

POLITICAL PLURALISM AND RELIGIOUS LIBERTY: THE TEACHING OF *DIGNITATIS HUMANA*

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Introduction

I begin with a simple observation that might seem to be a truism. *Dignitatis humanae* is a document about religious liberty. Religious liberty is seen first and foremost from an anthropological and moral perspective, enriched by revealed theology. It is not seen chiefly from the standpoint of the state, nor even from the standpoint of canonical law.

In this paper I consider the implications of this simple point. I begin by showing why it proved difficult for the Second Vatican Council to pull together this little document without becoming mired in so many philosophical, theological, and jurisprudential details that the effort would have been useless. After briefly considering the structure and summarizing its teaching, I show how *DH* can comport with many kinds of constitutional regimes. I conclude on a point that is almost as simple as where I began. *DH* does not impose a unitary model of regime for the relationship between religion-society-state. Hence, the title of my paper: *Political Pluralism and Religious Liberty*.

At the Council

In his opening allocution to the Council, Pope John XXIII twice raised the subject of religious liberty. He took note of the absence of many bishops who were imprisoned or otherwise impeded by their governments from attending. He also admonished ‘the prophets of gloom’ by pointing out that ‘these new conditions of modern life have at least the advantage of having eliminated those innumerable obstacles by which, at one time, the sons of this world impeded the free action of the Church’. ‘In fact’, he continued, ‘it suffices to leaf even cursorily through the pages of ecclesiastical history to note clearly how the Ecumenical Councils themselves ... were often held to the accompaniment of most serious difficulties and sufferings because of the undue interference of civil authorities’.¹

¹ *Gaudet mater* (October 11, 1962), *Sacrosanctum Oecumenicum Concilium Vatican II, Constitutiones, Decreta, Declarationes* (Vatican City: Libreria Editrice Vaticana, 1993), 860.

Pope John was not referring to ancient history. The First Vatican Council was conducted under the cloud of threats by some European governments to intervene, or at any rate to make life difficult for bishops who chose to vote in favor of papal jurisdiction and infallibility.² The more senior bishops assembled in 1962 would have remembered that at the papal conclave of 1903 the Emperor of Austria effectively exercised the so-called *ius exclusivae*, the right of vetoing a papal candidate.

The Pope's rather pointed comments were less about religious liberty in general than they were about the relationship between the Church and temporal governments. But he soon indicated that the time was opportune to step back from the conventional and somewhat narrow rubric of church-state relations and to contemplate things from a broader point of view. The time was opportune for many reasons. For the first time since the 18th century Rome enjoyed cordial relations with the western states. Not, of course, in the east, where some 55 million Catholics were under Communist regimes, and not with regard to all of the political parties in the west. But, on the whole, the post-war recovery had changed the climate of church-state relations without anyone needing to issue formal statements to that effect. Pope John aptly said in his allocution that 'history is the teacher of life'.

Was it necessary to rehearse ecclesiastical public law in a combative spirit?

For another thing, during the long pontificate of Pius XII magisterial thought on religious liberty seemed to evolve. Without saying that the Church was ready to abjure or relinquish political privileges in certain states, Pius maintained that the Church preferred to act within society *in profundità*, suggesting that an honest liberty would suffice for evangelization of society.³ He was the first pope to use the term *sana laicità* of the state.⁴ He searchingly pondered the grounds on which international agreements could secure religious pluralism even in predominantly Catholic countries.⁵ These Pian lines of thought seemed to bring liberty and society into the foreground. Furthermore, even before the Council, it was well known that religious liberty also involved ecumenical relations with non-Catholic Christians, inter-religious dialogue with Jews, and with other non-Christians, as well as dialogue with non-believers. These represent what can be called a dialogical rather than juridical challenges.

² *Pastor aeternus* (1870).

³ Consistory Allocution of 20 Feb 1946, AAS 38 (1946), 143.

⁴ '[T]he legitimate healthy laicity of the State is one of the principles of Catholic doctrine'. *Alla vostra filiale*, March 23, 1958, AAS 50 (1958), 220.

⁵ *Ci riesce*, Dec. 6, 1953, AAS 45 (1953), 794ff.

Interestingly, it was along this latter front that the move was made directly toward the subject of religious liberty during the first session of the Council (11 October to 8 December 1962). Only eleven days after his opening allocution, Pope John raised the Secretariat for the Promotion of Christian Unity to the same rank as the Council Commissions, thus empowering it to submit schemata. In the preparatory phase to the first session, two draft texts on the Church (*Scheme Constitutionis de Ecclesia*) included a chapter entitled ‘On the Relations Between Church and State’. Had the issue remained in that context, it would have been considered solely in the light of ecclesiastical public law. Now, having been empowered to submit schemata, Cardinal Bea’s Secretariat produced a document that was first entitled ‘Freedom of Cult’, and a few months later, ‘On Religious Freedom’.⁶

Second, in December of 1962, shortly after learning from his physicians that he had a terminal cancer, Pope John instructed Msgr. Pietro Pavan of the Lateran to draft a new encyclical, which would be called *Pacem in terris*. The drafting committee understood that one sentence in particular would have a direct effect on the schemata being drawn by the commissioners – ‘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’.⁷ (§14) But, in order to allow the Council to exercise its full deliberative weight, these sentences on religious liberty were carefully, even somewhat ambiguously, written.

Published on Maundy Thursday, Pope John christened *Pacem in terris* his ‘Easter gift’.⁸ It was also called his ‘last will and testament’, because he died on 3 June 1963. For our purposes, it was his own, indirect schema for a number of issues that would come before the second session of the Council (29 September to 4 December 1963), including religious liberty.

Instructive difficulties

Yet the process of creating a document on religious liberty turned out to be very difficult. The secular and religious media reported that the dif-

⁶ As it turned out, the Secretariat prepared and presented three documents in addition to *Dignitatis humanae*: *Unitatis redintegratio* (ecumenism), *Nostra aetate* (non-Christian religions), and *Dei Verbum* (Divine Revelation), which was done in cooperation with the Doctrinal Commission.

⁷ In fact, the right of religious conscience received more internal discussion and debate than any other theme of the encyclical during its drafting process. Alberto Melloni, *Pacem in terris: Storia dell’ultima enciclica di Papa Giovanni* (Roma: GLF, Editori Laterza, 2010), ad passim, and the appendices.

⁸ Message of 12 April 1963, AAS 55 [1963], p. 400.

difficulties were caused by intransigent cardinals and bishops who wished only to affirm the already standing ecclesiastical public law on church-state relations. The chief difficulties however were much more mundane. They inhered in the subject matter of religious liberty.

We have already noted that from the preparatory stage to the second session of the Council religious liberty was considered from more than one point of view: (1) under 'relations between church and state', (2) under 'ecumenism', specifically in terms 'freedom of cult', (3) under Pope John's broad historical picture, (4) under the category of human or natural rights introduced by *Pacem in terris*, (5) and, finally, in November 1963, under the more general rubric of 'religious freedom', but still as a sub-section in a proposed decree on ecumenism.

A year later, in November 1964, after more than four hundred suggestions and emendations, a draft was presented as an independent document with the title 'Declaration on Religious Freedom or on the Right of the Person and of Communities to Freedom in Matters Religious'.⁹ The text, now having swollen to twice its original size, was fraught with historical, legal, political, philosophical and theological issues.

Ordinarily, a declaration would be a shorter and more concise statement.¹⁰ Not surprisingly, further discussion was deferred to the next session of the Council.

During the drafting process, some bishops worried about the strictly philosophical questions (e.g. the precise meaning of conscience, and drawing proper distinctions between its subjective and objective conditions); some bishops worried about practical items (e.g. the effect of the Declaration on concordatory states); others worried about ideologies (e.g. indifferentism and laicism); still others about how to interrelate canonical, international, and natural rights. On the extremes, some wished for the document to clearly and decisively rehearse and to settle the broken history of church-state relationships going back over several centuries.

⁹ As it first stood as §§25–31 in the schema on ecumenism, the text was called *Declaratio prior* to distinguish the theme of religious liberty from *Declaratio altera* dealing with Jews and non-Christians. Later in this session, as it became an independent document, it was called *Textus emandatus*.

¹⁰ *Dignitatis humanae* is a *declaratio*, which differs from a *constitutio* and a *decretum*. Constitutions and decrees have binding force upon the whole Church. A declaration, on the other hand, is reserved for matters and persons who are not under the public law of the Church. Hence, the document on non-Christian religions (*Nostra aetate*, 1965) is also called a *declaratio*.

Gradually, by trial and error, the Commission and the conciliar bishops realized that the Declaration could not do all of these things. It could not convey the entire complexity of the subject. But this did not indicate an intellectual or moral deficiency so much as a healthy respect for the subject matter.

In the final session of the Council, the text underwent four major revisions, incorporating more than two hundred suggestions. An initial vote yielded a large number of *placet juxta modum* votes (agree with modifications). Several hundred more corrections were introduced. By the time of the final vote in December 1965, more than two thousand suggested corrections (*modi*) had been considered. On December 7, 1965, Pope Paul VI promulgated the Declaration on Religious Liberty.¹¹

Compared with the great conciliar constitutions (for example, *Lumen gentium* and *Gaudium et spes*), where the Council broadly spoke its mind and supplied exceedingly rich contexts for taking stock of things, *Dignitatis humanae* is very short, terse, and anything but loquacious.¹² Its restraint however should not be interpreted as a mere compromise.

The better interpretation is that the Commission and the Council achieved a ‘middle position’ between the wide array of conceptual issues on the one hand and the details of particular institutions, policies, and diplomatic tactics on the other. *Dignitatis humanae* leaves both poles intact. It begins with the dignity of the human person and is content to indicate the lines which connect this dignity toward both poles. *DH* declares a principle, draws only a few conclusions for the juridical and political orders. Otherwise, it allows the whole subject of religious liberty room to breathe.

The text and teaching

DH begins on the historical note sounded by Pope John XXIII. ‘A sense of the dignity of the human person has been impressing itself and more deeply on the consciousness of contemporary man, and the demand is increasingly made that men should act on their own judgment, enjoying and making use of a responsible freedom, not driven by coercion but motivated by a sense of duty. The demand is likewise made that constitutional limits

¹¹ There were more *non placet* votes registered for *Dignitatis humanae* than for any other document the council approved by the council. The final tally: *placet* 2308, *non placet* 70.

¹² Compare *DH* to a recent American Supreme Court decision on religious displays in the public square. The whole bevy of opinions in *McCreary County v. ACLU* (27 June 2005) consists of some 25,000 words, and even then a reasonable person could be in doubt about both the principles and their application. *DH* in the Latin typical contains less the 4500 words.

should be set to the powers of government, in order that there may be no encroachment on the rightful freedom of the person and of associations. This demand for freedom in human society chiefly regards the quest for the values proper to the human spirit. It regards, in the first place, the free exercise of religion *in society*.¹³ (§1)

Noting very briefly that the Declaration ‘leaves untouched traditional Catholic doctrine on the moral duty of men and societies toward the true religion and toward the one Church of Christ’, and that it ‘intends to develop the doctrine of recent popes on the inviolable rights of the human person and the constitutional order of society’,¹⁴ the Council resists the temptation either to give a grand narrative of the whole story or to bite on every interesting question that could be brought to the subject.¹⁵

Once we respect the boundaries of the document, especially its silences, the teaching can be rather quickly summarized.

Under the heading of religious liberty ‘in general’ [*ratio generalis*] (§§2–8), *DH* treats human dignity according to the natural law, but also as the demands of human dignity have become ‘more fully known to human reason through centuries of experience’ (§8):

- The right of religious liberty is grounded in human dignity. The human person has the capacity and the moral obligation to pursue

¹³ The term *in societatem* recurs throughout *DH*. Religious liberty is not exercised exclusively in the face of the state, but more generally in the public square. The term marks off *DH*’s position from the old shibboleth ‘a free church *in* a free state’.

¹⁴ The addition of ‘and societies’ was meant to rule out any indifferentism or individualism in the notion of the duty. This is confirmed by Jérôme Hamer, peritus for the Secretariat of Christian Unity. *Il s’agit ici de tous les groupes sociaux depuis les plus modestes et les plus spontanés jusqu’aux nations et aux États, en passant par tous les intermédiaires: syndicats, associations, culturelles, universités*... Jérôme Hamer, ‘Historique du texte de la Déclaration’. *La liberté religieuse*, Unam Sanctam, vol. 60, Sous la direction de J. Hamer et Y. Congar (Paris: Éditions du Cerf, 1967) 99–100. This is neatly summarized in the *Catechism of the Catholic Church*, §2105.

¹⁵ The Commission’s relator, Bishop Emiel-Josef De Smedt, commenting on §1 of *DH*, explained that the document’s relation to past popes is ‘a matter for future theological and historical studies to bring to light more fully’ [*in futuris studiis theologicis et historicis haec materia in plena luce ponenda erit*]. The present document, he says, does not cancel Leo XIII’s position on the moral duties of public authority; rather, it highlights the complementary duty of the same authority: namely, the exigencies of the dignity of the human person. ‘The special object of our Declaration is to clarify the second part of the doctrine of recent Supreme Pontiffs – that dealing with the rights and duties which emerge from a consideration of the dignity of the human person’. Thus need to add the word *recentiorum*, ‘recent’ popes. ASVol. IV, Part VI, p. 719. Congregatio Generalis CLXIV, 19 Nov. 1965. *Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani Secundi*. Rome, (Vatican City: Typis polyglottis Vaticanis, 6 vols. 1970–1978).

- truth and to adhere to it once it is found. The moral obligation can be satisfied only by free intellectual and volitional acts.¹⁶ (§2)
- Religious acts have the additional dimension of being ordered to God, and therefore transcend the order of terrestrial and temporal affairs. (§3) Injury is done both to the human person and to order established by God if the free exercise of religion in society is denied.
 - The right of religious liberty includes the social nature of the human person. The social dimension covers a broad range of actions: mutual assistance of inquiry, communication, instruction, and dialogue. (§3) The social dimension especially includes the family and religious communities who rightfully enjoy their internal solidarity and authority. (§§4,5)
 - Both dimensions, the actions of the person and religious communities, require constitutional protection as a civil right. (§2) Constitutional protection of freedom of worship is not enough. (§15)
 - Government should show favor upon and assist the exercise of religious liberty (§§3,5), but it would transgress its power to direct or impede [to take over] religious acts.
 - In certain circumstances, special recognition in a constitution may be given to one religious community, provided that the rights of others be protected. (§6)
 - Government has a special duty to curtail abuses in the name of public order, but such measures must conform to the objective moral order. (§7)
 - Care of the right of religious liberty¹⁷ belongs to the whole citizenry, social groups, the Church and other religious communities in the manner appropriate to each. (§6). Beyond the immediate issues of law and public order the ‘usages of society’ are presumed to be uses of freedom in their full range. (§7)

The second part, ‘in the light of Revelation’ [*libertas religiosa sub luce Revelationis*] (§§9–15), treats human dignity as it pertains to the conduct of Christians, and the institution and doctrine of the Catholic Church:

¹⁶ Therefore it is a strong right. Freedom to seek and adhere to the truth can neither be taken nor relinquished. *DH* does not explicitly use the term, but this looks like an inalienable right. An act of conscience, for example, cannot be out-sourced without ceasing to be an act of conscience.

¹⁷ Notice that the more traditional term *cura religionis* which once fell on the shoulders of Catholic sovereigns has become *cura iuris ad libertatem religiosam*, now shared by everyone according to a principle of subsidiarity.

- The dignity of assenting to the truth and of making a free response to the Word is an intrinsic part of the Gospel, therefore Christians ought to respect religious liberty all the more conscientiously. (§9)
- The work of Christ is not one of wrath or political force, but of rousing faith in humility, patience, and love. (§11) It is the prerogative of God, not of temporal authorities, to sort out the cockles from wheat. The disciple, therefore, is forbidden both to ask for and to ‘use means that are incompatible with the spirit of the Gospel’. (§14)
- The freedom of the Church ‘is the fundamental principle in what concerns the relationships between the Church and governments and the whole civil order’.¹⁸ (§13)
- The Church claims freedom as a spiritual authority established by Christ, upon rests the duty to preach the Gospel to all men. (§13)
- ‘At the same time, the Christian faithful, in common with all other men, possess the civil right not to be hindered in leading their lives in accordance with their consciences. Therefore, a harmony exists between the freedom of the Church and the religious freedom which is to be recognized as the right of all men and communities and sanctioned by constitutional law’. (§13)
- The liberty of the Church therefore includes the individual and corporate liberties outlined in the first part of *DH* (*ratio generalis*) as well as the specific ‘independence’ of her mandate by Christ spelled out in the second part (*sub luce Revelationis*).¹⁹

Liberty and pluralism

Three dimensions of pluralism are presupposed in the document and in light of what it calls ‘recent papal teaching’.

First, and most importantly, *DH* presupposes that church, state, and society are distinct spheres. Society does not ‘belong’ to either the state or the church. The individual who possesses the right of religious liberty has plural memberships which cannot be reduced to one another. Second, *DH* presupposes that there is more than one legitimate form of government. Neither the doctrine nor the discipline of the Church require a unitary model

¹⁸ Preeminently, the Church’s freedom is not the *cura religionis* or the *cura iuris* but the care for the salvation of men, *quantum salus hominum curanda requirat*. (*DH*, §13)

¹⁹ ‘The civil right is grounded in human dignity, not only as it is understood at the historical and philosophical plane, but also in the light of what the Church understands about herself’. John Paul II, *Redemptor hominis* (1979), §12.

of what must count as a political constitution. Leo XIII, Pius XII, and John XXIII insisted that the people enjoy the right to adopt a suitable form of government.²⁰ This liberty is held to be a natural right in *Pacem in terris*.²¹ Third, because religious liberty includes the right of social communication and social formations, the document assumes social pluralism.

This last assumption deserves one more distinction. It is a *fact* that in many countries we find a plurality of beliefs, confessions, religious organizations which themselves exist alongside a plurality of beliefs and associations of those who hold no religion. The right of religious liberty applies precisely to those facts. On the other hand, even if there were a common religion, a principled pluralism would still obtain. It ensues upon man's social nature. This principle is recognized canonically within the society of the Church, and it obtains even more broadly in society as envisaged by *DH*.²²

Although *DH* has a few important things to say about the responsibility of the state, *DH* does not develop the right of religious liberty from the standpoint of the state. By the 'standpoint of the state' I mean the typical horizon orienting state officials and their lawyers: the preservation of sovereignty, management of conflicts and interests according to the rule of law, and construction of jurisprudential theories and arts to guide laws, policies, and adjudication of cases. *DH* says virtually nothing about the various kinds or 'forms' of states.²³ It says almost nothing about 'establishment' of religion.²⁴

²⁰ Leo XIII: it is not 'of itself wrong to prefer a democratic form of government' [*Libertas* (June 20, 1888), *Acta* 8:245]; it is not for the prudence of the Church 'to decide which is the best amongst many diverse forms of government and the civil institutions' [*Sapientia* (Jan. 10, 1890), *Acto* 10:28]. 'in the order of speculative ideas, Catholics, like all other citizens, are free to prefer one form of government to another precisely because no one of these social forms is, in itself, opposed to the principles of sound reason nor to the maxims of Christian doctrine' [*Au milieu* (Feb. 16, 1892), *Acta* 12:28-29].

²¹ 'The fact that authority comes from God does not mean that men have no power to choose those who are to rule the State, or to decide upon the type of government they want, and determine the procedure and limitations of rulers in the exercise of their authority. Hence the above teaching is consonant with any genuinely democratic form of government'. *Pacem in terris* (April 11, 1963), AAS 55:271.

²² Baptized Catholics, for example, enjoy a right to establish and direct associations which serve a charitable or pious purpose, to hold meetings, and to pursue their purposes by common effort. CIC (1983), Can. 215.

²³ The only reference is at §15 where *DH* laments the fact that certain *regimina* (regimes) protect freedom of religious worship but otherwise aim to deter and to make life difficult for those who would profess a religion.

²⁴ The only reference is at §6 where *DH* notes the 'peculiar circumstances' obtaining among 'peoples' where special civil recognition is given to one religious community.

And it refrains altogether from using labels drawn from political ideology, such as ‘the laicist state’, ‘the Catholic state’, ‘the neutralist state’.

Even so, there are implications for the organization and conduct of governments at least regarding the ‘module’ specific to religious liberty. For the purpose of displaying these implications, and from the point of view internal to the document, I include five figures. These figures will help us to see (in a sketchy and initial manner) that while *DH* rules out some religion-state regimes, it does not require a unitary model for rest.

These figures are my own adaptations of W. Cole Durham’s chart depicting the continuum of religious liberty.²⁵ Durham devised the chart for the purpose of his work in comparative law. That is not my aim here, for I am only trying to establish that there are and can be plural, legitimate religion-state regimes. With the proviso that his terminology does not exactly match that of *DH*, the chart is useful for initially mapping *DH*’s teaching onto a spectrum of religion-state regime.

Figure 1 (see p. 677)

Along the upper and lower figure we see two parallel tracks. The upper track represents a spectrum of positions which have been, or might be, adopted by governments embracing a strong or weak version of *cura religionis*. ‘Care of religion’ is a term of art in Catholic history. It means that the sovereign bears a responsibility and a right to care for, to protect, and to promote a religion. Beginning at the neck (to the right), ‘care of religion’ can run from sanctified kingship which is virtually sacramental in nature, to strong establishments in the early modern period, to rather weak endorsements.

The lower track represents a spectrum of positions of governments which abjure ‘care of religion’. But, of course, they cannot help but ‘care *about* religion’. Beginning at the neck (to the right), the positions can run from a totalitarian state that represses religion, to secularist regimes which regulate religion wherever it overlaps in society with the dominion of government.

Both tracks begin and end in the same place, albeit for different reasons. The parallel tracks at the extreme neck effectively cancel the distinction between society, church, and state. There is no right of the human person to move within or between these integrated facets of a single membership and jurisdiction. At the other end are arrayed converging positions which give optimal room for that distinction.

²⁵ W. Cole Durham, Jr., ‘Perspectives on Religious Liberty: A Comparative Framework’, *Religious Human Rights in Global Perspective*, Eds. Johan D. van der Vyver and John Witte, Jr. (Martnus Nihoff, 1996), 23.

Figure 2 (see p. 678)

The second figure fills out some of the more familiar, restrictive positions at the neck of the figure. DH's opposition to those at the far extreme are self-evident. Religious actions and memberships are prescribed or proscribed with the sanction of criminal law. Citizenship is tightly integrated with religious membership, or lack thereof. In the middle portion of the figure, important sectors of religious liberty are left to the superintendence of the state – again, for different reasons.

Early modern establishments in Europe, for example, instituted monopolies for certain churches. But because the monopolies are creatures of the sovereign, his prerogative prevails both as to the temporal governance of the church and the exceptions and immunities which provide some toleration for other religions. Thus arose various ministerial offices to regulate the monopoly and to develop policy regarding other religious groups. A minority religion, for example, might be permitted the name of an assembly but not a church; permitted to worship but not to use steeples or bells.

The parallel would be secularist regimes which protect freedom of thought and worship, yet retain the prerogative to regulate religion insofar as it touches upon the public sphere. On the view that legal personality is exclusively a creature of the state, and that the state must never use its law to empower specifically religious institutions, legal personality might be denied altogether or refashioned to describe the religious group in neutral terms. For example, a monastery is given legal berth as an association of pottery makers. Here, the ministerial offices, often with the same name as the ministries of the confessional regimes, have the function of protecting the secularity of the state.

Figure 3 (see p. 679)

They are ruled-out for two kinds of reasons, corresponding to the two parts of the document. First, according to the natural right delineated as religious liberty 'in general' (§§2-8). Second, according to the Church's understanding of itself 'in light of revelation' (§§9-15). The theological opposition pertains especially to the upper scope of the figure. Here, the 'care of religion' does not comport with the Church as instituted by Christ in a corporate body distinct from, and independent of the state. Confessional regimes in the middle represent what John XXIII was referring to in his opening allocution to the Second Vatican Council, when he said that however well-intentioned the princely care of the Church amounted to undue interference.

But the spectrum of positions along both parts of Figure 3 can be understood without special reference to the Catholic Church. Insofar as they

attack, obscure, or impede the individual right of religious liberty, the rights of families, and the rights of religious bodies and associations they are excluded by the *ratio generalis* of the document.

Whatever was the historical provenance of these restrictive or outright repressive regimes, *DH* would count them as dead-ends in view of the principles of religious liberty. In countries historically shaped in Latin Christianity, the establishments have eroded by the slow grind of modern history.²⁶ But established religions and puppet churches continue to exist in significant regions of the non-Christian world. Moreover, the handy device of government ministries to control religion is used assiduously in some countries.²⁷

Figure 4 (see p. 680)

The fourth figure depicts a rather broad spectrum of positions which are ‘live’ options. While some may be more agreeable, and while others may be perilously close to ‘dead ends’, none are absolutely ruled out. Here we enter the great ‘middle’, which can be characterized as a gamut of positions and institutional arrangements of peoples who seriously subscribe to a principle of religious liberty.

These arrangements are legitimately debatable, and choice of one or another ultimately will depend upon prudence. By prudence, I mean both prudence in devising constitutions suitable to a particular people, prudence of interpretation, and the prudence of particular laws and policies.

Taken as a whole, and in light of surrounding magisterial and conciliar documents, *DH* should be located in the frontier where Professor Durham’s chart puts cooperation and accommodation. We can call it a proactive concordia. Individual believers and religious groups have the right to communicate the value of their doctrine in what concerns the organization of society

²⁶ The obsolescence, for example, of the regime in the Wallis & Futuna Islands, in Oceania, where, until recently, failure to attend mass was punishable by the fine of a pig. Until 1970, the Catholic bishop held the title ‘co-prince’ of the kingdom. *World Christian Encyclopedia. A comparative study of churches and religions in the modern world, AD 1900–2000*, David B. Barrett ed. (Nairobi and Oxford: Oxford University Press, 1982), 749.

²⁷ As of 1980, there were still forty such ministries worldwide. *Ibid.*, map 3, at 866. Perhaps the most interesting example is the Indonesian Ministry of Religious Affairs. It is a case study of how a quasi-executive organ of the state can monitor, control, regulate religious matters, large and small. Virtually every position sketched in figure two is in evidence, willy nilly, in the activities of the Indonesian ministry. See the United States Dept. of State, *2009 Report on International Religious Freedom – Indonesia* (Oct. 26, 2009).

without presuming to impair the proper function of government or the rights of other citizens (§4); government should create conditions fostering religious life so that society may benefit from the moral capital (§6); government ought to take account of the religious life of citizens and show it favor, but not presume to command or inhibit it (§3). Harmony, moreover, is not determined exclusively by church and government, but more broadly by the ‘usages of society’ which are to be uses of freedom in their full range (§7).

If we strike the term ‘proactive concordia’, and adopt instead the slightly (but importantly) different term ‘accommodation’, we are still within the orbit of *DH*. For accommodation also suggests a principle of generosity. When government enters social territory already occupied by the religious actions, customs, and institutions of a society it will accommodate them *without pretending to identify religion and the state*. We can consider a broad range of issues: burdens of religious conscience, religious rights of families with regard to mandatory education (§6), provision for chaplaincies in the military, as well as the moral and religious sensibilities of health care practitioners and religious institutions devoted to works of mercy. Within American constitutional law, for example, accommodations can be mandatory or merely permissive. Yet the spirit of accommodation is fairly simple: Do no harm. That is to say, avoid unnecessary disruptions of society, and moderate potential conflict between religion and government by deferring whenever possible to ordered liberty compatible with the common good.²⁸

Cooperation and accommodation do not represent the exact terminology of *DH*, but it seems to me that they do not misrepresent it either. Each is compatible with what Pius XII and Benedict XVI mean by ‘healthy secularism’.²⁹ Religion is not inside the state nor is the state inside religion.

²⁸ *DH* is silent on the issue of direct funding of religion by the state, and for good reason. First, neither of these positions which we have characterized as cooperation and accommodation entail state funding. Second, funding is a vexed issue that defies easy pronouncements from on high. Third, funding is usually determined by many factors other than religion.

²⁹ ‘The Agreement, which contributed largely to the delineation of that healthy laicism which denotes the Italian State and its juridical ordering, has evidenced the two supreme principles which are called to preside over the relations between Church and political community: that of the distinction of realms and of collaboration. A collaboration motivated by the fact that, as Vatican Council II taught, between both, namely the Church and the political community ‘even if with different title, are at the service of the personal and social vocation of the same human persons’ (Constitution ‘*Gaudium et Spes*’, No. 76). Benedict XVI, letter to the President of Italy, Giorgio Napolitano, on the occasion of the 150th anniversary of Italy’s political unity. Delivered by Cardinal Tarcisio

Each is at service of the same human person, and ordinary persons are at liberty to be of service to their polities, societies, and religions.

Figure 4 displays still other positions.

Gaudium et spes asserts: 'The Church, by reason of her role and competence, is not identified in any way with the political community nor bound to any political system. She is at once a sign and a safeguard of the transcendent character of the human person'. The Church, it continues, 'does not place her trust in the privileges offered by civil authority. She will even give up the exercise of certain rights which have been legitimately acquired, if it becomes clear that their use will cast doubt on the sincerity of her witness or that new ways of life demand new methods'. (§76)

Privileges are not required, but they are not absolutely forbidden by the Council. *DH* §6 refers to the 'peculiar circumstances' in which one religion is given special recognition in the constitutional order. Importantly, *DH* does not limit the 'peculiar' circumstances to the Catholic Church, but to any church or religion. It is not incompatible with religious liberty, provided that the rights of all citizens and religious communities to religious liberty is 'recognized and made effective in practice'.

What does this rather terse sentence cover? It covers what Professor Durham labels 'endorsements' of the kind which comport with equal treatment in every other respect. The continuum of such endorsements cannot be neatly captured by a single term. There are strong endorsements which, in reality, are weak establishments. We can think of national religions in the U.K. and some Scandinavian countries, and on the Catholic side in Malta and Monaco. We can also think of concordatory regimes which are not accompanied by a state or official religion, such as in Italy, Poland, and Ireland. For its part, Italy has reached agreements with no fewer than six different religious groups and is negotiating yet another six.³⁰ Endorsements can also include constitutional preambles recognizing the religious convictions of the people or the majority of the people.

Depending on the circumstances, these endorsements might be imprudent on the side of either the government or the particular religion. They

Bertone (March 16, 2011). Healthy versus hostile secularity was explicitly discussed by the drafting committee of *DH*. See Bishop de Smedt's relation #5 entitled *De character laicali sed non laicistico potestatis publicae*, where he distinguished *État laïque* and *État laïcisé*. Congregatio Generalis LXXXVI, 23 Sept. 1964. AS Vol. III, Part II, 352 ff.

³⁰ Andrea Pin, 'Public Schools, The Italian Crucifix, And The European Court Of Human Rights: The Italian Separation Of Church And State', *Emory International Law Journal*, Vol. 25 (forthcoming).

can be forbidden by the constitution of a particular people. The U.S. Constitution gives Congress no power to have a national religion in the fashion of England. They can be forbidden on the side of a particular religion or church. Old order Mennonites have theological reasons to eschew identification with Caesar. But for all of that, endorsements are not in principle ruled out by *DH*.

Nor are constitutional regimes which avow some version of ‘separation’ of church (religion) and state. *DH* does not use the term, and for good reasons. Its history is troubled.³¹ And just as so-called endorsement regimes would have difficulty determining whether they are in some extenuated sense establishing a religion, quite normal states who avow separation are notoriously unable to give a crisp definition of what ‘separation’ means. Suppose that separation means that the state is constitutionally forbidden either to endorse or to confess a religion, to become entangled in the affairs of religion, to have religious tests for holding of civil offices, and to fund religion any direct way, which means funding for no other reason than on the merits of religion. This kind of regime is not ruled out by *DH*, which is content to allow a free citizenry to identify with religion without needing to commandeer the organs or monies of government.

A general, standing law ‘neutral’ on its face regarding religion may inadvertently impair some aspect of religious life – perhaps in rather important aspects related to the burdens of conscience. These consequences are controversial apart from anything laid down by *DH*. So-called separationist regimes are capable of protecting religious liberty along a broad continuum, including the ability of citizens at law to lodge complaints about inadvertent insensitivity.

Within this ‘great middle’ much of the work will depend upon prudence.³²

The right to religious liberty can of itself be neither unlimited nor limited only by a ‘public order’ conceived in a positivist or naturalist manner. The ‘due limits’ which are inherent in it must be determined for each social situation by political prudence, according to the requirements of the common good, and ratified by the civil authority in accordance with ‘legal principles which are in conformity with the objective moral order’. CCC 2109

³¹ Which is why the word did not gain entrance into the U.S. Constitution or the first ten amendments. In fact, the word was not used by the Supreme Court as a normative term of art until 1947.

³² As Pope John XXIII counseled, creating political and juridical institutions which protect human rights in domestic constitutions and in international law needs ‘the queen of all the virtues’. *Pacem* §§160-162.

Problems emerge within the ‘great middle’ where the figure begins to tail off toward the more restrictive regimes. *DH* would have government mindful of the fact that persons are multi-dimensional: citizens, believers or non-believers, and members of societies other than the state. Where government emphasizes one so heavily that the others fade from view the person can be put at war with himself.

I give one example from the side of separationism because it is a disputed issue in our own time. When the state looks upon persons *only* as citizens, and strives to form the body politic in its various dimensions exclusively according to that point of view, it can be a species of what Pope Paul VI and John Paul II call ‘negative confessionalism’.³³

Pope Benedict XVI suggests that it is the flip side to confessional monopoly.³⁴ Although important aspects of religious liberty might remain legally intact, the state acts as though it has priority access to society. As Benedict recently remarked, it is a ‘sophisticated form of hostility to religion’ precisely because it may stop well short of legal persecution.³⁵

We are grappling here with a vice that is the obverse of a liberal virtue. Liberal societies take pride in fostering in society a robust practice of truth freely pursued and communicated. But insofar as religious reasons, and even natural law reasons, in public debate are discouraged as contrary to the letter and spirit of a democratic society, and insofar as citizens who avow such reasons are menaced by the verdict of being bad citizens, ‘life is in fact made very difficult’ for religious believers. The specifically ‘religious’ dimension of the right to religious liberty is endangered.

Negative confessionalism must be distinguished from what Professor Durham calls the ‘inadvertent insensitivity’ of regimes which separate religion and the state. A law that is *prima facie* ‘neutral’ with regard to religion can make the burdens of religious conscience more difficult to bear. But the very rubric ‘neutral’ means that it is not a pretense for marginalizing religion.

Conclusion

Peoples who have a serious commitment to religious liberty cannot be fit into a single model governing the relationship between state, religion,

³³ *Confessionalismo negativo*, see Paul VI, Address to the Diplomatic Corps, 14 January 1978: AAS 70 [1978] 170; Message of John Paul II To The Secretary General Of The United Nations, To His Excellency Dr. Kurt Waldheim, Secretary-General of the United Nations Organization, Dec. 2, 1978.

³⁴ Address to Members of the Diplomatic Corps (Jan. 10, 2011).

³⁵ Message for the Celebration of the World Day of Peace (Jan. 1, 2011), §13.

and society. Even a single domestic polity can find itself gravitating toward different positions within Figure 4 (p. 670), depending on the issue under dispute, how public opinion influences the behavior of legislatures and courts, and many other factors. In the brief course of a single generation, the law of the U.S. has embraced every position in Figure 4, except endorsement and hostile confessionalism.³⁶

Remnants of the positions which we have called ‘dead ends’ (Figure 3, p. 669) pose a different problem. If the principle of religious liberty is neither recognized nor instantiated, then we cannot start in the middle and then make fine adjustments. Rather, we can make only ad hoc agreements for some small measure of toleration or engage in broad philosophical and moral discussion about the principle of religious liberty.

³⁶ While these are outside the tent of jurisprudence, many believe that they are not.

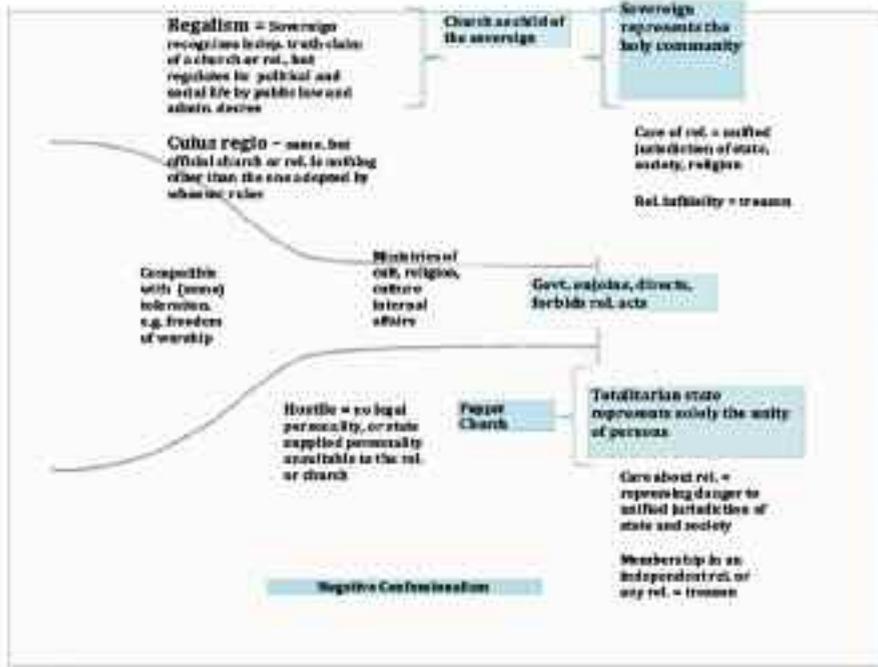


Figure 2.

RIGHTS	Regalium Causa regis	Limits on human power
Right inheres in all persons by virtue of the duty to pursue and adhere to truth, DH 2		Divine law: Constitution and mission of the Church, DH 13
Right is not a forbearance or toleration, DH 2-3		Divine and natural law: Non-coercive means of evangelization, DH 4, 12
Right protected in constitution, not by mere administrative decrees, DH 1-2, 13, 15		Natural law: No merely human power can command or prohibit internal acts of conscience
Right of the family to its domestic religious life, and choice of rel. education, DH 5		Natural law: External rel. acts curtailed only according to the objective moral order in view of the common good, DH 7
Right includes social liberation, not just private worship, DH 15		Natural law: Freedom of Church having the same rights as other societies, DH 4, 13
Right to make religious-based proposals for what concerns the organization of society, DH 4	Puppet Church	
	Hinders = Denial of legal personality, or state supplied personality amenable to the rel. or church; forbad rel. arguments in what concerns society	

Figure 3.

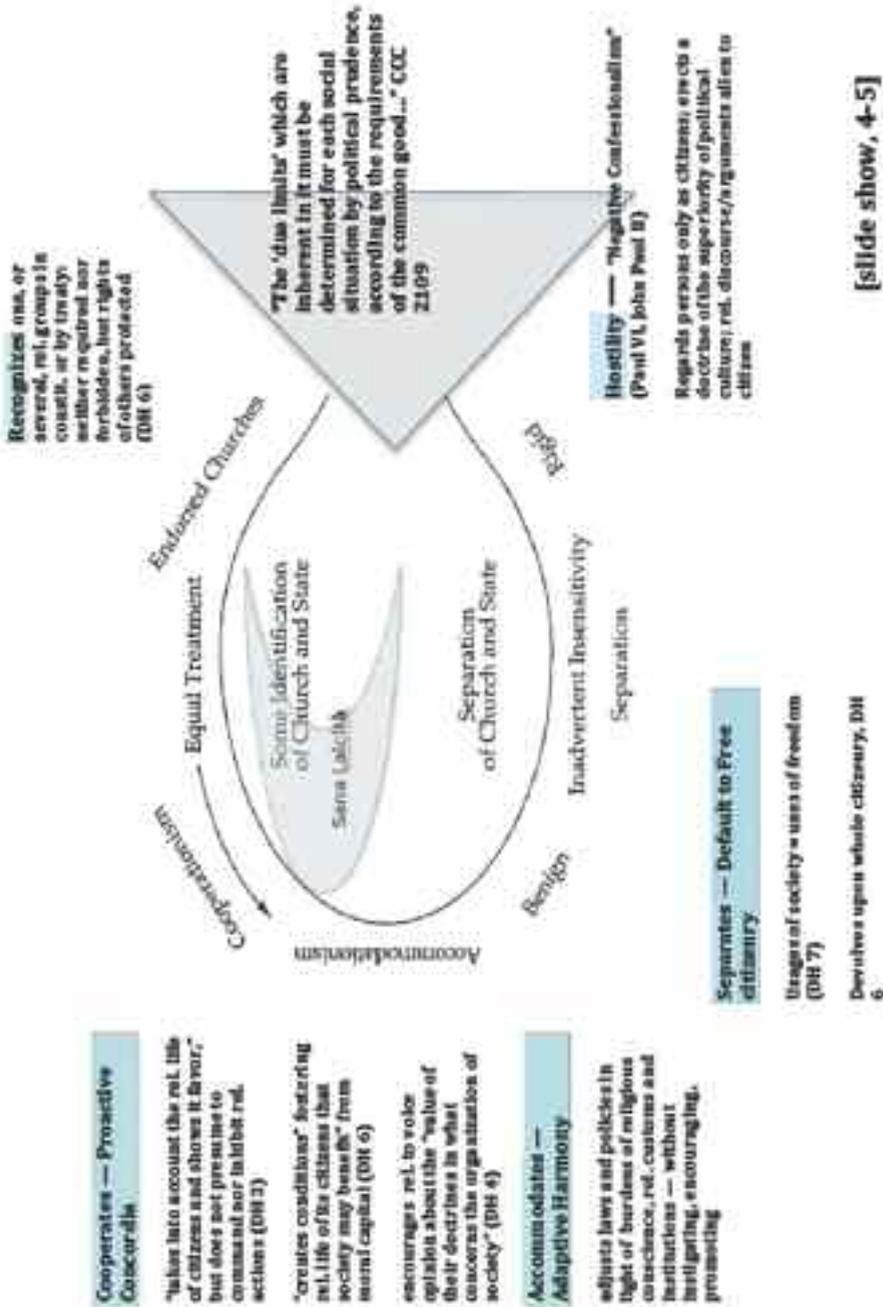


Figure 4.