

# CONFERENCE: THE FOUNDATION OF HUMAN RIGHTS: CATHOLIC CONTRIBUTIONS, PART II: ARTICLE: RELIGIOUS LIBERTY: A COMMON CHALLENGE FOR CATHOLIC-MUSLIM DIALOGUE

Fall, 2012

## Reporter

11 Ave Maria L. Rev. 31 \*

**Length:** 15235 words

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## Text

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[\*31]

Comparing the struggles of the Church on the subject of religious liberty with those in course of progress within Islam may be conducive to greater interreligious understanding. It is not by chance that Muslim and Christian scholars have adopted this approach on more than one occasion. <sup>1</sup> Even Pope Benedict XVI, speaking to the Roman Curia at the end of 2006, seemed to implicitly acknowledge this fact when he stated that "the Muslim world today finds itself facing an extremely urgent task ... very similar to the one ... imposed upon Christians beginning in the age of the Enlightenment" <sup>2</sup>: namely the task of recognizing the freedom of faith and finding appropriate solutions in this regard. Starting from this presumption, the present paper will be divided mainly into two parts. Part I will briefly illustrate the positions of the Church before and after the Second Vatican Council. Part II will delve into the positions of some modern Islamic Organizations, countries, and scholars on the civil right to religious freedom.

### I. Religious Liberty: The Evolution of the Idea in the Catholic Church

To begin with, it must be recalled that the journey of the Catholic Church towards the full proclamation of human rights has gone through at least three phases: rejection, discernment, and finally, proclamation. <sup>3</sup> The phase of initial rejection - which lasted roughly [\*32] from the Papacy of Gregory XVI to that of Pope Pius XII - was mostly driven by the fear that the language of rights, as first portrayed by the 1789 French Declaration and then by the 1948 U.N. Declaration, might lead to indifferentism and relativism.

"The Church saw the French Revolution as proclaiming a 'liberty' that was total and without limits." <sup>4</sup> More precisely, the right to religious liberty - as conceived by the French revolutionaries - had not been simply understood

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<sup>1</sup> Maurice Borrmans, *Catholiques et Musulmans: deux approches a la modernite*, 24 *Islamochristiana* 57, 58 (1998).

<sup>2</sup> Sandro Magister, *A Glimmer of Light in an Egypt in Revolt*, *Chiesa* (Jan. 31, 2011), <http://chiesa.espresso.repubblica.it/articolo/1346544?eng=y>.

<sup>3</sup> Australian Catholic Bishop Conference, *From Rejection to Proclamation: A Brief Overview of the Catholic Church's Thinking on Human Rights*, available at [www.socialjustice.catholic.org.au/.../PDF/human\\_rights\\_thinking.pdf](http://www.socialjustice.catholic.org.au/.../PDF/human_rights_thinking.pdf) (last visited Sept. 8, 2012).

<sup>4</sup> Id.

as the right to be free from any political or external coercion in matters pertaining to Faith,<sup>5</sup> or as what we now define a legal right as pertaining to, or regulating the external forum. Rather, it was understood in ethical, relativistic terms as the right to think and believe whatever one wants, and even to be free from any religion.

Against this background, Pope Leo XIII stated that "the eternal law of God is the sole standard and rule of human liberty."<sup>6</sup> Going as far as saying that "the liberty of worship" - which is a specific instance of modern freedom - "is so opposed to the virtue of religion."<sup>7</sup>

The sub-titles of the Papal Encyclicals issued during this period are all quite evocative of the general suspicion of the Catholic Church with respect to religious liberty. *Mirari Vos: On Liberalism and Religious Indifferentism* (1832), *Quanta Cura: On Condemning Certain Errors* (1864), *Immortale Dei: On the Christian Constitution of States* (1885) all reacted against the "absolutist" notion of freedom portrayed by the French Declaration.

Likewise, the 1948 U.N. Declaration was initially passed under silence by Pope Pius XII. This Document had been drafted with the help of communist countries, a fact which in itself constituted a motive of suspicion. Secondly, the Document did not mention either the word God or natural-moral law - two notions which the Vatican Observer to UNESCO (who then became Pope John XIII) had pressed the Human Rights Committee to include, but without success.

**[\*33]** For such reasons, the Church believed once again that human rights, including the right to religious liberty as then portrayed,<sup>8</sup> might be conducive to the idea that all religions are the same, and that even error has its rights. Whereas Pope Pius XII subscribed to the view that "that which does not correspond to truth or to the norm of morality objectively has no right to exist, to be spread or to be activated."<sup>9</sup>

A turning point in history was the acquisition, starting with the papacy of Pope John XXIII, of the distinction between the legitimate content, on the one hand, and the ambiguous intention, on the other, of human rights rhetoric.<sup>10</sup> With Pope John XXIII, the phase of discernment of the Church on the subject of human rights and religious liberty begins.

In his Encyclical *Pacem in Terris* (published on April 11, 1963), Pope John XXIII explicitly praised, not without some reserve, the Universal Declaration of Human Rights which had been issued by the United Nations in 1948.<sup>11</sup> He also welcomed the right to freedom of conscience and religion, re-defining them respectively in non-relativistic, ethical terms as the "right to be free to seek out the truth, to follow moral principles, discharge the duties imposed

<sup>5</sup> Francesco Compagnoni, *I diritti dell'uomo* 53 (San Paolo ed., 1995); John Finnis, *Why Religious Liberty is a Special, Important and Limited Right* 2 (Notre Dame Law Sch. Legal Studies, Research Paper No. 09-11, 2008).

<sup>6</sup> Pope Leo XIII, *Libertas* [Encyclical Letter on the Nature of Human Liberty] P 10 (1888) [hereinafter *Libertas*].

<sup>7</sup> *Id.* P 19 (emphasis omitted).

<sup>8</sup> Article 18 of the U.N. Declaration precisely states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others in public or private, to manifest his religion or belief in teaching, practice, worship and observance." *Universal Declaration of Human Rights*, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 18 (Dec. 10, 1948).

<sup>9</sup> Pope Pius XII, *Ci Riesce* Address to the National Convention of Italian Catholic Jurists P 5 (Dec. 6, 1953), available at <http://www.ewtn.com/library/papaldoc/p12ciri.htm> [hereinafter *Ci Riesce*] (translated by the Vatican Press Office).

<sup>10</sup> International Theological Commission, *The Dignity and Rights of the Human Person* P 2.2.3 (1983).

<sup>11</sup> Pope John XXIII, *Pacem in Terris* [Encyclical Letter on Establishing Universal Peace in Truth, Justice, Charity, and Liberty] P 144 (1963) [hereinafter *Pacem in Terris*].

by justice, and lead a fully human life,"<sup>12</sup> and the right "of being able to worship God in accordance with the right dictates of his own conscience."<sup>13</sup>

The notion of freedom of worship "in accordance with the right dictates of his own conscience," however, left the faithful and the bishops to wonder whether those, whose conscience was erroneous, or mistaken, could still legitimately claim a right to religious freedom and worship.<sup>14</sup> The Encyclical - however formally espousing the [\*34] contents of the U.N. Declaration - was still based on the premise, expressed by Pope Pius XII, in *Ci Riesce*,<sup>15</sup> and Pope Leo XIII, in *Libertas*<sup>16</sup>: namely the assertion that a genuine right is only based on what is objectively true and good.<sup>17</sup> This basic premise - which essentially reduces rights to ethically justified claims, coupled with another main tenet, that "The Roman Catholic faith is the true religion" - had led for a long time the Popes to deny that the other faiths and religions stand on an equal footing before the law.<sup>18</sup> The State could at best tolerate them, in virtue of the fact that "no one must ever be forced to act against his conscience either in public or private" and in virtue of the fact that "no one must be prevented from acting in accordance with his conscience in private." Nonetheless, even these negative liberties - which were not yet recognized in terms of rights (but only in terms of lesser evils to be at best tolerated) - were very restricted.<sup>19</sup> Their limit being the natural moral law, on which the Catholic State itself should be based.

Finally, it is only under the Papacy of Pope Paul VI, and the Second Vatican Council Declaration on Religious Liberty, *Dignitatis Humanae*, that a more fundamental turning point is reached: namely the acquisition of the further distinction between the legal notion of religious liberty and the theological notion of religious liberty.<sup>20</sup> Thus [\*35] opening the way for the phase of full proclamation of the civil right to religious liberty.

In the Declaration, the Council Fathers precisely stated that the civil right to religious freedom has to do with immunity from coercion and discrimination in the exercise of one's religion, in such a way that no one is to be forced by civil society to act in a manner contrary to his own conscience, or restrained from acting in accordance with it. This idea of religious liberty, then, does not have anything to do with the freedom to believe in whatever one wills, nor with the idea that any religion is equivalent to another. Thus preserving, on a theological level, the traditional

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* P 14 (emphasis added).

<sup>14</sup> JerOme Hamer & Clemente Riva, *La Liberta religiosa nel Vaticano II* 30 (2d ed. 1967).

<sup>15</sup> That which does not correspond to the truth or to the norm of morality objectively has no right to exist, to be spread or to be activated." *Ci Riesce*, supra note 9.

<sup>16</sup> Right is a moral power which - as We have before said and must again and again repeat - it is absurd to suppose that nature has accorded indifferently to truth and falsehood, to justice and injustice." *Libertas*, supra note 6, P 23.

<sup>17</sup> John Courtney-Murray, *The Problem of Religious Freedom*, in *Religious Liberty: Catholic Struggles with Pluralism* 127, 135 (J. Leon Hooper ed., 1993).

<sup>18</sup> David Hollenbach, *Justice, Peace and Human Rights: American Catholic Social Ethics in a Pluralistic World* 102 (1988).

<sup>19</sup> For the most part, a policy of toleration towards the Jews was followed in the papal states. Jews were allowed to meet together for private worship but were not allowed to hold ceremonies in public or to proselytize among Catholics." In fact

it has been the consistent teaching of the Popes that a Catholic state has the right to restrict the public expression of heresy. Thus, in a Catholic state, members of a Protestant sect could not be compelled to assist at Mass but they could be prevented from holding outdoor services, putting up notices outside their places of worship designating them as such, or advertising their services.

Religious Liberty & Vatican II, *Catholic Apologetics*, <http://www.catholicapologetics.info/apologetics/defense/rbity.htm> (last visited Sept. 6, 2012).

<sup>20</sup> The first draft of the Encyclical refers to this distinction in terms of the difference between the freedom ab-extra and the freedom ab-intra. Hamer & Riva, supra note 14, at 50-51.

belief that you can claim a moral right only to the truth, and that men and societies have a duty toward true religion.  
<sup>21</sup> A duty which includes the obligation "to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of the truth."<sup>22</sup>

This implies, for example, that the liberty to change one's religion is not properly conceived in moral terms as the freedom to change one's religion, in oblivion of the truth. Rather it is conceived in negative and legal terms as the right not to be obliged by the State, "by force or fear or other means ... [to leave] a religious community."<sup>23</sup> The Declaration, that is, grounds the right to change religion on the natural duty of non-interference on the part of the State, rather than on a natural-ethical claim to do whatever one wants to, in matters of freedom and conscience.<sup>24</sup>

It is interesting to point out that some of the most conservative, fundamentalist strands of the community of Bishops taking part in the discussions and works around the Declaration failed to recognize the continuity of the Second Vatican Council's notion of religious liberty with the Catholic Church's traditional teaching.<sup>25</sup> In particular, **[\*36]** they failed to realize that *Dignitatis Humanae's* civil right to religious liberty was not in dire contrast with the tradition's doctrine that error may not be the object of a positive moral claim.<sup>26</sup> Thus, as the recent Pope's Message for the World Day of Peace has recalled, the modern Catholic Church's teaching on religious freedom stands equally apart from the perils of secularism and religious fundamentalism.<sup>27</sup>

## II. The Foundations of Religious Liberty in *Dignitatis Humanae*

*Dignitatis Humanae* grounds the civil right to religious liberty on both theological and socio-political premises. The former mostly reiterate the ancient, spiritual tradition of the Church, whereas the latter - in as much as they are applied to the issue of religious liberty - constitute the real breakthrough of the whole Encyclical.

Particularly crucial is the socio-political distinction between the role of the State and the role of the Church as part of civil society. In the Declaration's own words, "the religious acts whereby men, in private and in public and out of a sense of personal conviction, direct their lives to God transcend by their very nature the order of terrestrial and

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<sup>21</sup> Pope Paul VI, *Dignitatis Humanae* [Declaration on Religious Freedom, on the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious] P 1 (1965) [hereinafter *Dignitatis Humanae*].

<sup>22</sup> *Id.* P 2.

<sup>23</sup> *Id.* P 6.

<sup>24</sup> This is a subtle difference, which nonetheless has important philosophical weight and may help "orthodox" Muslims to come to the acceptance of the right to apostasy properly understood.

<sup>25</sup> Amongst them was Mgr. Lefebvre. See *Religious Liberty & Vatican II*, supra note 19. For them, "le droit de propager des religions fausses dans une nation catholique constitue, en tant que principe, une violation grave de la moralite publique... Elle accorde a toutes les religions, encore une fois dans les nations catholiques, un droit strict a la liberte exterieure et civile du proselytisme, sans meme prendre un compte la faiblesse des gens du commun." Julio Alvear, *Dignitatis Humanae, Liberte religieuse: evolution d'un concept*, 107 *Catholica* 61, 67 (2010).

<sup>26</sup> *Libertas*, supra note 6, P 33.

While not conceding any right to anything save what is true and honest, she [the Church] does not forbid public authority to tolerate what is at variance with truth and justice, for the sake of avoiding some greater evil, or of obtaining or preserving some greater good... . But if, in such circumstances, for the sake of the common good (and this is the only legitimate reason), human law may or even should tolerate evil, it may not and should not approve or desire evil for its own sake ... .

*Id.*

<sup>27</sup> See Pope Benedict XVI, *Religious Freedom, the Path to Peace* [Message for the Celebration of the World Day of Peace] P 8 (2011).

temporal affairs." <sup>28</sup> Therefore, a government "would clearly transgress the limits set to its power, were it to presume to command or inhibit acts that are religious." <sup>29</sup>

This distinction had been partially acquired in previous papal teachings, but not yet applied coherently to the issue of religious liberty. In the Encyclical *Immortale Dei* (1885) and in *Sapientiae Christiana* (1890), for instance, Pope Leo XIII had mostly used the distinction to legitimize the respect due by the State to ecclesiastical authority, rather than to condemn the imposition of the Catholic faith in the public sphere.

**[\*37]** The growing reality of religious pluralism within Catholic States, <sup>30</sup> but also the presence of Catholic minorities spread all over the world and suffering from persecution, convinced the Council Fathers of the need to distinguish Church and State in ways which were not needed, or even thought of before, when "The condition of the commonwealth" was seen as directly "[dependent] on the religion with which God is worshipped ." <sup>31</sup> Or when civil power was invested with the duty to restrict, or prohibit, non-Catholic worship and religious expression. <sup>32</sup>

The Declaration on Religious Liberty was in this respect influenced by the insights of Father John Courtney Murray S.J., an American political philosopher, who had been asked to write the 3rd and 4th drafts of the Encyclical. His Article, *The Problem of Religious Freedom*, which sets the aforementioned distinction, appeared in *Theological Studies* a year before the promulgation of *Dignitatis Humanae*. <sup>33</sup>

Another important socio-political premise on which religious liberty is grounded is the distinction between the common good (which appears only once in the Declaration) and the public order. <sup>34</sup> This distinction - by some depicted in terms of the "integral common-good" and the "political common-good" <sup>35</sup> - follows almost immediately from the aforementioned Church-State duality: endowing the State with the duty to care for the civil right to religious freedom and leaving the Church, or civil society, the freedom to pursue religious truth in its own ways. <sup>36</sup>

On the theological level, it is worth mentioning that *Dignitatis Humanae* presents three kinds of reasons in favor of religious liberty. First of all, religious liberty is grounded on the Gospel, and especially on the attitude of Christ who used patience and persuasion - never coercion - in attracting and inviting his disciples. <sup>37</sup> Second, the nature of the true faith is advanced as a justification. In paragraph 3, the **[\*38]** Declaration states that the "exercise of religion, of its very nature, consists before all else in those internal, voluntary and free acts whereby man sets the course of his life directly toward God." <sup>38</sup> Thus re-asserting St. Augustine's principle (*credere non potest homo nisi volens*), according to which "[a] person can do other things against his will; but belief is possible only in one who is willing." <sup>39</sup> For belief is in itself an interior act of assent on the part of the intellect and the will, which in virtue of its nature

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<sup>28</sup> *Dignitatis Humanae*, supra note 21, P 3.

<sup>29</sup> *Id.* P 3.

<sup>30</sup> *Id.* P 15.

<sup>31</sup> Pope Leo XIII, *Immortale Dei* [Encyclical Letter on the Christian Constitution of States] P 19 (1885) [hereinafter *Immortale Dei*].

<sup>32</sup> See generally Pope Pius IX, *Quanta Cura* [Encyclical Letter Condemning Current Errors] (1864) [hereinafter *Quanta Cura*].

<sup>33</sup> The Article was later re-published. See Courtney-Murray, supra note 17.

<sup>34</sup> Hollenbach, supra note 18, at 103.

<sup>35</sup> Martin Rhonheimer, *The Common Good of Constitutional Democracy* (William F. Murphy, Jr. ed., forthcoming Jan. 2013).

<sup>36</sup> Courtney-Murray, supra note 17, at 183.

<sup>37</sup> *Dignitatis Humanae*, supra note 21, P 11.

<sup>38</sup> *Id.* P 3.

can only be facilitated through rational persuasion, and escapes the control of physical coercion.<sup>40</sup> This Augustinian argument was already present in the Papal Encyclicals prior to *Dignitatis Humanae*.<sup>41</sup> In that context, however, it had been used to justify tolerance of unbelief, on condition that there is no infringement of natural moral law. Here, it is used to support the negative right to religious liberty of all, providing that there is no breach to public order and respect of others' rights.

Furthermore, the Declaration recalls that God has created man in his image, impressing in his conscience the light of his divine law, "with the result that, under the gentle disposition of Divine Providence, he can come to perceive ever more fully the truth that is unchanging."<sup>42</sup> A reason why "in all his activity a man is bound to follow his conscience" and "is not to be forced to act in manner contrary to his conscience."<sup>43</sup> In this resuming Aquinas's view on the dignity of conscience, according to which conscience should be **[\*39]** always respected even when - in honestly searching for the truth - it is misled or in error.<sup>44</sup>

### III. Religious Liberty: The Gradual Reception of the Idea in Contemporary Islamic Human Rights Charters

Whilst the Catholic Church started to struggle with the idea of the right to religious freedom since the French Enlightenment, Islam began to articulate its own response only recently, specifically from the time of the 1948 U.N. Declaration, when some countries with a Muslim majority raised objections to its formulation of the right to religious freedom.<sup>45</sup> Since then, Islamic countries - including those that were not members of the U.N. at the time of the 1948 Universal Declaration - felt the urge to draft their own Human Rights Charters. Their response has in the course of times moved from a conservative, traditionalist stance to a more liberal position.

The conservatives' views on religious freedom were initially portrayed in the 1981 Universal Islamic Declaration of Human Rights ("UIDHR") and the 1990 Cairo Declaration on Human Rights in Islam ("CDHRI")<sup>46</sup> issued

<sup>39</sup> Eric D'Arcy, *Conscience and its Right to Freedom* 154 (1961). In other words, "[a] man may sign a contract, join a firing-squad, pronounce an oath of allegiance" and even outwardly adhere or abjure one's faith "without any interior consent," or without truly believing. *Id.*

<sup>40</sup> 1 Antonio Rosmini, *The Essence of Right*, in *The Philosophy of Right* 166 (Denis Cleary & Terence Watson trans., 1993) (1865).

<sup>41</sup> *Immortale Dei*, supra note 31, at P 36.

The Church, indeed, deems it unlawful to place the various forms of divine worship on the same footing as the true religion, but does not, on that account, condemn those rulers who, for the sake of securing some great good or of hindering some great evil, allow patiently custom or usage to be a kind of sanction for each kind of religion having its place in the State. And, in fact, the Church is wont to take earnest heed that no one shall be forced to embrace the Catholic faith against his will, for, as St. Augustine wisely reminds us, "Man cannot believe otherwise than of his own will."

*Id.*

<sup>42</sup> *Id.* P 3.

<sup>43</sup> *Id.*

<sup>44</sup> See David Little, John Kelsay & Abdulaziz A Sachedina, *Human Rights and the Conflict of Cultures* 17 (Frederick M. Denny ed., 1988) ("Thomas is thoroughly consistent on this point: 'Belief in Christ is, of itself, something good, and necessary for salvation. But if one's reason presented it as something evil, one's will would be doing wrong in adopting it.'). See also St. Thomas Aquinas, *Summa Theologica*, Pt. I-II, Q. 19, Art. 5 (Fathers of the English Dominican Province trans., Christian Classics 1981); D'Arcy, supra note 39, at 159-60 (explaining that "St. Thomas' principles ... forbid a 'Catholic state' to exercise compulsion on born Protestants with a view to forcing them to adopt the State religion. 'People who have never accepted the Faith must not, on any account, be forced to embrace it.'").

<sup>45</sup> Draft International Declaration of Human Rights, U.N. GAOR 3d Comm., 3d Sess., at 392, U.N. Doc. A/C.3/265 (1948).

<sup>46</sup> A first draft of the text was replaced by a second draft, which was the object of many debates and summits, the majority of which held in Tehran. It was finally adopted in Cairo, on August 4, 1990, by forty-five Foreign Ministers of the Organization of the

respectively by the Islamic Council of Europe, a private organization of Islamic groups already present in Europe,<sup>47</sup> and the Organization of the Islamic Conference, a much more representative entity, being the second largest inter-governmental [\*40] organization after the United Nations, which presently has fifty-seven member states spread over four continents.<sup>48</sup>

These two initial Islamic Human Rights Charters were united by three main features. First of all, they ground human rights on a classical interpretation of the Koran and Sunna.<sup>49</sup> In the second place, the main definition of religious liberty found in these documents is theological and ethically comprehensive: like, for instance, the notion found in Article 12(b) of the UIDHR<sup>50</sup> and Article 22 of the Cairo Declaration.<sup>51</sup> A notion which is perhaps surprisingly very similar to [\*41] the one contained in the Papal Encyclicals *Quanta Cura*,<sup>52</sup> *Libertas*,<sup>53</sup> and even *Pacem in Terris*.<sup>54</sup>

Finally - coming up to their third common feature - they almost totally lack a legal, or negative, notion of religious liberty as immunity from coercion. This is advanced only in two cases, one of which is non-compulsion in the refutation of one's religion (Article 10 of the CDHRI)<sup>55</sup> and the other is non-compulsion of non-Muslim minorities in

Islamic Conference ("OIC"). Maurice Borrmans, *Convergences et divergences entre la Déclaration universelle des droits de l'homme (1948) et les récentes Déclarations des droits de l'homme dans l'Islam*, 60 *Conscience et Liberté* 27, 28 (2000).

<sup>47</sup> Therefore, this was not representative of the whole Muslim world. Robert Caspar explains that the Council was, at the time of the UIDHR, actively supported by Pakistan, whose regime was and still is quite integralist. Robert Caspar, *Les déclarations des droits de l'homme en Islam depuis dix ans*, in 9 *Islamochristiana* 59, 75 (1983).

<sup>48</sup> The OIC does not only include States with Muslim majority. In fact, it also includes Gabon and Uganda, in which Muslims comprised, in 1984, 0.5% and 10% of the population. *Id.* at 73 n.27.

<sup>49</sup> Islamic Council, *Universal Islamic Declaration of Human Rights*, at arts. 1-3, 7, 10 (1981). The Foreword of the *Universal Islamic Declaration of Human Rights ("UIDH")* explicitly affirms that "human rights in Islam are firmly rooted in the belief that God, and God alone, is the Law Giver and the Source of all human rights" and that "the *Universal Islamic Declaration of Human Rights* is based on the Qur'an and the Sunnah." *Id.* foreword. This is re-stated in the Preamble, which also adds "that rationality by itself without the light of revelation from God can neither be a sure guide in the affairs of mankind nor provide spiritual nourishment to the human soul." *Id.* pmb. Similarly, Article 25 of the *Cairo Declaration on Human Rights in Islam* states reads: "The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration." *World Conference on Human Rights*, Jul. 31-Aug. 5, 1990, *Cairo Declaration on Human Rights in Islam*, art. 25, U.N. Doc. A/CONF.157/PC/63/Add.18 (Aug. 5, 1990) [hereinafter *Cairo Declaration*]. Even where, as in article 12(a) of the UIDH, reference is made to "the limits prescribed by the Law," the term "Law" denotes the shari'a, as the explanatory note explains at the bottom of the text. *Universal Islamic Declaration of Human Rights*, *supra*, at art. 12(a).

<sup>50</sup> *Universal Islamic Declaration of Human Rights*, *supra* note 49, at art. 12(b) ("Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim.").

<sup>51</sup> *Cairo Declaration*, *supra* note 49, at art. 22 ("Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.") (emphasis added).

<sup>52</sup> *Quanta Cura*, *supra* note 32, P 3.

For you well know, venerable brethren, that at this time men are found not a few who ... dare to teach that "the best constitution of public society and (also) civil progress altogether require that human society be conducted and governed without ... any distinction being made between the true religion and false ones." And, against the doctrine of Scripture, of the Church, and of the Holy Fathers, they do not hesitate to assert that "that is the best condition of civil society, in which no duty is recognized, as attached to civil power, of restraining by enacted penalties, offenders against the Catholic religion, except so far as public peace may require."

*Id.*

<sup>53</sup> The eternal law of God is the sole standard and rule of human liberty ... . Therefore, the true liberty of human society does not consist in every man doing what he pleases ... ." *Libertas*, *supra* note 6, P 10.

<sup>54</sup> Also among man's rights is that of being able to worship God in accordance with the right dictates of his own conscience, and to profess his religion both in private and in public." *Pacem in Terris*, *supra* note 11, P 14 (emphasis added).

the choice of religion (Article 10 of the UIDHR). The latter is justified on the basis of the Koranic verse stating: "There is no compulsion in religion."<sup>56</sup>

This often quoted passage dates back to the early period of Medina. Traditional Islamic schools generally believed that the subsequent passages of the Medina period "repealed, abrogated for the purposes of Shar'ia, over one hundred preceding verses of the Qur'an which instruct Muslims to use peaceful means and arguments to convince unbelievers to embrace Islam."<sup>57</sup>

The fact that the first two Islamic Human Rights Charters do not abide on this point on the late Medina verses is in itself a sign that, [\*42] however traditionalists, they still show some signs of an effort towards the modernization and rational re-interpretation of classical Islamic Law.<sup>58</sup> An effort which - as we shall see - is taken up by the subsequent Arab Charter and articulated by modern Muslim reformers.

On the other hand, the legal right to religious freedom is not recognized and is severely limited by what pertains the right of Muslims not to be restrained from leaving one's religious community, which is generally condemned and severely punished by the classical interpretation of the Koran and Sunna,<sup>59</sup> and by what pertains religious minorities' free exercise of religion. This is jeopardized by Article 12 of the UIDHR and Article 9 of the CDHRI. Both of these Articles set the limits of this right in a confessional notion of the public order - that is on the promotion of the true Islamic Faith. Thus they "authorize to think that, whilst Islamic proselytism is completely legitimate and also recommendable, the relevant propositions of other Faiths, or other ideologies, are forbidden,"<sup>60</sup> running against the non-discrimination principle on the basis of religion.<sup>61</sup>

A paradigmatic shift - analogous to that obtained by the Catholic Church, with *Dignitatis Humanae* - is found in The Arab Charter on Human Rights (ACHR). The ACHR was ratified by the League of Arab States<sup>62</sup> in 2004, thanks to the votes of seven countries: United Arab Emirates, Jordan, Bahrain, Algeria, Syria, Palestine, and Libya.<sup>63</sup> This Charter points to the evolution which Muslim-majority countries are undergoing regarding the foundations of human rights and religious freedom.<sup>64</sup> In fact, reference to the Islamic law is completely [\*43] omitted except for a brief

<sup>55</sup> Compare Cairo Declaration, *supra* note 49, at art. 10 ("Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism."), with *Dignitatis Humanae*, *supra* note 21, P 4 ("In spreading religious faith and in introducing religious practices everyone ought at all times to refrain from any manner of action which might seem to carry a hint of coercion or of a kind of persuasion that would be dishonourable or unworthy, especially when dealing with poor or uneducated people.").

<sup>56</sup> Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation* 55 (1990) (citing verse 2:256 of the Qur'an).

<sup>57</sup> *Id.* at 146-47. This verse, also known as the Verse of the Sword, was quoted by Osama bin Laden to justify his terrorist attacks.

<sup>58</sup> See Table 1 for a comparative analysis of the Mecca and Medina, Koranic verses on the treatment of non-Muslims.

<sup>59</sup> Muslim countries abiding to classical shari'a punish apostasy either by physical or civil death.

<sup>60</sup> Lucie Pruvost, *Declaration Universelle des Droits de L'Homme Dans L'Islam et Charte Internationale des Droits de L'Homme*, 9 *Islamochristiana* 151, 152 (1983) (author's translation).

<sup>61</sup> The Pakistani blasphemy laws may be viewed as a probable consequence of this line of reasoning.

<sup>62</sup> Mohammed Amin Al-Midani & Mathilde Cabanettes, *Arab Charter on Human Rights 2004*, [24 B.U. Int'l L.J. 147, 148 \(2006\)](#).

<sup>63</sup> Mohammed Amin Al-Midani, *The Enforcement Mechanisms of the Arab Charter on Human Rights and the Need for an Arab Court of Human Rights*, [acihi.org, http://www.acihl.org/articles.htm?article\\_id=22](http://www.acihl.org/articles.htm?article_id=22) (last visited Aug. 31, 2012). Mohammed Amin Al-Midani, President of the Arab Centre for International Humanitarian Law and Human Rights Education, observes that Yemen and Qatar have also ratified it lately. *Id.*

<sup>64</sup> Al-Midani & Cabanettes, *supra* note 62, at 148-49.



mention in the Preamble, where its "eternal principles of brotherhood [and] equality ... among all human beings" are recalled, along with those of the "other divinely-revealed religions." <sup>65</sup>

In its place, human rights are anchored on man-made, civil law (qanun). Article 24 of ACHR further explicates that this law should be forged in such a way as to protect public safety, public order, health, morals, or the fundamental rights and freedoms of others, <sup>66</sup> in the spirit of reciprocity. Thus it abides to what may be defined as a secular notion of the public good - similar to that found in *Dignitatis Humanae* <sup>67</sup> and in Article 29(2) of the U.N. Declaration. <sup>68</sup> Once again there is no explicit mention here of the right to change religion. However, the fact that the moral limitations to which the right to religious freedom is subject to are secular may lead one to believe that this Document is at least in principle open to the recognition of the right to religious conversion, and leave hope for a possible evolution of Islamic countries in this respect. Even though in practice, as of today, the laws of many Islamic countries do still punish apostasy by physical death, <sup>69</sup> or civil death, and deny the apostate a whole set of rights - spanning from inheritance to property rights.

**[\*44]** The secular notion of the public good - expounded in the Arab Charter - is harmonious with the principle of reciprocity and with the "eternal principles of brotherhood and equality" mentioned in its Preamble as being part of the heritage of shari'a: specifically that part of shari'a based on the Koran and Sunna of Mecca. <sup>70</sup> Principles which the traditionalists believed had been definitively abrogated by the specific shari'a rulings of Medina, notoriously more aggressive in content. <sup>71</sup>

#### IV. The Foundations of Religious Liberty in the Thought of Modern Muslim Reformers

The paradigmatic shift of the Arab Charter - which implies a renewed hermeneutical approach to the Koran and Sunna - is justified and called forth also by some individual Muslims scholars and spiritual leaders, living both in Islamic countries and in the West. Very recently, a group of twenty-three Egyptian religious authorities - including Nasr Farid Wasel, former grand mufti of Egypt; Gamal al-Banna, brother of the founder of the Muslim Brothers; and imam Safwat Hegazi - promulgated a text, entitled "Document for the renewal of religious discourse," advancing the

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<sup>65</sup> Id. at 150.

<sup>66</sup> Al-Midani & Cabanettes, *supra* note 62, at 156. The language is very much similar to that adopted by the modern Turkish Constitution, which goes as far as saying that: "The Republic of Turkey is a democratic, secular and social State governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights ... ." The Constitution of the Republic of Turkey Nov. 7, 1982, art. 2.

<sup>67</sup> See *Dignitatis Humanae*, *supra* note 21, P 7.

The right to religious freedom is exercised in human society: hence its exercise is subject to certain regulatory norms ... . These norms arise out of the need for the effective safeguard of the rights of all citizens and for the peaceful settlement of conflicts of rights, also out of the need for an adequate care of genuine public peace, which comes about when men live together in good order and in true justice, and finally out of the need for a proper guardianship of public morality. These matters constitute the basic component of the common welfare: they are what is meant by public order.

Id.

<sup>68</sup> Article 29(2) states that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

G.A. Res. 217 (III) A, *supra* note 8, at art. 29(2).

<sup>69</sup> For example, Sudan and Mauritania still punish apostasy by physical death.

<sup>70</sup> Al-Midani & Cabanettes, *supra* note 62, at 150.

<sup>71</sup> See Table 2 for a comparative analysis of the Mecca and Medina, Koranic verses regarding apostasy.

proposal to separate religion from politics. <sup>72</sup> The Egyptian leaders view the proposal as being "in harmony with Islam" unless it degenerates into radical secularism. <sup>73</sup>

At the academic level, we also find the theological and socio-political considerations of very well-known scholars like Mohamed Charfi, Mohamed Talbi, and Abdullahi An-Na'im. Talbi writes that "faith, [in order] to be true and reliable faith, needs absolutely to be a free and voluntary act." <sup>74</sup> The same is stated, although in different words, by Mohamed Charfi, former Tunisian Minister of Education, and by Abdullahi An-Na'im, Professor of Law at Emory University in Atlanta. The former justified the need to separate the law of the State from shari'a, arguing that it is in the nature of religious norms - specifically those which deal with the relationship between men and **[\*45]** God - not to be coercive. <sup>75</sup> The latter writes that "it is critical for the moral integrity of the religious tradition itself that people are free to stay or leave the community at will, instead of being forced or intimidated into the hypocritical pretence of conformity." <sup>76</sup>

Another theological reason adduced in favor of religious liberty - and the differentiation between the confessional and secular notion of the public good - is taken from the Koran (26:4) and states that "even God refrains from overpowering man to the point of subduing him against his will." <sup>77</sup> Other authors argue in Thomistic fashion that human beings have been endowed with an "innate disposition (fitrah) to know God and rationally believe in Him." <sup>78</sup> Thus, there is no need for religious coercion.

All these theological considerations are made possible by the hermeneutical renewal mentioned before. In fact, they are all rooted on the Mecca verses of the Koran and Sunna which were for a long time considered abrogated by classical scholars of Islamic law. <sup>79</sup>

However important these theological considerations are, they are still not sufficient, in my view, to fully support - as the authors mean to - the process of differentiation between religion and politics. In fact, the same Catholic Church had for a long time espoused the Augustinian principle (*credere non potest homo nisi volens*) according to which man cannot believe if he does not will so. <sup>80</sup> However, this truth did not prevent the Church from restricting the exercise of religious freedom of non-Catholics, as well as punish those **[\*46]** who left the Catholic faith, on the basis that it was against the good of the State.

So, in order to fully arrive at a differentiation between religion and politics, from an Islamic point of view, as well as from any other religious perspective, a more convincing argument is needed. This is, in my opinion, the argument

<sup>72</sup> Magister, supra note 2.

<sup>73</sup> Id.

<sup>74</sup> Mohamed Talbi, *Religious Liberty: A Muslim Perspective*, 11 *Islamochristiana* 99, 103 (1985).

<sup>75</sup> Mohamed Charfi, *Islam et liberte* 150-54 (Albin Michel ed., 1988).

<sup>76</sup> Abdullahi Ahmed An-Na'im, *Re-affirming Secularism for Islamic Societies*, in *Islam and Human Right: Selected Essays of Abdullahi An-Na'im* 48, 52 (Mashood A. Baderin ed., 2010).

<sup>77</sup> Talbi, supra note 74, at 103.

<sup>78</sup> Mahmoud Ayoub, *Religious Freedom and the Law of Apostasy in Islam*, 20 *Islamochristiana* 75, 77 (1985). See also Little, Kelsay & Sachedina, supra note 44, at 73, 86 (explaining that Qur'anic passages presuppose that universal values are "imprinted upon the human psyche," and that "basic individual freedom in religion is a logical requirement of the Qur'anic notion of universal guidance, something which is 'engraved' upon the human psyche and which presupposes the ability of all human beings to accept or reject faith.").

<sup>79</sup> Modern reformers like An-Na'im propose to base abrogation on "contextual analysis of the nature and circumstances of revelation" rather than on an arbitrary, chronological criteria, in the same line of traditionalists schools of thought. Abdullahi Ahmed An-Na'im, *Towards an Islamic Reformation: Responses and Reflections*, in *Islamic Law Reform and Human Rights* 97, 99 (Tore Lindholm & Kari Vogt eds., 1993).

<sup>80</sup> St. Augustine, *Tractates on the Gospel of John*, in *The Fathers of the Church* 259, 261 (John W. Rettig trans., 1988).

advanced by Abdullahi An-Na'im. Like John Courtney Murray, he is one of the few Muslim reformers to stress the need to distinguish the role of the State from the role of the Islamic civil society (umma). The changed reality of Muslim States characterized by an ever growing religious pluralism and globalization, requires such a differentiation, along with the parallel recognition that the public and private law aspects of shari'a are the concern of the State and civil society respectively. According to this line of reasoning, apostasy might have been conceived as a wrong of public concern only at the time of Medina, when the State order was built around religious values. But in the context of "the pluralistic national and international political communities of today,"<sup>81</sup> apostasy should be conceived as a moral wrong, pertaining to the private sphere. Thus it is not the role of the State to punish the infidel.<sup>82</sup> Rather, it is the role of civil society to encourage "conformity with the dictates of one's beliefs ... through the activities of non-governmental organizations and other forms of agency."<sup>83</sup>

## Conclusion

In light of what has been said thus far - both regarding the Catholic Church and Islam - one might then conclude that the real confrontation on religious liberty runs not so much Islam and the other religions. Rather it runs between religions and their common, political foes: secularism and fundamentalism.

In order to support this interpretation, I would like to point out that the present anti-blasphemy laws promulgated by Pakistan - laws which not only forbid offending religious sensitivities, but apply the death penalty to whoever has been accused of denying the truth [\*47] claims of Islam - constitute thus far only an isolated case. To my knowledge, Pakistan and Indonesia are the only Islamic countries that have adopted such a law up till now.<sup>84</sup>

Thus, it would be a mistake to associate this fundamentalist law with the whole of Islam. Such a mistake would legitimize all those who believe that religion is compatible with violence or aggression. Whereas, as Pope Benedict XVI said in Regensburg, one way to discern genuine from non-genuine believers is by way of their commitment to peace and justice. Religions - notwithstanding their unavoidable theological differences - can hope to find agreement at least on the level of social justice. One reason why it is so, lies - at least from a Catholic perspective - in the existence of a natural sense of justice with which God has endowed human beings since Creation.

Table 1: The teachings of the Koran regarding Non-Muslims<sup>85</sup>

Koran	Mecca	Medina
Sura 2, 256		There should be no compulsion in religion. Truth stands out clear from error.
Sura 9, 5		But once the forbidden months [the period of grace] have passed, kill the

<sup>81</sup> Abdullahi Ahmed An-Na'im, Best of 2010: Islam, Apostasy and Freedom of Belief, abc.net (Dec. 22, 2010), <http://www.abc.net.au/religion/articles/2010/09/24/3021228.htm>.

<sup>82</sup> See Abdullahi Ahmed An-Na'im, Islamic Foundations of Religious Human Rights, in Religious Human Rights in Global Perspectives: Religious Perspectives 337, 337-57 (John Witte, Jr. & Johan D. van der Vyver eds., 1996).

<sup>83</sup> Abdullahi Ahmed An-Na'im, Shari'a and Positive Legislation, in Kluwer Law International 29, 38 (2000).

<sup>84</sup> A similar law is presently under review in post Ben-Ali Tunisia. See Isobel Coleman, CNN.com Blog (Aug. 16, 2012, 10:10 AM), <http://globalpublicsquare.blogs.cnn.com/2012/08/16/women-free-speech-and-the-tunisian-constitution/>.

<sup>85</sup> F. Khanam (eds.), The Qur'an (translated by M. W. Khan), Goodword Books, 2009.

		polytheists [unbelievers] wherever you find them . . .
Sura 10, 99	Had your Lord pleased, all the people on earth would have believe in Him, without exception. So will you compel people to become believers?	
Sura 26, 4	But if We had so willed, We could have sent to them a sign from the heavens so that their heads would be bowed down before it in utter humility.	
Sura 88, 21-22	So, . . . exhort them: your task is only to exhort, you are not their keeper.	

## [\*48]

Table 2: The Teachings of the Koran regarding Apostasy<sup>86</sup>

Koran	Mecca	Medina
Sura 4, 88-89		How is it that you are divided into two groups regarding the hypocrites, when God Himself cast them back . . . because of their misdeeds? . . . They want you to deny the Truth, so that you may become all alike. Do not take them as your allies . . . If they turn back, seize them and kill them, wherever you may find them . . .
Sura 9, 73		O Prophet, strive against those who deny the truth and the hypocrites, and be firm against them. Their abode shall be Hell: an evil

<sup>86</sup> Id.

destination. They swear by God that they did not, yet they uttered the words of denial of truth after they had accepted Islam . . . . If they turn away, God will punish them with grievous suffering in this world and the Hereafter, and there will be no one on earth to protect or help them.

Sura 16,  
106-08

As for one who denies God after he has believed, with the exception of one who is forced to do it, while his heart rests securely in faith . . . shall incur the wrath of God; such as these will have terrible punishments . . . . It is they who are heedless and in the life to come, they will be surely the losers.