CHAPTER 2
THE RIGHT TO RELIGIOUS FREEDOM

1. *Religion in the Public Sphere*

In modern societies, which are by definition pluralistic with respect to moral values and religions, any religion acts as one voice among others in the civil sphere; it raises the question of *lived religions* in societies that are shaped by the pluralism of values and life-forms. However, in the USA as well as in some European countries, there is a Christian-political movement that is sympathetic to the understanding that Christian moral norms should be the foundation of the state. The tension between the two approaches, public and political theology, is revealed in many conflicts of morality; the debate on religious freedom, I hold, becomes an ambiguous term in this context, too. It may be interpreted either as one right among other rights, determining how religious groups are to navigate the different facets of their identities, or as the *primary* right defining the moral foundations of the state.

1.1 Religion in the civil sphere

Religion, we have learned from the discourse of religion in the public sphere of the last decades, is never merely a private affair. Whatever religion's role in the public may be, we need to be aware that the public discourses are dominated by those who have access to media and controlled by those who are visible and audible due to their financial, political, or social power, notwithstanding the rise of social media and their influence on public opinion. In this situation, the question is how civil societies can take on the political-ethical task of social integration. While political philosopher Charles Taylor has long argued that liberal democracies flatten the idea of a highest good that orients the plural goods that we pursue in our actions,[1] German philosopher Jürgen Habermas has engaged this question since the early 2000s.[2] While he is mostly interested in establishing a counter-force to the functional systems of social integration, which in fact turn out as forces that colonize the lifeworld, as he famously put it,[3] the current interest in the role of religion in the public sphere offers opportunities for a new dialogue between philosophy and religion about the political-ethical aim of peaceful co-

1 Ch. Taylor, *Sources of the Self. The Making of Modern Identity,* Cambridge, MA 1992.

2 J. Butler/E. Mendieta/J. Van Antwerpen, *The Power of Religion in the Public Sphere,* New York 2011; J. Habermas, *Between Naturalism and Religion: Philosophical Essays,* Cambridge, UK/Malden, MA 2008; J. Habermas, *An Awareness of what is Missing : Faith and Reason in A Post-Secular Age,* Cambridge, UK/Malden, MA. 2010.

3 J. Habermas, *The Theory of Communicative Action,* London 1984, Vol I, Part IV.

habitation.[4] Habermas analyzes the present threat of social disintegration by quasi-autonomous systems such as the financial market or the life sciences. Regarding the formation of new ideas of social integration that must be transnational rather than national, he renders "religious voices" not only *acceptable* in the public sphere but *indispensable*; they may provide the "sources" to "keep alive" questions which otherwise may be buried under the weight of instrumental reason. This means: rather than regarding religion's assumed *idiosyncratic rationality* as a *threat* to a democratic state, Habermas argues that the public face of Christianity is especially needed today, because Christianity claims a specific "sensitivity for time". Explicitly taking up the new political theology of Johann Baptist Metz, Habermas agrees that theology may remind society of what may be lost "in the face of growing and disarming systemic strains on the social integration of our political communities."[5] In his "new political theology", Metz insisted on the connection between Christian theology and political ethics: theology, he held, must *resist* the refusal to attend to suffering, and *remember* the duty to stand in solidarity with those who suffer or, put differently, with those who are the victims of a social order that throws them into oblivion.[6] Religious freedom, turned positively, would then mean – not exclusively but certainly in the case of the Christian religion – to spell out the practical and political responsibility to attend to anybody whose dignity and rights are violated. In contrast, what we observe in the current debate on Christianity's freedom of religion is an identity politics pursued by Christian groups, aimed at defending a privileged status regarding exemption from abiding by specific laws within a pluralistic society.

In the civil sphere of public life, the reality of lived religions concerns as much the tolerance and mutual respect among people who all share (or should share) the foundational value of human dignity, i.e. peaceful forms of cohabitation, as the failures of understanding each other. Tolerance is the core value of modern societies – but paradoxically, tolerance does not allow the toleration of human rights violations. This line is where the moral conflicts normally arise: what exactly counts as a human rights violation and requires solidarity is not always easy to discern. It requires the willingness to listen to all sides and the willingness to come up with prudent practical solutions in order to secure the peace of a community or polity. Public debates often reveal that what appears to be a violent act of infringement on a person's liberty turns out to be more complex at second sight. Religious groups may consider themselves to be under attack by increas-

4 J. Butler/E. Mendieta/J. Van Antwerpen, *The Power of Religion in the Public Sphere,* 2011.

5 Ibid. 23.

6 J. B. Metz, *Zum Begriff der neuen Politischen Theologie,* Mainz 1998. Cf. for further discussion chapter 10 in this volume.

ingly secular societies, by states that favor one religion over another, or by legal decisions that seem to go against the core of some groups' religious identity. In the civil sphere, it is crucial to frame moral conflicts in such a way that those whose practices (or identities) are questioned are not disrespected for the way they live. Once practiced, legal resolutions may be the exception rather than the rule. When conflicts cannot be resolved locally, however, courts must sometimes judge the scope and limits of religious expressions and practices protected under religious freedom.

France often serves as an example of how conflictual the civil sphere can become: The French Constitution, established with the so-called Laïcité clause in 1908, was twice renewed, in 1946 and 1958. It guarantees the "free exercise of religious worship", but at the same time excludes any state involvement in religious affairs: Article 2 describes a French republic that "does not recognize, pay, or subsidize any [form of] worship". The French society had been rather comfortable with this arrangement, shaped above all by French intellectuals who often declared indifference or hostility towards any religion. While over the years especially the Catholic Church succeeded in negotiating multiple exemptions of the non-subsidy clause so that many religious services are in fact paid for by the state, conflicts arose when the Muslim communities claimed the equal right to more explicit visibility in the public sphere. France, as other countries, faced deep conflicts among its citizens: with their visibility and claim to be part of the civil/public sphere, Muslims seemed to threaten what was promoted as the French identity; it therefore came as little surprise that France passed a law, the so-called Loi-Stasi, in 2004, that prohibits the public wearing of the hijab. Yet, over the last years, efforts are being made, in France and throughout Europe, to acknowledge the social transformations of the citizenry within the European Union.[7] One priority is the call for more organized, representative religious bodies as conversation partners for state institutions. This is a politics based on prudence and practical accommodations, aimed at a peaceful cohabitation in a pluralist society, within the human rights framework that governs the overall policies of the European Union. However, this approach has been attacked in the name of a European

7 Directorate General Internal Policies Of The Union, *Islam in the European Union: What's at Stake in the Future?*, European Commission: Policy Department Structural and Cohesion Policies May 14, 2017, www.europarl.europa.eu/RegData/etudes/.../IPOL-CULT_ET(2007)369031_EN.pdf. The Report states: "Muslim presence in Europe is an uneven and unfinished process. It is an ongoing process in the manner of all social facts. The internal articulation of European Islam is unfinished, leaders are rare, the leadership class is in the process of being constituted, the populations are still in the process of taking full possession of (their rights in) European public space, with many still rendered fragile because of the difficulty and precariousness of their entry into the space of the labour market."

cultural identity over the last years. While some hold that open islamophobia is on the rise, the 2017 Report by the European Union cautions against overemphasizing the rift that ignores multiple local resolutions. The specter of "Islamization" may well be a politically motivated *narrative* that does not represent where the society stands in general.[8]

Another public discourse concerns marriage equality, but in Europe, it played out differently in different countries: In France, in January 2013, hundreds of thousands of Catholics and other supporters of a so-called traditional family model demonstrated against sexual equality and the 'Marriage for all Act' brought forward by President Holland. In Germany, Spain, and Ireland, where similar laws were passed over the last decade, no mass demonstrations took place. In the USA, the debate on religious freedom is dominated by Christian conservatives and the Christian Right who claim that their identity is under attack by an increasingly secular society.[9] The US Catholic bishops have embraced this argumentation in certain ways, however arguing strictly on moral, not cultural grounds: same sex marriage, they bluntly state, is *against nature*: "a same-sex union contradicts the nature of marriage: It is not based on the natural complementarity of male and female; it cannot cooperate with God to create new life; and the natural purpose of sexual union cannot be achieved by a same-sex union."[10]

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8 "Contrary to what has been written in some places, we continue to believe that there is no widespread or virulent current of 'Islamophobia' in Europe. There is certainly no manifestation of deep-seated hostility toward Islam, no phobic hatred. There are reactions on the surface of society and situations that are sometimes translated by manifestations of hostility." Ibid. 27.

9 This is part of a broader narrative of the nationalists who were not always aligned to Christian groups but increasingly did so over the course of the 20th century. The main line of argument of these nationalist groups is that not only Christianity but also whiteness is threatened by an increasingly multicultural society. As Damon Berry has shown, this is a pattern that has been consistently used by white nationalism groups D. T. Berry, *Blood and Faith: Christianity in American White Nationalism*, Syracuse/New York 2017.

10 "The natural structure of human sexuality makes man and woman complementary partners for the transmission of human life. Only a union of male and female can express the sexual complementarity willed by God for marriage. The permanent and exclusive commitment of marriage is the necessary context for the expression of sexual love intended by God both to serve the transmission of human life and to build up the bond between husband and wife […] For several reasons a same-sex union contradicts the nature of marriage: it is not based on the natural complementarity of male and female; it cannot cooperate with God to create new life; and the natural purpose of sexual union cannot be achieved by a same-sex union. Persons in same-sex unions cannot enter into a true conjugal union. Therefore, it is wrong to equate their relationship to a marriage." Committee on Marriage and Family Life, *Between Man and Woman: Questions and Answers about Marriage and Same-Sex Unions*, U.S. Conference of Catholic Bishops, November 2003, http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/questions-and-answers-about-marriage-and-same-sex-unions.cfm.

1.2 From the civil sphere to political decision-making

In democracies, public debates are channeled into formal political decisions. These must seek to integrate the insights from citizens into those policies that strive to do justice to all citizens. In the best possible way, legislators will weigh the different arguments as guides of their decisions, and propose laws accordingly. How exactly the transformation of public discourse into governance and laws occurs, is, however, complicated when interest groups – with different powers and different channels of influence – drive the political decisions, sometimes to the point of drafting laws. The gap between the ideal of a deliberative democracy[11] and the reality of politics is not to be underestimated. However, at least procedures are available to pave the way to operationalize democratic decision-making. Ideally, these enable citizens to hold their politicians accountable.

Today – in the USA as in numerous other countries in Europe – political groups are on the rise who create a narrative that is decidedly populist, calling for a *national politics*. It is promoted as security politics, rendering exceptional security and surveillance measures and the accompanying law enforcement measures necessary. The narrative of a *Christian* national identity is not, however, necessarily coherent with these policies. For example, the Catholic Church explicitly warns against violations of human dignity and rights of Muslims, Jews, immigrants, or refugees – yet, current US politics steers exactly in this direction. Religious freedom, the Catholic Church claims, *obliges* Christians to speak out against islamophobia, xenophobia and the overall criminalization of entire groups. However, instead of centering the debate on religious freedom on *these* issues, the Catholic Church has aligned itself with conservative Evangelicals, fostering an alternative narrative of religious freedom, namely one that primarily attacks so-called liberal values around sexuality, gender, and family norms. Over time, these values, rather than the advocacy for social integration and religious freedom of all religions, have come to dominate the religious freedom debates.

2. *Religious Freedom and the Catholic Church*

While religious groups use their right to religious freedom to promote a particular morality, in the USA, political groups use religion especially to promote *their* agenda of an American (Christian) identity. The conflation of these two movements results in a politicization of religion. This seems to me an even more important and troublesome issue than in the 1990s: 'God' seems to once again serve as the "ultimate" authority regarding normative claims; 'God' is invoked to legitimize wars, and 'God' is invoked in the so-called culture war about the future of the American society, a 'war' between a so-called liberal morality and a so-called

11 A. Gutmann/D. Thompson, *Why Deliberative Democracy?*, Princeton 2004.

traditional morality.[12] Sexuality, gender, and family norms are the key symbols in this battle – despite the fact that the majority of Catholics in the USA, for example, do not follow the sexual morality of their Church in questions of contraceptives, and Catholic women who tend to consider abortion morally wrong still terminate pregnancies in similar numbers as other groups.[13] Regarding the social values of US citizens, acceptance of homosexuality is on the rise, and same sex marriage was supported by almost two thirds of US citizens in 2017, up from one third in the early 2000s.[14] This means not only that there is a gap between convictions and actions of Christians, but also that the issues in the debate are more *symbols* in a *narrative* of a "war" meant to create the "frontlines" in a battle that is more constructed discursively than being backed by social facts.[15] It also means that in the debates, religious freedom becomes a political instrument: no longer upheld as one right among others, which together aim to guarantee the peaceful cohabitation of different societal groups, it is utilized as a political *weapon*. At present, Evangelicals together with the Catholic Church use their power to undermine and undercut major legal reforms that resulted from decades-long public debates – and they use it in spite of the disconnect between the values they put forward and the values of their members.

I agree with Habermas that religions could be models for the social integration of pluralistic societies – but this is not what we see today. I will now focus on my own tradition, Catholicism, and explore the relationship between ethics and politics, and more precisely, ethics and law within Catholic Theology.[16]

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12 J. D. Hunter, *The Culture War and the Sacred/Secular Divide: The Problem of Pluralism and Weak Hegemony,* in: Social Research 76/4 (2009), 1307–1322.

13 According to the Guttmacher Institute Report from 2016, 24% of women who terminated a pregnancy in 2014 were Catholic. Guttmacher Institute, https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf.

14 http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/

15 Hunter argues that the framing of discursive narratives do not necessarily reflect the lives of their supporters; instead the narratives create what Hunter calls "weak hegemonies" that are aimed at securing the cultural domination of one group over another: "It is this effort to establish a weak hegemony that explains why so many cultural issues have been contested politically – through litigation, lobbying, and electoral politics. When factions employ these tools, they use the instrumentalities of the state in order to secure the patronage of the state, its resources and, finally, its coercive power. Needless to say, all of these instrumentalities run roughshod over the actual far-ranging plurality of religious and cultural commitment, typically reducing them to crude simplifications, often based upon the narrow interests of activists." J. D. Hunter, *The Culture War,* 1314.

16 As I have shown in the first chapter of this volume, resistance against the framework of human rights emerged in part because of its naturalistic justification that theologians such as Jacques Maritain indeed invoked in the preparations for the UN Universal Declaration of Human

2.1 Religious Freedom and the Role of the Church in Modern States

By the end of the 19th century, the Catholic Church had lost its claims on political power in most Western countries and focused on its internal ecclesial affairs, alongside with the pastoral and moral guidance of its members. The medieval and early modern tradition of Catholic natural law emphasized the endowment of every human being with reason and freedom that is ultimately grounded in the theology of creation. In early modernity, it transformed into the legal theory of natural rights, starting with Grotius in the 16th century and becoming the most influential political theory by the 19th century. The neo-scholastic interpretation of the 19th century, however, narrowed it to a metaphysical, objective order that resulted in a legalistic and authoritarian theology. What happened in the reductionist reading of the tradition of Christian theology was, first, that divine justice was narrowed to divine law, spelled out in normative commands; these commands were then, second, codified into quasi-legal, ecclesial-moral norms. With the separation of state and religion on its way in most Western countries, the Church lacked the power of enforcement, unlike laws of a state, and hence moral formation became a central task of the Church. With the beginning of Catholic Social Teaching, a new social ethics emerged since the late 19th century, complementing personal moral theology – but even this social ethics was mostly based on an ecclesial understanding of a hierarchical church.

After the Vatican II Council that began to embrace a human rights oriented reinterpretation of the natural law tradition, Catholic conscience formation was regarded mostly in juxtaposition to the secular "modern" culture that was criticized in its striving toward a seemingly unrestricted individualized "autonomy". In his social teachings, Pope John Paul II often referred to the secular "culture of death", which was repeated by Pope Benedict XVI and, though with a more anti-capitalist twist, also by Pope Francis. The neo-scholastic interpretation of the natural law is therefore not only reflected in major parts of the Church's *moral* theology; it also reflects a particular *political theology,* which explains the relationship between (secular) laws and their legitimization, namely by recurrence to an objective order that is rooted in divine law.[17]

Rights. For Catholic theology especially, the justification of morality by way of the natural law tradition is a cornerstone of the official Church teachings. Among theologians, however, it is contested. I consider the critical political ethics as an alternative to the natural law theology, however exactly not an alternative that eschews the theory of human dignity. For a discussion of the natural law theory cf. L. Sowle Cahill/H. Haker/E. Messi Metogo (ed.), *Human Nature and Natural Law,* London, Concilium 4 (2010).

17 In this understanding, it echoes Carl Schmitt's often-discussed critique of liberal democracies. Schmitt states that any political order rests upon premises it cannot itself justify; hence it has a legitimation problem. For the Catholic Church, this can only be resolved if secular orders

2.2 *Dignitatis Humanae*

Dignitatis Humanae, On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious (DH) accepts religious pluralism as the context in which religious freedom is spelled out.[18] The overall goal is to ensure that people and groups, religious and non-religious, can live together in peace, working for the common good. This aim of peaceful cohabitation and cooperation for the common good coincides with the purpose or end of the secular state according to modern political theory since Hobbes. DH argues, however, that the state has a particular *duty* regarding religion: it must secure the freedom of religion for the individual and the freedom of religious institutions. It must not interfere with the truth-claims of the church and/or the expressions of conscience of individuals.

> Furthermore, society has the right to defend itself against possible abuses committed on the pretext of freedom of religion. It is the special duty of government to provide this protection. However, government is not to act in an arbitrary fashion or in an unfair spirit of partisanship. Its action is to be controlled by juridical norms which are in conformity with the objective moral order. 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.[19]

At the Council, DH, drafted mostly by John Courtney Murray, was the result of modern political history since the French Revolution, in which different models of the church-state relationship had emerged in different countries. I hold that one needs to consider these different national constellations in order to understand the debate before and during the Vatican II Council. After all, just as Murray reflected upon the American arrangement, other participants, too, had their own national experiences of the relation between the Church and the state. Given the dominance of European participants at the Council, it may be possible to discern several different models in systematic terms – and they show that the adopted model of DH is a major achievement, seen in its historical context. One model was the religious state in Franco's Spain: the fascist state was defined as a Catholic state, and during the time of the Council, Franco's dictatorship was still in place, ending only in 1975. It is no secret that the Spanish clergy mostly supported Fran-

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accept that they rest upon an objective, metaphysical truth, captured in the tradition of natural and divine law. Cf. chapter 10 in this volume.

18 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. Declaration on Religious Freedom*, Vatican Rome December 7, 1965, http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

19 Ibid. No. 7.

co's regime. Had it served as the model for the course of the Church in the 1960s, it would have come with the price of an ongoing religious conflict between different Christian groups as well as interreligious conflicts. Another model was France's laicist or 'agnostic' state that severs any political tie between the state and religions; here, religious freedom is strictly seen as a negative right – had the Council followed this model, it would have risked the influence of its major public institutions in different societies. A third model was experienced in the Eastern European countries, where faith was suppressed by the Soviet Union: in these countries, religion was not even a negative right, because the state policy explicitly promoted atheist policies. Furthermore, there was ample evidence of the ever-possible persecution of Christian or other religions' minorities under Communist regimes. Finally, the US model of a secular state that guarantees religious freedom under the auspices of the separation of church and state while welcoming religion in the civil and public life, guarantees both negative and positive freedom rights. It does not privilege one religion over another, but it still leaves enough room for the Church to flourish in the civil sphere. This is the model that DH ultimately draws upon. DH spells out religious freedom rights in terms of the natural law and its inherent theory of human dignity. On the one hand, freedom of conscience is explicitly stated:

> In all his activity, a man is bound to follow his conscience faithfully, in order that he may come to God for whom he was created. It follows that he is not to be forced to act contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious. The reason is 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.[20]

But the Declaration is ambiguous, shifting between the freedom of conscience, addressed mainly as protection against any coercion by state laws, and the authority of the Church, in the institution of the Magisterium, orienting the faithful in discerning moral truths.

> For the Church is, by the will of Christ, the teacher of the truth. It is her duty to give utterance to, and authoritatively to teach, that truth which is Christ Himself, and also to declare and confirm by her authority those principles of the moral order which have their origins in human nature itself.[21]

In other words, the Catholic Church holds that human dignity functions as the *metaphysical* presupposition of the secular state, thus providing the legislator with a criterion to discern whether a given law is in fact coherent with the "objective order of human relations", the natural law, as well as informing individuals in

20 Ibid. No. 3.

21 Ibid. No. 14.

their conscience formation. Both, however, must be taught by the Church, the "teacher of the truth". The ambiguity regarding the natural law tradition continues up to today; it therefore almost always looms in the background of the understanding of the church-state relationship with respect to religious freedom.

2.3 Natural Law and Human Rights

As is well known, sexual morality became an obsession of Catholic moral theology over the last fifty years, strictly shaped in relation to the sacrament of marriage. Contraceptives, abortion, and human embryo protection dominated the moral debates throughout the papacies from Paul VI to Benedict XVI.[22] Prioritizing family ethics and sexual ethics, the US Conference of Catholic Bishops (USCCB), for example, referred both to the Canon Law and to the Catechism of the Church but, quite tellingly, not to the human rights framework.[23]

Despite the ongoing presence of neo-scholastic interpretations that certainly guide the Magisterial writings on sexual ethics since *Humanae Vitae*,[24] the natural law doctrine has been considerably reinterpreted, bringing it much closer to the human rights framework than one would expect from the Magisterium's interpretation of moral theology. This has been documented, most importantly, in the 2009 Document by the *International Theological Commission*.[25] While this reinterpretation is a much welcome move, the tension between the 'ethical' paradigm and the 'metaphysical' natural law paradigm still prevails. The *International Theological Commission* still refers to the natural law as 'objective law' that responds to the order of nature, which is seen in accordance with the eternal law. The only change is that this order is now interpreted in view of human rights. In other words: the content to which the natural law refers may have slightly changed, but the structure of the moral order has not. Addressing the relationship between

22 Ironically, Thomas Aquinas – otherwise quoted as 'the' doctor of Catholic moral theology – only mentions abortion in passing, and even when he does, he does not distinguish between intentional and unintentional loss of pregnancy. Cf. R. Pasnau, *Thomas Aquinas on Human Nature*, Cambridge MA 2001.

23 For comprehensive overview of the two main interpretation lines of natural law, i.e. "the metaphysical objective radical" interpretation and the "deontological, critical and moderate" interpretation that is aligned to the human rights tradition, drawing on the natural law tradition in Spain and Portugal, cf. A.-E. Pérez Luño, *Natural Law Theory in Spain and Portugal*, in: Age of Human Rights Journal 1 (2013), 1–24, quote on p. 12.

24 For an overview of the developments cf. T. A. Salzman/M. G. Lawler, *Vatican II and Sexual Ethics: Past, Present, Future*, in: Toronto Journal of Theology 32/2 (2016), 297–313.

25 International Theological Commission, I*n Search of a universal ethic: a new look at the natural law,* Vatican 2009, http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20090520_legge-naturale_en.html

natural law and positive laws issued in secular societies, the "norms of natural justice [law]" (lex naturalis, translation adjusted), the Commission holds, are to be directly translated into positive law; only when this is the case, are they not only legally, but also morally binding:

> 91. Positive law must strive to carry out the norm of natural justice [natural law]. It does this either by way of conclusions (natural justice forbids homicide, positive law prohibits abortion), or by way of determination (natural justice [natural law] prescribes that the guilty be punished, positive penal law determines the punishments to be applied in each category of crime). Inasmuch as they truly derive from the norm of natural justice [natural law] and therefore from the eternal law, positive human laws are binding in conscience. In the opposite case, they are not binding. "If the law is not just, it is not even a law."[26]

Not surprisingly, however, the International Commission still grapples with the potential clashes between positive law and natural law; after all, human history demonstrates that both do not necessarily coincide. Therefore, the Commission cautions to identify both, insisting on the superiority of the natural law over against the positive law:

> 92. *The norms of natural justice [natural law] are thus the measures of human relationships prior to the will of the legislator.* They are given from the moment that human beings live in society. They express what is naturally just, prior to any legal formulation. *The norms of natural justice [natural law] are expressed in a particular way in the subjective rights of the human person, such as the right to respect for one's own life, the right to the integrity of one's person, the right to religious liberty, the right to freedom of thought, the right to start a family and to educate one's children according to one's convictions, the right to associate with others, the right to participate in the life of the community, etc.* These rights, to which contemporary thought attributes great importance, do not have their source in the fluctuating desires of individuals, but rather in the very structure of human beings and their humanizing relations. The rights of the human person emerge therefore from the order of justice [law] that must reign in relations among human beings. *To acknowledge these natural rights of man means to acknowledge the objective order of human relations based on the natural law.*[27]

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26 The footnote to this passage explains the sources (Augustine and Thomas Aquinas) and the reasoning behind the distinction: "St. Augustine, *De libero arbitrio*, I, V, 11 (*Corpus christianorum*, series latina, 29, 217): "In fact a law that is not just does not seem to me to be a law"; St. Thomas Aquinas, *Summa theologiae, Ia-IIae*, q. 93, a. 3, ad 2: "Human law has the nature of law insofar as it in accord with right reason, and in this respect it is evident that it derives from the eternal law. But insofar as it departs from reason, it is called an unjust law, and does not have the nature of law, but rather of a certain violence. (Lex humana intantum habet rationem legis, inquantum est secundum rationem rectam, et secundum hoc manifestum est quod a lege aetera derivatur. Inquantum vero a ratione recedit, sic dicitur lex iniqua, et sic non habet rationem legis, sed magis violentiae cuiusdam)"; *Ia-IIae*, q. 95, a. 2: "Consequently every law made by men has just so much of the nature of law to the extent that it is derived from the natural law. But if in some matter it deflects from the natural law, then it will not be law, but a perversion of law. (Unde omnis lex humanitus posita intantum habet de ratione legis, inquantum a lege naturae derivatur. Si vero in aliquo a lege naturali discordet, iam non erit lex sed legis corruptio)." Ibid. footnote 83.

27 Ibid. (emphasis added).

The problem with the Natural Law tradition is not, however, that it distinguishes between positive law and justice, and that it insists on inserting a critical perspective to any legal order. This critical distance, oriented by a concept of justice, is a condition for any critical ethics. The problem with the Natural Law theory is its insistence on a moral order that is metaphysical, inscribed into human nature (and often naturalized in its interpretation, as is the case in sexual ethics), and the Catholic Church's insistence that the (all-male) Magisterium is the ultimate authority of its interpretation. The first claim separates the natural law from any alternative foundation of justice, and it dismisses the experience of injustice as foundational for the understanding of an unjust order; the second claim betrays an authoritarian understanding of the Church, which contradicts the acclaimed freedom of conscience that requires of every moral agent "to follow his conscience faithfully, in order that he may come to God for whom he was created", and to actualize this moral agency in "internal, voluntary and free acts."

Whether today it is possible to rescue a "moderate" version from the "radical" natural law tradition is contested.[28]

> I have always found it appropriate to distinguish between an ontological, dogmatic or radical Natural Law, which defends a metaphysically objectivistic order from which absolute and extemporal values may be deduced; and a deontological, critical or moderate Natural Law, which does not deny legal character to unfair Positive Law, but establishes certain criteria in order to assess such a regulation and therefore set grounds for its criticism and substitution by a just system.[29]

Pope Francis certainly has shifted the emphasis from sexual morality to the major global crises and global injustice, even though he faces constant attacks by the "traditionalists" who, like prominent bishops in Poland, Hungary, or the USA, are close to the nationalist movements in their countries. I hold, however, that even Pope Francis' understanding of his central theological concept, mercy,[30] overlooks the tension between the radical-dogmatic and the deontological-ethical interpretation of Catholic morality: it still does not succeed in shifting the political theology that is tied to the neo-scholastic natural law tradition towards what Luño called its "deontological, critical, and moderate" interpretation. Rather, Pope Francis shifts the focus from theory to practice, from orthodoxy to orthopraxis, orienting doctrine towards a *pastoral* interpretation of norms. The problem with this move is the difficult relation between the metaphysical order of be-

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28 For a discussion cf. L. Sowle Cahill/H. Haker/E. Messi Metogo, Concilium 4 (2010).

29 A.-E. Pérez Luño, *Natural Law Theory in Spain and Portugal*, 12.

30 Pope Francis, *The Church of Mercy. A Vision for the Church*, Chicago 2014. His approach owes much to Walter Kasper's book from 2012 (translated 2014): W. Kasper, *Mercy: The Essence of the Gospel and the Key to Christian Life*, New York/Mahwah, NJ 2014.

ing that includes the natural law, the interpretation of natural rights that can be translated into human rights, and the interpretation of the requirements of justice, which is a question of political ethics. As long as the concept of mercy is formulated in analogy to the 'pardoning' power of a judge, applied to the ecclesial-legal framework of Canon Law that is otherwise untouched by such acts of (pastoral, yet paternalistic) mercy, the broader ethical concept of justice is still reduced to its quasi-legal interpretation. The pastoral solution that Francis puts forward in several areas of conflict, such as divorce, homosexuality, or the use of contraceptives, still rests upon the authority of the Pope. It does not shift the emphasis from the moral authority represented by the Magisterium to a political ethics that is centered on moral freedom and the collective responsibility for justice, that, as I argue, can only be achieved in the renewal of Catholic social ethics in the form of a critical political ethics.[31]

3. *Laws and Justice Reconsidered*

The Catholic Church in the USA regards some US laws in contradiction with the moral order of the Natural Law. Among these are the death penalty, the right to abortion, or the same sex marriage law. It does not matter right now whether one agrees with these judgments or not – the question is whether the generalized reference to the "objective order of human relations"[32] suffices as ultimate criterion of these judgments. Heiner Bielefeld, human rights scholar and former UN Rapporteur for Human Rights, warns that a nondiscriminatory protection of religious freedom – i. e. the protection of *all* religions – is only possible in a secular state. Bielefeld argues that religious freedom rights must not be limited abstractly but strictly in view of concrete conflicts.[33] This warning, I would hold, can serve as a guide to the current treatment of the religious freedom rights in the USA, especially regarding Islam and any minority religion. Political decisions are, as we know, based on compromises – but so-called *inalienable* or *basic* rights are *exempt* from these compromises. No rights framework, however, can tell us how to prioritize between basic rights in given conflicts – they cannot anticipate the contexts in which these conflicts may arise. It is the task of practical moral reasoning and juridical reasoning to offer such prioritizations, taking into consideration the circumstances and available options. *Beginning* rather than ending the work of discernment of responsibility in view of human rights, Catholic ethics can turn to

31 I. M. Young, *Responsibility for Justice*, Oxford/New York 2011. Cf. chapter 13 in this volume for a discussion of solidarity,and justice.

32 International Theological Commission, 2009, No. 92, cf. complete quote above.

33 H. Bielefeldt, *Bedrohtes Menschenrecht. Erfahrungen mit der Religionsfreiheit*, in: Herder Korrespondenz 60/2 (2006), 65–69.

its own rich tradition of contextual practical reasoning: *prudence, remembrance, docility, caution, foresight*, or the regard for *circumstances* are called middle principles for a reason: they support the concrete normative assessments in a given situation – sometimes as concrete as a baker's concern who does not want to bake a wedding cake for a gay couple, the issue at stake in one prominent US lawsuit on the religious exemptions in matters of the same sex marriage law. Ultimately, however, the courts must secure the equality of citizens under the one rule of law. DH explicitly affirms this as the duty of the state.[34] The current lawsuits in the US, however, show that equality is indeed at stake. It is here that the Church's claim to be the teacher of the truth, obliged "to declare and confirm by her authority those principles of the moral order which have their origins in human nature itself"[35] reaffirms the "objectivist" position, to wit that the *Church*, not the state, is the arbiter of moral conflicts.

It fosters this perception a) by using the power of its public voice and affiliation with political groups, and b) by expanding the already granted religious exemptions from the law to ever-more areas of social life. Yet, in these debates, theologians have – our ought to have – a crucial role: *first*, they must critique the priorities in the debate on religious freedom. If today Islam is the target of multiple attacks, fostered and amplified by the US Administration's rhetoric, its policies, and the shifts in the laws, Christians are indeed obliged, in the name of the right to freedom of religion, to speak up and stand with all those groups and individuals under attack. *Second*, theologians must contribute to the concrete judgments brought forward in legal cases. Human rights, including religious freedom rights, are never entirely captured by legal rights. The legal perspective must be constantly correlated to morality, and potentially critiqued in view of the broader moral perspective that emphasizes human dignity and justice. When the Church judgments are considered wrong for ethical reasons (as I believe they are with respect to many questions of sexual and gender ethics), Christian ethicists must speak up – and the Church must listen to them in the "forum internum". *Third*, theologians must remind the Church, in its role as an authority in conscience formation, that the moral beliefs of all moral agents are protected *theologically*, as freedom of conscience.[36] *Finally*, theologians must bring to light the underlying

34 "Finally, government is to see to it that equality of citizens before the law, which is itself an element of the common good, is never violated, whether openly or covertly, for religious reasons. Nor is there to be discrimination among citizens." Pope Paul VI, December 7, 1965, No. 6.

35 Ibid. No. 14.

36 It should be noted that the medieval natural law tradition, too, insists on the freedom of conscience, as does the Catechism of the Catholic Church – however, both treat it in the contexts of an 'erring conscience', referring to the objective moral order. Cf. the quote from *Dignitatis Humanae* on the freedom of conscience above.

double-faced political theology that threatens not only the equilibrium between the secular state and religions but also revises the hard-won reforms of the Vatican II Council.

Leslie Griffin, who has examined the recent lawsuits of religious freedom in the USA, offers a pointed analysis of the current conflicts of religious freedom rights.[37] As she has shown, the US Supreme Court and multiple state laws go along with an argumentation presented by and large by the Catholic Church and several Protestant denominations, which in my view questions the foundations and principles of the church-state relation. Under the headline of "religious exemptions", Christian groups promote a broad non-compliance with some laws, dismissing the discrimination claim as irrelevant or secondary to religious freedom rights. Exempting a religion (or any group) from a law that *itself* guarantees equal rights – as is the case in the equal marriage law, for example – undermines, however, the very purpose of the law, namely to secure a just order. In the USA, it also undermines the authority of the US Supreme Court that is regarded as subordinated to the authority of the Church. This creates a contradiction that the court cannot tolerate: standing with the discriminated groups that ought to be protected by the law *and* with the group that argues for religious exemptions in the name of a "higher" cause is impossible. The criticized practices – use of contraceptives, reproductive rights, right to marry – must be accessible and open to *all* citizens; the principle of equality does not allow for unequal access lest it creates new injustices. However, because the Christian groups see a conflict between the positive law, the natural law, and eternal or divine law, they claim to have the duty not to abide by certain laws.

Over the last years however, religious groups, the Catholic Church's hospitals, schools and universities affiliated with Christian denominations ask for exemptions from the rule of law claiming their religious freedom rights. Since an affirmative Supreme Court decision on such a case (the so-called Hobby Lobby case that concerned a Christian company), more and more companies or corporations join the call to claim religious freedom rights, affecting all of their employees, broadening the scope ever-more to employees, students, and any staff. In effect, these groups are, for example, denied coverage of contraceptives, healthcare benefits for their partners, and other benefits. Through these practices, employers try to *force* particular *moral* norms upon their members and/or clients that are considered otherwise *illegal*. The proponents of the religious exemption turn this argument around; as the International Theological Commission (quoting Augustine and Thomas Aquinas) pointedly states: "If the law is not just, it is not even a

37 L. C Griffin, *Religious Freedom, Human Rights, and Peaceful Coexistence*, in: Loyola University Chicago Law Journal 50 (2018), 77–105.

law."[38] This attitude reflects not only a potential conflict between morality and legality but threatens to rise to contempt of the rule of law. With respect to the forum internum, however, this move is also problematic, risking to immunize a particular interpretation of Christian ethics against any questioning and/or deliberation.

I certainly do not want to argue that laws are always just. I agree, for example, with the Catholic Church's position on the death penalty, on Pope Francis' critique of current international migration and refugee policies, or the overall disregard for poverty, and the racial and/or religious discrimination of minorities. I also agree that physicians and prison staff, for example, should have the conscientious freedom right to refrain from killing or torturing of prisoners – just as physicians and nurses have the right to conscientious objection in the case of abortion which in their view violates their convictions. Yet, this *moral* right, extending to members of religions, has never been interpreted in such a way that the Church prohibits chaplains, for example, to *minister* to prison or medical staff because it would make them complicit with a practice regarded as morally wrong. Complicity, however, is exactly the argument used in the cases of ministry or counseling regarding reproductive health services: it has been argued that Catholic doctors must not even inform their patients of the legality and availability of reproductive services that conflict with Catholic moral norms. Civil disobedience may, in extreme cases, be indeed an obligation – but those who disobey the laws normally *acknowledge* their transgression, bearing the consequences of legal prosecution. If the conscientious objection is assumed on an institutional level, it may indeed threaten the rule of law from the perspective of the state. The current politicization of religious freedom could be seen as an attempt by Christian groups and the Catholic Church to have their cake and eat it, too: resisting the law of the land with the blessing of the courts.

From the perspective of a moderate Natural Law ethics, the above-quoted sentence: "if the law is not just, it is not even a law" can be reformulated in the following way: "If a law violates the dignity and rights of human beings, it cannot be just." In this case, the conscientious objection concerns the concrete violation of rights – rights that the Church and the State both need to adhere to and must be able to argue for. In order to answer whether a law does indeed violate the dignity and rights of individuals, legal *and* moral judgments must be exchanged: the courts are not the only institution tasked with the question of justice, provided by the law; certainly, ethicists are, too, schooled in providing practical judgments. If both sides – ethics and the law – agree that justice cannot contradict human dignity, spelled out in the plurality of human rights, the conflicts concern, most like-

38 International Theological Commission, 2009, No. 91, cf. complete quote above.

ly, the priorities of rights. In the case of same-sex marriage, this would be the claim to be discriminated against over against the right to religious freedom. Ethically speaking, both sides must be willing to acknowledge the other side's claim; if they cannot find a solution, it is not the Church but the court who must decide which right has a priority in the given concrete case, in the given context, and for the persons who are affected by the decision.

The current wave of populist nationalism, intertwined with a (white) Christian identity politics, however, reveals another problem that looms in the shadow of these current expansion of religious freedom rights: political offices seem to increasingly privilege one particular religious tradition, namely the Christian tradition, while discriminating against another, namely Islam. In the USA, the defense of a particular religious identity in the name of religious freedom rights is increasingly echoed by a state-driven political theology – clearly violating the principle of neutrality that has guided the modern discourse on the relationship of religion and state. According to the White House website, the Trump Administration aggressively promotes religious rights; while the website does not state it, most of the measures take up the demands of conservative Christian groups.[39] It renders the specific policies a part of the broader political agenda, namely blending the nationalist politics with a Christian identity. Historically, this is not unprecedented, and Christians should be aware of their own historical experiences, especially those of the 20th century. It remains to be seen whether the Trump Administration's politics resembles more Franco's strategy to embrace the dominant religion with their consent and support, or whether Christians are merely lured into the belief that the President of the USA will fulfill their own agenda while he is, in fact, only pursuing his own agenda of a populist nationalist politics. In both cases, Christians cannot invoke DH.

Conclusion

Religious freedom is a precious right, securing the dignity of persons and the rights of religious groups to exercise their beliefs both privately and publicly. Regarding its own moral teachings, the Catholic Church that I have primarily addressed in this essay must adhere to its own principle of moral freedom. When religious groups force their beliefs or practices upon citizens, employees, clients, or patients, even though these concern rights otherwise protected by the state law, they conflate morality with a law-like status that moral norms do not have. Moral conflicts require practical moral reasoning. One of the greatest insights of the concept of dignity, as it is spelled out in the medieval tradition already, is that the

39 *President Trump Has Been a Champion for Religious Freedom, Feb. 8, 2018*. https://www.whitehouse.gov/briefings-statements/president-trump-champion-religious-freedom/

conscience of the moral agent, not the authority of the Church, is the ultimately reference that a person must abide by. If the positive law of nation-states and justice always coincided, legal reforms would be unnecessary. The space for dissent to laws is the civil sphere; the space for moral dissent is the conscience of the moral agent.

When individuals are discriminated against in their dignity or freedom, the state must intervene – and secure the rights, be they religious or non-religious. At times, the state *must* constrain or limit the freedom rights of a religious group in order "to protect the rights of other basic rights and supreme goods", as the German Constitution, in line with many other international Conventions, aptly states. All this is in line with DH. With Heiner Bielefeld, I hold that conflicts of human rights must be addressed only in view of concrete conflicts between human rights, not on the basis of a general exemption clause. In the case of reproductive rights and marriage – the two major conflicts we are dealing with right now in the USA – I would hold that the state must limit religious freedom rights. The argument that certain (lawful) practices are offenses to religious values is not sufficient for Christian groups to be exempted from legal requirements; in fact, many people are often offended by certain laws and still need to abide by them. In many cases, religious people (or religious organizations, or the Catholic Church) are not *directly* affected in the exercise of their religion by the lives or conduct of others, while in contrast, people on the other side – women, those who identify as homosexual, transgender, or gender-non-conforming – are *directly* affected by the often discriminatory tone in the discussion and certainly by the acts and practices of members of some religious communities. As long as their conduct is lawful, these groups, already vulnerable to discrimination, must be protected by the state. And even if laws were to change, their human rights are guaranteed by the Universal Declaration of Human Rights. In Europe, every citizen who belongs to the 47 member states of the Council of Europe (hence much larger than the European Union that currently has 28 member states) can call the European Court of Human Rights, located in Strasbourg. The same mechanism does not exist in the USA, but it demonstrates that states have mechanisms at hand to secure that human rights cases are heard in addition to national laws. In many conflicts, it may well be possible that compromises can be found without going to court; after all, this is what prudent practical moral reasoning would call for. Likewise, both sides may escalate the conflict and use their arguments strategically. It is then up to the courts, both national and international ones – the only authority in a polity that decides on legitimate and illegitimate (not necessarily just or unjust) laws – to secure that the rights of individuals are guaranteed.

The public space is never empty; it is always already "occupied" and filled with many voices who compete in their narratives of "good" and "bad" visions of life,

or "right" and "wrong" practices. Religious freedom – as any freedom – comes with the price of accountability and moral responsibility. For whoever has the privilege of being granted religious freedom – and all other human rights – is obliged in return to fight for the human rights of those whose rights are denied and whose dignity is violated. The "preferential option for the poor and vulnerable", often invoked by the proponents of Catholic Social Teaching, renders the call for exemptions to the service to others – be it health services or anything else – utterly self-centered and defensive. It turns religious freedom into a *privilege* that must be defended against moral strangers or moral enemies. If religious freedom is rescued from such a self-centered reading *and* from its narrow legal interpretation, its ethical dimension, contrary to being a privilege, appears in plain sight: it is the moral freedom as the capability to respond to those whose needs, desires, and rights remain otherwise unanswered.

Religions belong in the public sphere like any other group. However, *because* the public space is never unoccupied, Christians must choose *where* they stand, and *with whom* they stand. The parables of the Gospels, often alluding to the spatial terms of the 'margin' and the 'center', help to discern where to look and whom to attend to. Furthermore, as the most "cosmopolitan" Apostle, Paul, writes in his letter to the Galatians, Christian ethics is indeed an ethics of social integration, calling for the peaceful cohabitation of different groups. For Christians, identity is *not* what matters, nor *should* it matter: "There is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Christ Jesus." (Galatian 3:28). Rather than being an exclusive truth claim of Christianity, it is a radical inclusive statement, not only claiming the *freedom* of Christians but their *liberation* from the concern about privileges that stem from social status, gender, ethnicity, or a particular religion. Here, I would hold, a whole new story of religious freedom was meant to begin, liberating the one-ness in Jesus Christ to the one-ness of the one human family.

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