the immanence of God in the universe. The laws of nature are immutable because they are the thoughts of God. Muhammad said "this is the Divine Nature on which God has built the nature of man."[55] While natural law can be known in the heart of man, sin and ignorance prevent him from knowing the ways of nature. The content of natural law can therefore be known only through the religious prophets. The prophet, as a man of God, alone has the wisdom to make clear the law of nature.[56] The great Prophet, Muhammad, taught that man has a natural right to freely practice the religion he believes. Religious freedom was to prevail in Islam, and it could be limited only by the need of state to insure order and safety within its borders.[57] Thus, for the Moslem, a revelation through the prophets shows man his natural rights.

The Declaration adopts a form of revealed natural law.[58] Christian revelation "discloses the dignity of the human person in its full dimensions" (article 9). Thus the "doctrine of freedom has roots in divine revelation" (article 9). Revelation is *not* the *sole* source of this knowledge for "this dignity [has] come to be more adequately known to human reason through centuries of experience," nor does revelation "affirm in so many words the right to immunity from external coercion in matters religious" (article 9).

The primary revelational basis for religious freedom is the New Testament teaching that faith is a gift of God which man is at liberty to accept or reject. Being free, faith cannot be based on any "manner of coercion" (article 10). Religious freedom makes "no small contribution to the creation of an environment in which men can without hindrance be invited to the Christian faith and embrace it of their own free will" (article 10). The example of Christ and the Apostles not using force to spread their views is cited as giving an additional revelational insight into religious freedom (article 11). The Bishops saw the Declaration as being

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55 MUHAMMAD, QUARN, Rum 30.

56 *Cf.* Sundaram, *The Natural Law in the Hindu Tradition*, 5 NAT. L. INST. PROC. 69, 72 (1951). The Hindu tradition is also revelational, for the content of natural law is "promulgated . . . by teaching. The teachers are those we call seers, sages, prophets, mystics, philosophers, law-givers, saints and sons of God." A comparable example may be the *ching* as developed in the Canonical Scripture of Confucianism. The *ching* is the immutable law of nature, but its content is found in the sacred canons as these were developed by Chinese philosopher-theologians. *See* Hu Shih, *supra* note 19, at 133.

57 *See* Hakim, *The Natural Law in the Moslem Tradition*, 5 NAT. L. INST. PROC. 29, 33-35 (1951).

58 In Catholic thought, revealed natural law seems to have had its origin in the writings of Gratian who thought that natural law was identifiable with the Decalogue, *Decretum* 1 pars, d. I proem.

faithful to the truth of the gospel . . . and giving support to the principles of religious freedom as befitting the dignity of man and being in accord with divine revelation (article 12).

Conclusion

Six different approaches to natural law have been discussed above and each has been compared to the content of the Declaration. Four of these theories are embodied in some form in the document; only the neo-Kantian and Christological approaches seem to have had no influence on the Bishops. The fact that four approaches did influence the text may give an impression of random eclecticism, but there is generally an internal consistency of thought in the Declaration. The resort to a first amendment solution to the problem of the state's function in maintaining religious freedom and the dependence on historical-social realities in explaining the right enable the Church to speak intelligibly to modern western man. The influence of contemporary rights-oriented Thomists enabled the Bishops to express these ideas in a vocabulary familiar to Catholics. The dependence on revelation allowed the Council to put the right to religious freedom on what is for Catholics the most solid possible juridical grounds.[59] If Aristotle could justify slavery, if Aquinas could justify the burning of heretics, and if sixteenth century Spanish theologians could justify the denial of civil rights to the Indians of South America because they "practiced blasphemy," then it is apparent that a belief in natural law does not of itself assure a devotion to natural rights as contemporary man understands that concept. However, since Catholics believe that revelation constitutes the central event in the history of man, the Bishops did try to place the right to religious freedom on the firmest possible natural law basis which they could find.

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[59] *See generally* B. HARING, THE LIBERTY OF THE CHILDREN OF GOD (1966); L. JANSSENS, FREEDOM OF CONSCIENCE AND RELIGIOUS FREEDOM (1966); T. LOVE, JOHN COURTNEY MURRAY: CONTEMPORARY CHURCH-STATE THEORY (1965); Crittenden, *Religious Liberty: A Study in Doctrinal Development*, 200 CATH. WORLD 355 (1965); Murray, *This Matter of Religious Freedom*, 112 AMERICA 40 (1965); Murray, *The Problem of Religious Freedom*, 25 THEO. STUDIES 503 (1964).