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# Towards an Understanding of Catholicism and Human Rights

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## **In Memoriam**

In memory of my parents, Michael Taylor 19<sup>th</sup> November 1937 – 22<sup>nd</sup> February, 2009 and Christine Taylor (nee Hayes), 25<sup>th</sup> March 1944 – 25<sup>th</sup> May, 2007. This thesis is dedicated to them with my loving gratitude, and who remain a constant source of joy.

## **Declaration**

I, Leonard Taylor, certify that this thesis is all my own work and that I have not obtained a degree in this University or elsewhere on the basis of this work.

Signed \_\_\_\_\_

Dated \_\_\_\_\_

## Acknowledgements

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In writing this thesis I undertook a lengthy journey of research and learning to understand the history of Catholic political thought and the human rights project. It was a journey that addressed international law, human rights and sovereignty, and the conceptual links with Christianity from the medieval period to the modern. That in itself has been an exceptional process of discovery and cause for much reflection.

I will always be extremely grateful to my supervisor Kathleen Cavanaugh, who believed in this undertaking from the get-go. Her calm, patient support and perseverance to develop academic excellence in research is a real example and inspiration. I would like to thank the many staff of the Irish Centre for Human Rights, from whom I drew inspiration, particularly Prof. Ray Murphy, and Dr. Shane Darcy. I would also like to thank Dr. James Chappel and Dr. Hans-Martien ten Napel for helpful comments on parts of this thesis. Over the years I have met many wonderful fellow students who have been great companions along the way, especially those who took part in our monthly doctoral forums. It became a place to germinate new ideas and share our observations but also to build great friendships from around the world.

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## A. Introduction and Research Rationale

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International law has a standard account of the nature of international law and human rights. Thirlway states that ‘all subsystems or specialized fields of international law will operate on the basis that they derive their force from the established sources of Article 38 of the ICJ Statute’.<sup>1</sup> Therefore, religion does not provide international law with an established source, and ‘in principle, the individual legal, political, or religious system of a State does not impinge on its acceptance of, and compliance with, general international law’.<sup>2</sup> Further Thirlway remarks, since ‘the waning of the influence of the teachings of the Catholic Church on moral and legal concepts, it has become possible for at least half a century to say that international law is now free from any religious input— that it is ‘laicized’’.<sup>3</sup> The formal sources of international law, which are by in large viewed as a pragmatic agreements founded in a secular positivistic legal science developed since the 19<sup>th</sup> century, has had to engage again with religion in a manner that was unanticipated.<sup>4</sup>

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<sup>1</sup> Hugh Thirlway, *The Sources of International Law* (Kindle edn., Foundations of Public International Law; Oxford: Oxford University Press, 2014). 25. See Statute of the International Court of Justice, Article 38(1):

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, [i.e. that only the parties bound by the decision in any particular case,] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

<sup>2</sup> Mashood A. Baderin, 'Religion and International Law: Friends or Foes?', *European Human Rights Law Review*, (641). Baderin observes the,

[...] adoption of the United Nations Charter in 1945 can be described as the climax in the formal substantive secularisation and politicisation of modern international law, as none of its provisions refer directly to religion as a legal or normative source of international law, except for its provisions on prohibition of religious discrimination.

See also Thirlway, *The Sources of International Law*. 27. Thirlway points to Islamic law as distinctly problematic for this system:

There is, however, one system of law operating on a supranational or international level that presents problems that are not easily soluble by application of the principles just stated: Islamic law. This system is supranational of its nature, being addressed, as a minimum, to all who accept Islam, and supranational in its operation, being adopted and applied by a considerable group of sovereign States.

<sup>3</sup> Thirlway, *The Sources of International Law*. 26-27.

<sup>4</sup> See for instance Philip Alston, 'Book Review. Does the Past Matter? On the Origins of Human Rights', *Harvard Law Review*, 126 (2012). 'The norms invoked by the international movement are not natural law norms but derive from custom and treaties made by states [...]'. David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', *Nordic Journal of International Law*, 65/3/4 (385-420). 387. The field of international law 'has typically understood its progress from nineteenth century philosophical preoccupations and classical doctrinal formalism to twentieth century cooperative pragmatism in political terms'. See also M.G.S. Rovira, *The Project of Positivism in International Law* (Oxford: OUP Oxford). Martti Koskeniemi, *From*

That paradoxical arrival of a Christian and Catholic rights based tradition in the early 20<sup>th</sup> century problematises histories of international law and human rights. An historical presentation of the emergence of international law tends to move progressively from Grotius and the Enlightenment period of natural rights, toward the 19<sup>th</sup> century's classical formulations of international law.<sup>5</sup> From there an account of the development of international law from the League of Nations to the construction of the United Nations after World War II and the process of building institutions and international mechanisms, agreeing treaties and establishing Courts to settle disputes, unfolds. In that advancing era for international law and politics, it initiated an alignment of global institutions included the participation of the human rights project, bringing rights ideas into its normative assumptions.<sup>6</sup> Nevertheless, this account creates its own boundaries, setting some normative values at the centre and others to the periphery. One striking question that drives this thesis is how religion moved, and continues to move, across and through that standard narrative, from the centre to the periphery. It is because Catholicism played such a formative role in the construction of Western legal culture that it became the focal point of this enquiry. The account of international law from its origin in the treaties of Westphalia, and located in the writing of the Grotian tradition, had lost contact with another history of international law that reappeared with the growth of the early 20<sup>th</sup> century human rights movement. This thesis seeks to relocate and reunite that history of law and political theory that has shadowed this dominant narrative.<sup>7</sup> Western legal culture had looked to the Christian religion for its foundational ideas, and at the beginnings of the human rights movement returned to that moral vocabulary to ground the further growth of international order in the 20<sup>th</sup> century. In recognising this technique of

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*Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press). 131. See the following on religion in modern politics, Scott M. Thomas, *The Global Resurgence of Religion and the Transformation of International Relations* (New York: Palgrave MacMillan). 24-25. The re-emergence of public religion has challenged the 15<sup>th</sup> century concept of religion that began to emerge in Europe, 'as a universal, inward impulse or feeling towards the divine common to all people'. Peter L. Berger, *The Desecularization of the World : Resurgent Religion and World Politics* (Washington, D.C. Grand Rapids, Mich.: Ethics and Public Policy Center; W.B. Eerdmans Pub. Co.) viii, 135 p. 2. Peter Berger suggests the 'assumption that we live in a secularized world is false. The world today, with some exceptions [...], is as furiously religious as ever, and in some places more so than ever'. See also Fabio Petito and Pavlos Hatzopoulos, *Religion in International Relations: The Return from Exile* (New York: Palgrave MacMillan). Daniel Philpott, 'Has the Study of Global Politics Found Religion?', *Annual Review of Political Science*, 12/1 (183-202). and Erin K. Wilson, *After Secularism : Rethinking Religion in Global Politics* (Basingstoke: Palgrave Macmillan) viii, 222 p.

<sup>5</sup> Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*.

<sup>6</sup> Standard international law text books view human rights law in this standardised way, see Ian Brownlie, *Principles of Public International Law* (Oxford Oxford University Press). Antonio Cassese, *International Law* (Oxford: Oxford University Press). Martin Dixon, *Textbook on International Law* (Oxford Oxford University Press).

<sup>7</sup> Martti Koskeniemi, 'Expanding Histories of International Law', *American Journal of Legal History*, 56/1 (104-12). 106.



periodically returning to Western legal culture, this thesis endeavours to provide a more complete account of understanding the human rights project that factors in the contribution Catholicism made to a general theory of sovereignty, international law and human rights.<sup>8</sup> Engaging this broad canvas is necessary, as Koskenniemi argues as, 'it is very hard to see the 'international' apart from through state centric lenses'.<sup>9</sup> Koskenniemi observes, 'merely to examine statehood may even leave the most interesting and powerful phenomena responsible for the organization of life on the globe invisible'.<sup>10</sup> And,

As long as we are preoccupied by states, we miss something of perhaps even greater importance, something that gives statehood its substance, directing it in particular ways, and accounting for our own ambivalence about the moral value or explanatory force of statehood as a principle of human organization. State-centrism in the histories of international law may also contribute ideologically by making it harder to have a full grasp of the mechanisms of global politics.<sup>11</sup>

Viewing institutional Catholicism as a liminal international actor and a "fringe player" acknowledges that the driving forces that creates international order, and develops international law, is not always visible but located in the deeper history of international legal culture.<sup>12</sup> Therefore, this thesis engages with the process of the laicisation of law, and scrutinises the standard narrative by striving to establish how international law became involved in a partial turn back towards a Catholic natural law tradition, which made a contribution to the development of modern international law through the process of defining human rights. That contribution implies relating the history of international law's roots in older categories and traditions that those located in the 19th and 20<sup>th</sup> century, which allowed a fusion of two quite different traditions: the positive law tradition developed from the Enlightenment's natural rights tradition, and the Catholic natural law tradition.<sup>13</sup> It

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<sup>8</sup> See John Witte and Frank S. Alexander, *The Teachings of Modern Roman Catholicism on Law, Politics, and Human Nature* (New York ; Chichester: Columbia University Press) xxxiii, 499 p. xxx.

<sup>9</sup> Koskenniemi, 'Expanding Histories of International Law', (108)

<sup>10</sup> Ibid.108.

<sup>11</sup> Ibid.108. Here Koskenniemi is especially focused on economics as it impacts on statehood, and observes that 'while international legal histories have meticulously traced the legal trajectories of the foreign policy of states, they have paid much less attention—virtually no attention—to the private law relations that undergird and support state action [...]'. Yet it could be added that religion is also generally excluded from that telling of legal history.

<sup>12</sup> M. Mälksoo, 'The Challenge of Liminality for International Relations Theory', *Review of International Studies*, (481).

J. Batora and N. Hynek, *Fringe Players and the Diplomatic Order: The 'New' Heteronomy* (Palgrave Macmillan).

<sup>13</sup> Michael J. Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge: Cambridge University Press).

also implies engaging with authors who would not be considered found among ‘the teachings of the most highly qualified publicists of the various nations’, or those who would provide a ‘subsidiary means for the determination of rules of law’.<sup>14</sup> Nevertheless, underlining the emergence of human rights law, initiated in the Universal Declaration of Human Rights (hereinafter UDHR), are principles drawn from the Enlightenment and European religious traditions. As this thesis proposes, it would seem there was a fusion of those two very different traditions in the development of the UDHR, one from a liberal Enlightenment tradition and another from a conservative Christian rights based tradition. It is this point, identified by the legal historian Samuel Moyn, which underpins this thesis; the paradoxical arrival of a Christian rights based tradition into a predominantly secular and positivistic legal discourse.<sup>15</sup> The writing of Jacques Maritain is central to this enquiry because of his pivotal role as intermediary between Catholicism’s political, legal and theological thought and the modern legal and democratic project that emerged in Europe. Similarly, the development and role of Christian democracy in shaping European sensibilities and ideas about the future of Western democratic project is reconsidered.

An outcome of this enquiry is to recognise, as Koskenniemi has shown, that international law did not completely exclude the idea of natural law, even as jurists emphasised legal positivism in the 19<sup>th</sup> century.<sup>16</sup> If natural law waned in influence, though it was disseminated partially by the thought of Grotius and Vattel, natural law theory nevertheless had potential to arise in a new context.<sup>17</sup> A return of natural law thought would seem to abandon ‘the liberal distinctions between morality/law, or imperfect/perfect rights, and reopening the early faith/sin debate which it was the purpose of the classical [legal] discourse to close’.<sup>18</sup> However, that debate did reopen with the construction of an argument for human dignity and human rights at the start of the 20<sup>th</sup> century originating by-in-large in Catholic political thought. Catholic jurists and philosophers regained access to the development of international law, not to restore the faith/sin distinction but to resolve the problem of the political form of the state in the western legal tradition

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<sup>14</sup> See Statute of the International Court of Justice, Article 38 (1) (d).

<sup>15</sup> Samuel Moyn, *Christian Human Rights* (Kindle edn.; Philadelphia: University of Pennsylvania Press, Incorporated).

<sup>16</sup> Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*. 131.

<sup>17</sup> Koskenniemi, 'Expanding Histories of International Law', (105). However, Koskenniemi writes, When Georg Friedrich Martens produced his first textbook on international law in Göttingen in 1788, he did this in order to depart from the declining tradition of natural law at German universities and to offer his students a more practical type of instruction in the technical aspects of foreign policy statecraft. In this, he was immensely successful [footnotes omitted].

<sup>18</sup> Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*. 131.

in the 20<sup>th</sup> century. Catholic political thought encountered a deeply polemical period about the nature of the state, and the value of democracy, through a confrontation with the jurist Carl Schmitt in the early 20<sup>th</sup> century, leading to a firmer embrace by Catholic academics of Christian democracy. It is argued that foundation led to a Catholic contribution to the human rights project and democratisation of European institutions. Therefore, the ideas of Carl Schmitt also drive this enquiry into how Catholicism understood its relationship to the human rights project.<sup>19</sup>

Catholicism is marked by the paradoxical need to remain the same and constantly reform.<sup>20</sup> In this thesis there is an acknowledgement of the distinct difference between religion, law and politics, even though each discipline contributes to the morality and rhetoric of human rights. While not a theological treatise, this thesis acknowledges that to understand Catholicism, there is a need to draw upon the moral and theological sources that are familiar to an academic theologian. There are a variety of ways to understand Catholicism, and yet it is difficult to provide one definitive text to critically explain a religion that is both deeply political and profoundly religious.<sup>21</sup> Sociologists,<sup>22</sup> political scientists,<sup>23</sup> historians,<sup>24</sup> legal

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<sup>19</sup> Every effort is made to untangle the relationship between political theology and political Catholicism. This is a distinction emphasised as an outcome of Catholic theological debate with Carl Schmitt. See James V. Schall, *Roman Catholic Political Philosophy* (Lexington Books, 2004), 48. James Schall describes the place of Christianity in politics as a philosophical one. See also P. Scott and W.T. Cavanaugh, *The Blackwell Companion to Political Theology* (Wiley, 2006). (Kindle Edition.) Kindle Location 65. The Political is broadly described as 'the use of structural power to organize a society or community of people'. A definition of political theology is therefore, 'the analysis and criticism of political arrangements (including cultural-psychological, social and economic aspects) from the perspective of differing interpretations of God's ways with the world' (Kindle Locations 67-68). Another kind of political theology which Scott and Cavanaugh identify, is one which view theology and politics as 'essentially similar activities; both are constituted in the production of metaphysical images around which communities are organized' [emphasis added] (Kindle Location 75). They see therefore the task of political theology as 'exposing the false theologies underlying supposedly "secular" politics and promoting the true politics implicit in a true theology' (Kindle Location 77). Scott and Cavanaugh outline the uniqueness of political theology from that of secular discourses in politics, stating: What distinguishes all political theology from other types of theology or political discourse is the explicit attempt to relate discourse about God to the organization of bodies in space and time (Kindle Location 79-80).

<sup>20</sup> The terms Catholicism, the Catholic Church, and Catholics are used to describe in turn the religion, the institutional Church, its hierarchy and administration, and lay and clerical members of the Catholic Church. The title Roman Catholicism is not used, although it is acknowledged this title is often used to describe post-Reformation Catholicism that adheres doctrinally to the Magisterium of the Catholic Church. More broadly other Christian Churches use the title Catholic to identify with doctrinal teachings of the Nicene Creed and other statements of the early Christian Church, or doctrines existing prior to the Reformation (1517–1521 ad) or prior to the Great Schism (1054 ad) in Christianity between East and West. See also Richard P. McBrien, "'Roman Catholicism": E Pluribus Unum', *Daedalus*, 111/1 (73-83). See also John D. Dadosky, 'Who/What Is/Are the Church(es)?', *The Heythrop Journal*, 52/5 (785-801). and John P. Boyle, *Church Teaching Authority: Historical and Theological Studies* (Notre Dame: Univ. of Notre Dame Press).

<sup>21</sup> There are standard texts produced by the Catholic Church, and Catholic theologians to set out the basic doctrinal and pastoral teaching of Catholicism, see Catholic Church., *Catechism of the Catholic Church* (Dublin: Veritas). Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Catholic Church* (Washington: USCCB Publishing). Vatican Council II, 'Gaudium Et Spes (Pastoral Constitution on the Church in

experts,<sup>25</sup> and multiple other professions all approach the position of Catholicism in the world from various perspectives.<sup>26</sup> Each seeks to narrate the fascinating and compelling history and often unwillingly reveal the continuing relevance of a religion that has become a global creed.<sup>27</sup> These competing narratives necessitate an interdisciplinary approach which while primarily drawing from law also engages with historical research on political Catholicism, and also draws from sociology and political science. Archival and literature review, is undertaken to assist in identifying key concepts and ideas, with a view of understanding the transition of Catholicism towards the human rights project and democratic principles. Applying a range of approaches is necessary not alone to understand how Catholicism approaches human rights in the way it does but why it has taken a particular approach to the human rights project. This does not exclude critiques of those perspectives but rather it is undertaken with a view to pursuing and understanding various historical strands of thought, so it is hoped to provide an approach that is better suited to evaluate those criticisms. Past research on human rights and the Catholic Church is

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the Modern World)', *Acta Apostolicae Sedis*, 58 (1025-115 see also P. Hünermann et al., *Compendium of Creeds, Definitions, and Declarations on Matters of Faith and Morals*, ed. P. Hünermann (Ignatius Press, 2012). For example, Pope Benedict XVI, *Called to Communion: Understanding the Church Today* (San Francisco Calif.: Ignatius Press) 165 p. Matthew L. Lamb and Matthew Levering, *Vatican II: Renewal within Tradition* (Oxford; New York: Oxford University Press) xxiv, 462 p. Avery Dulles, *Models of the Church* (1st edn.; Garden City, N.Y.: Doubleday) 216 p. I. Linden, *Global Catholicism: Pluralism and Renewal in a World Church* (Columbia University Press).

<sup>22</sup> Linda Woodhead, 'Christianity', in Linda Woodhead et al. (eds.), *Religions in the Modern World. Traditions and Transformation* (London/New York: Routledge, 2002). See also Michelle Dillon, 'Roman Catholicism' in Mark Juergensmeyer and Wade Clark Roof, *Encyclopedia of Global Religion*, 2 vols. (Los Angeles Calif.; London: SAGE). 1092. David Martin, *The Future of Christianity: Reflections on Violence and Democracy, Religion and Secularization* (Ashgate, 2011). On the particularities of European secularism, see also Grace Davie, 'Religion in 21st-Century Europe: Framing the Debate', *Irish Theological Quarterly*, 78/3 (August 1, 2013, 279-93. Grace Davie, *Europe - the Exceptional Case: Parameters of Faith in the Modern World* (Darton Longman & Todd).

<sup>23</sup> José Casanova, 'Global Catholicism and the Politics of Civil Society', *Sociological Inquiry*, 66/3 (1996), 356-73. Paolo G. Carozza and Daniel Philpott, 'The Catholic Church, Human Rights, and Democracy: Convergence and Conflict with the Modern State', *Logos: A Journal of Catholic Thought & Culture*, 15/3 (Summer 2012), 15-43. and James V. Schall, 'Fides Et Ratio: Approaches to a Roman Catholic Political Philosophy', *Review of Politics*, 62/1 (Winter 2000 2000), 49. John Witte and M Christian Green, *Religion and Human Rights: An Introduction* (Kindle edn.; Oxford: Oxford University Press, 2011).

<sup>24</sup> Moyn, *Christian Human Rights*. See also Udi Greenberg, 'The Origins of Christian Democracy: Politics and Confession in Modern Germany', *Politics, Religion & Ideology*, 16/2-3 (2015/04/03 2015a), 326-29. John Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958* (OUP Oxford). Gerd-Rainer Horn and E. Gerard, *Left Catholicism 1943-1955: Catholics and Society in Western Europe at the Point of Liberation* (Leuven Leuven University Press).

<sup>25</sup> Mary Ann Glendon, 'The Influence of Catholic Social Doctrine on Human Rights', *Journal of Catholic Social Thought*, 10/1 (2013), 69-84. Christopher McCrudden, 'Catholicism, Human Rights and the Public Sphere', *International Journal of Public Theology*, 5 (2011), 331-51. Perry, *Toward a Theory of Human Rights: Religion, Law, Courts*.

<sup>26</sup> For a helpful overview see Witte and Alexander, *The Teachings of Modern Roman Catholicism on Law, Politics, and Human Nature*.

<sup>27</sup> Conrad Hackett and Brian J. Grim, 'Global Christianity: A Report on the Size and Distribution of the World's Christian Population', (Washington, D.C.: Pew Research Center's Forum on Religion & Public Life). See also Thomas, *The Global Resurgence of Religion and the Transformation of International Relations*.

mainly addressed through the prism of the Catholic Church's extensive social justice tradition.<sup>28</sup> They have sought to inspire interaction with the human rights project as a social justice and moral commitment. However, those approaches have not sought to engage with the historical and international legal perspective of the human rights project.<sup>29</sup> Against this backdrop this thesis seeks to fill the space between the disciplines of international law, human rights and its associated discourse with Catholicism, both institutionally and as a political and legal engagement with the modernising state.

## **B. My name is *Eutopie*: a place of felicity. Background and Methodology.**

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Reflection on the natural of law and its genealogy has many precedents, which include the mythical search for Utopia, where law and nature exist in perfect harmony. Thomas More wrote poetically of the island of Utopia, 'my name is *Eutopie*: a place of felicity', it is a place of happiness (*eu-topos*) that could be somewhere and nowhere (*ou-topos*) at the same time.<sup>30</sup> Thomas More chose satire to offer a profound reflection on the nature of law, and to provoke thought about how the workings of law might be associated with the promise of a just world. Histories and historiographies about human rights have increased in the last

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<sup>28</sup> For a good overview see Kenneth R. Himes and Lisa Sowle Cahill, *Modern Catholic Social Teaching : Commentaries and Interpretations* (Washington, D.C.: Georgetown University Press) xii, 563 p. Catholic Social thought is often said to begin with Pope Leo XIII, 'Encyclical Letter Rerum Novarum ', *Leonis XIII P.M. Acta, XI, Romae* (Rerum Novarum, May 15, 1891, 97-144. More formal sources are found in Pope John XXIII, 'Pacem in Terris', *Acta Apostolicae Sedis*, 55 (§ 28). See also Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Catholic Church*. and International Theological Commission, 'In Search of a Universal Ethic: A New Look at the Natural Law ', (Vatican: Congregation for the Doctrine of the Faith). also Archbishop Roland Minnerath, 'Catholic Social Doctrine and Human Rights, the Proceedings of the 15th Plenary Session of the Pontifical Academy of Social Sciences', in Roland Minnerath, Ombretta Fumagalli Carulli, and Vittorio Possenti (eds.), *Catholic Social Doctrine and Human Rights* (Vatican City: Pontifical Academy of Social Sciences). Ombretta Fumagalli Carulli, Roland Minnerath, and Vittorio Possenti, 'Catholic Social Doctrine and Human Rights: Final Statement', *ibid.*(15th Plenary Session). See also David Hollenbach, *Claims in Conflict: Retrieving and Renewing the Catholic Human Rights Tradition* (New York: Paulist Press International). John Finnis, *Natural Law and Natural Rights* (2nd edn., Clarendon Law Series; Oxford ; New York: Oxford University Press) xvi, 494 p. Walter Kasper, 'The Theological Foundations of Human Rights', *The Jurist*, 50 (148-66. Christopher Mccrudden, 'Legal and Roman Catholic Conceptions of Human Rights: Convergence, Divergence and Dialogue?', *Oxford Journal of Law and Religion*, 1/1 (197).

<sup>29</sup> There are many standard accounts of Catholic Social thought, for example see Joe Holland, *Modern Catholic Social Teaching: The Popes Confront the Industrial Age, 1740-1958* (New York: Paulist Press, 2003) xi, 404 p. Charles E. Curran, *Catholic Social Teaching, 1891-Present : A Historical, Theological, and Ethical Analysis* (Washington, D.C.: Georgetown University Press) ix, 261 p. and Himes and Cahill, *Modern Catholic Social Teaching : Commentaries and Interpretations*. Textbook accounts of the tradition include, Joseph Milburn Thompson, *Introducing Catholic Social Thought* (Maryknoll, N.Y.: Orbis Books, 2010) xii, 228 p. and David Matzko McCarthy, *The Heart of Catholic Social Teaching: Its Orgins and Contemporary Significance*, ed. David Matzko McCarthy (Grand Rapids: Brazos Press, 2009).

<sup>30</sup> Thomas More, *Utopia. With an Introduction by Mishtoon Bose.*, ed. Tom Griffith (Kindle edn., Classics of World Literature; Hertfordshire, UK: Wordsworth Editions Ltd, 2013). Kindle Location 2413.

number of years, to lead in the view of some, towards assigning this labour as an epigraph for a declining legal doctrine.<sup>31</sup> However, International human rights law has become part of the established architecture of international law and only increases in integration with general legal ordering of international relations and politics. The presumption of growing acceptance of human rights law's contribution has also led to concern and scepticism about the lack of traction that body of law has to prevent gross human rights abuses internationally.<sup>32</sup>

Efforts to 'traces the origin of the enactment of bills of rights' and to provide a general account of development of human rights have increased in scope and depth.<sup>33</sup> Human rights ideas can be located in a variety of texts associated with cultures and in periods of history, traced as far back as the late bronzes age in Mesopotamia, northern Syria and Anatolia, and even to ancient Irish law.<sup>34</sup> It is proposed that religious sources are similarly interspersed with references to rights and duties ascribed to human behaviour to follow after divine command.<sup>35</sup> O'Donovan notes a narrative of the biblical origin of rights remains problematic including attempts made by Wolterstorff 'to trace the language of rights to biblical

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<sup>31</sup> Samuel Moyn, 'The End of Human Rights History', *Past & Present*, (September 1, 2016. Samuel Moyn and Mp Bradley, 'Substance, Scale, and Salience: The Recent Historiography of Human Rights. Writing Human Rights History.', *Annual Review of Law and Social Science*, 8/1 (2012), 123-40. See also Christopher McCrudden, 'Human Rights Histories', *Oxford Journal of Legal Studies*, 35/1 (179-212. Stefan-Ludwig Hoffmann, 'Human Rights and History', *Past & Present*, 232/1 (August 1, 2016, 279-310.

<sup>32</sup> Alex De Waal, 'Writing Human Rights and Getting It Wrong', *Boston Review* (Online edn., bostonreview.net; Cambridge, MA: Boston Review, June 06, 2016). Costas Douzinas, 'The End(S) of Human Rights', *Melbourne University Law Review*, 26/2 (08//, 445-65.

<sup>33</sup> Georg Jellinek, *The Declaration of the Rights of Man and Citizen. A Contribution to Modern Constitutional History* (New York: Henry Holt and Co., 1901). See Lynn Hunt, *Inventing Human Rights. A History* (New York: W.W. Norton & Co., 2007). Kindle Locations 167-168.

Human rights require three interlocking qualities: rights must be natural (inherent in human beings); equal (the same for everyone); and universal (applicable everywhere).

Further Hunt proposes:

Human rights only become meaningful when they gain political content. They are not the rights of humans in a state of nature; they are the rights of humans in society. They are not just human rights as opposed to divine rights, or human rights as opposed to animal rights; they are the rights of humans vis-a-vis each other. They are therefore rights guaranteed in the secular political world (even if they are called "sacred"), and they are rights that require active participation from those who hold them (Kindle Locations 172-176).

<sup>34</sup> Amnon Altman, 'Tracing the Earliest Recorded Concepts of International Law. The Near East in the Late Bronze Age (1600-1200 Bce)', *Journal of the History of International Law* 11 (2009), 125-86. See also Brendan Tobin and Michael O'flaherty, 'Ireland: Individual and Group Rights in Ancient Irish Law', in M. Suksi et al. (eds.), *First Fundamental Rights Documents in Europe: Commemorating 800 Years of Magna Carta* (Intersentia, 2015).

<sup>35</sup> Paul J. Martin, 'The Three Monotheistic World Religions and International Human Rights', *Journal of Social Issues*, 61/4 (827. Brueggemann, 'Scripture: Old Testament', and also Christopher Rowland, 'Scripture: New Testament', in E. Phillips, *Political Theology: A Guide for the Perplexed* (T & T Clark). See also Scott and Cavanaugh, *The Blackwell Companion to Political Theology*. Josef Blank, 'The Justice of God and the Humanisation of Man - the Problem of Human Rights in the New Testament', *Concilium*, 124/4 (27-38. Abdullahi Ahmed An-Na'im, 'Islam and Human Rights', in John Witte and M Christian Green (eds.), *Religion and Human Rights: An Introduction* (Kindle edn.; Oxford: Oxford University Press). John Nurser, *For All Peoples and All Nations: Christian Churches and Human Rights* (Georgetown: Georgetown University Press).

and patristic influence'.<sup>36</sup> The history of religion and human rights language provokes three particular problems. Briefly summarised, there is a *political* problem with the language of rights, which engages the late-modern struggle between revolutionary individual rights and conservative sociality as the basis of rights.<sup>37</sup> In the second place, there is a *conceptual* problem with the language of rights, and therefore there arises the difficulty of 'two fundamentally different ways of thinking about justice': justice as inherent rights and justice as right order.<sup>38</sup> Thirdly, there is an *historical* problem: the use of the word ["rights"] in the plural *is not found in the ancient world*.<sup>39</sup> O'Donovan looks to trace 'whether a historical narrative that traces the origin of multiple rights to the Middle Ages is soundly based'.<sup>40</sup> He suggests, the 'narrative of the origins of multiple rights is one of a family of modernity-origin narratives'.<sup>41</sup> Alternatively, human rights have been located in a turn to subjective human rights in the medieval period, and also during the Enlightenment, producing communitarian and individualistic versions, and attributed their origins in both natural law and natural rights.<sup>42</sup> Those investigations give rise to the idea that individual human rights (as a plural noun) were at least anticipated in the Western legal culture and traditions.<sup>43</sup> That inquiry forms part of this thesis, to understand and investigate after a rights based

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<sup>36</sup> Oliver O'donovan, 'The Language of Rights and Conceptual History', *Journal of Religious Ethics*, 32/2 (193–207. 198. See Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton University Press). See also Nicholas Wolterstorff, 'Justice as Inherent Rights: A Response to My Commentators', *Journal of Religious Ethics*, 37/2 (261-79.

<sup>37</sup> Oliver O'donovan, 'The Language of Rights and Conceptual History', *ibid.*32 (193–207. 194 [emphasises included].

<sup>38</sup> *Ibid.* 194 [emphasises included].

<sup>39</sup> *Ibid.* 195 [emphasises included]. To O'Donovan the question of rights language begins in asking: where the question of moral ontology is resolved. The end point of ontology may indeed provide the same conclusions centred on fundamental rights as described in major human rights documents. He suggests the language of rights 'was promoted precisely to challenge our moral intuitions, intending to educate us out of them' (204). Therefore,

The immediate grounds for the late-modern recovery of the revolutionary project, founding justice relations independently of moral order, may have been many, but overall it reveals a despair of how prevailing doctrines (Christianity among them, but also its sickly child Democracy) could ever summon up the intellectual and moral coherence to found a civilization free of brutality. The ebbing sea of faith no longer affording an encompassing meaning, the philosophical and theological quest, hitherto the highest undertaking of mankind, came to seem, in Matthew Arnold's famous phrase, as though "ignorant armies clash by night."

<sup>40</sup> *Ibid.* 196.

<sup>41</sup> *Ibid.* 196.

<sup>42</sup> Brian Tierney, 'Historical Roots of Modern Rights: Before Locke and After', *Ave Maria Law Review*, 23/3 (24) Tierney details how Enlightenment thinkers, 'made a decisive break with the past by introducing a novel concept of individual natural rights that was inherently incompatible with the established tradition of natural law'. See O'donovan, 'The Language of Rights and Conceptual History', (197. See also Steven J Brust, 'Retrieving a Catholic Tradition of Subjective Natural Rights from the Late Scholastic Francisco Suarez, S.J.', *Ave Maria Law Review*, 10/2 (345). Jeremy Waldron, *God, Locke, and Equality : Christian Foundations of John Locke's Political Thought* (Cambridge: Cambridge University Press) xii, 263 p.

<sup>43</sup> O'donovan, 'The Language of Rights and Conceptual History', ( 197.

tradition in Catholicism. From that perspective human rights have been described as founded in alternatives to the Enlightenment tradition. Christian rights based histories can be polemical, as John Witte and Christian M. Green propose,

The human rights regime is not the child of Enlightenment liberalism, nor a ward under its exclusive guardianship. It is the *ius gentium* of our times, the common law of nations, which a variety of Hebrew, Greek, Roman, Christian, and Enlightenment movements have historically nurtured in the West and which today needs the constant nurture of multiple communities, in the West and well beyond.<sup>44</sup>

Similarly, both a theological and secular grounds for human rights have been proposed and debated.<sup>45</sup> There have also been noteworthy searches for the foundations of human rights in a broadly philosophical theory of justice and law.<sup>46</sup> Human rights have also been defined in various ways, both philosophically and through legal definitions.<sup>47</sup> The 1940's is also considered a location where human rights brought together and reassembled rights ideas into a Universal Declaration.<sup>48</sup> During that era, the contribution of protestant Christianity is ably told by John Nurser who records their contribution to the evolution of the human rights idea.<sup>49</sup> Latin American sources have also been identified as contributing to the human

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<sup>44</sup> Witte and Green, *Religion and Human Rights: An Introduction*. Kindle Locations 673-676. In explanation they 'use the antique term *ius gentium* advisedly—to signal the place of human rights as “middle axioms” in our moral and political discourse'. Kindle Locations 678-679.

<sup>45</sup> Perry, *Toward a Theory of Human Rights: Religion, Law, Courts*. Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (Oxford: Oxford University Press). Dohrman W. Byers, 'The Morality of Human Rights: A Secular Ground', *Journal of Law and Religion*, 26 (1. See also Heiner Bielefeldt, 'Secular Human Rights: Challenge and Opportunity to Christians and Muslims', *Islam and Christian-Muslim Relations*, 7/3 (1996/10/01), 311-25.

<sup>46</sup> See Charles R. Beitz, *The Idea of Human Rights* (Kindle edn.; Oxford: Oxford University Press). James Griffin, *On Human Rights* (Kindle edn.; Oxford: Oxford University Press). Amya Sen, 'Elements of a Theory of Human Rights', *Philosophy & Public Affairs*, 32/4 (2004), 315-56.

<sup>47</sup> Seyla Benhabib, 'Moving Beyond False Binarisms: On Samuel Moyn's the Last Utopia', *Qui Parle: Critical Humanities and Social Sciences*, 22/1 (2013), 81-93. 88.

Human rights are the most abstract and foundational principles of a political system built around the rule of law, which then need to be filled with concrete content through the constitutional, legal, and socioeconomic traditions of various polities.

<sup>48</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: Univ of Pennsylvania Press). Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House).

<sup>49</sup> John Nurser and World Council of Churches., *For All Peoples and All Nations : Christian Churches and Human Rights* (Geneva: WCC Publications) xix, 220 p. See also John Nurser, 'The "Ecumenical Movement" Churches, "Global Order," and Human Rights: 1938-1948', *Human Rights Quarterly*, 25/4 (2003/10/30), 841-81. Also on the contribution by Lutheran Frederick Nodde's "The Six Pillars of Peace", see also Linde Lindkvist, 'The Politics of Article 18: Religious Liberty in the Universal Declaration of Human Rights', *Humanity*, 4/3 (2013), 429-47.



rights project, as well as the challenge of socialist and Marxist theories.<sup>50</sup> The human rights project has given rise to numerous controversies, including its potential for cultural relativism and ties to ideological positions that run contrary to the claim of universality.<sup>51</sup>

Histories of human rights have resulted in questioning the continuity or discontinuity of human rights ideas and traditions.<sup>52</sup> Finding a starting point to when the human rights movement began is a curious preoccupation of legal historians and human right academics. Yet it has shown to be necessary because they can disclose how even human rights histories are politicised and narrated for ideological reasons, bringing some ideas to the centre and moving others to the periphery. As an alternative to a chronological recounting of human rights history, Samuel Moyn has divided recent human rights historiography ‘into three sorts of enterprise: substantive history, scalar history, and (for lack of a better alliterative term) salience history’.<sup>53</sup> A substantive history is concerned with ‘the content of norms, whether taken individually or in connected packages, such as “civil and political” or “economic, social, and cultural” rights’.<sup>54</sup> This ‘also mean histories of law and legal doctrine that concern how norms are codified and canonized’.<sup>55</sup> The second enterprise is to locate ‘the geographical zone of application in which a right or package of rights applies’<sup>56</sup> Finally, as salience history, it ‘singles out the prominence and believability of human rights as a language of political ideology, maneuvering, and struggle—given that it is far from the only language, indeed far

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<sup>50</sup> Paolo Wright-Carozza, 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights', *Human Rights Quarterly*, 25/2 (281-313). B. Bowring, *The Degradation of the International Legal Order?: The Rehabilitation of Law and the Possibility of Politics* (Kindle edn.; Oxon: Taylor & Francis).

<sup>51</sup> Micheline Ishay, 'What Are Human Rights? Six Historical Controversies', *Journal of Human Rights*, 3/3 (2004/09/01 2004), 359-71. Jack Donnelly, 'The Relative Universality of Human Rights', *Human Rights Quarterly*, 29/2 (2007), 281-306. Michael E. Goodhart, 'Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization', *ibid.* 25/4 (2003), 935-64.

<sup>52</sup> Hoffmann, 'Human Rights and History', (2) Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*.

Mark Mazower, 'The Strange Triumph of Human Rights, 1933–1950', *The Historical Journal*, 47/02 (2004), 379-98. Marco Duranti, 'The Holocaust, the Legacy of 1789 and the Birth of International Human Rights Law: Revisiting the Foundation Myth', *Journal of Genocide Research*, 14/2 (159-86). Ernest L. Fortin, 'On the Presumed Medieval Origin of Individual Rights', *Communio: International Catholic Review*, 26/1 (1999). Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', *International Organization*, 54/02 (2000), 217-52. Brust, '10 Ave Maria L. Rev. 343 2011-2012', (Anthony Pagden, 'Human Rights, Natural Rights, and Europe's Imperial Legacy', *Political Theory*, 31/2 (April 1, 2003 2003), 171-99.

<sup>53</sup> Moyn and Bradley, 'Substance, Scale, and Salience: The Recent Historiography of Human Rights. Writing Human Rights History.', (125.

<sup>54</sup> *Ibid.* 125. For example Richard Tuck, *Natural Rights Theories : Their Origin and Development* (Cambridge: Cambridge University Press) viii, 185 p.

<sup>55</sup> Moyn and Bradley, 'Substance, Scale, and Salience: The Recent Historiography of Human Rights. Writing Human Rights History.', (125.

<sup>56</sup> *Ibid.* 125.

from the only universalistic language, in which to advance moral claims'.<sup>57</sup> Interestingly, Moyn observes,

[...] the history of human rights has often taken the form of idealist intellectual or textual history that ignores the sources of global ambition, the pressures of political context, and the exigencies of ideological competition.<sup>58</sup>

Important questions arise from Moyn's review of recent literature, including the questions as to why did various theorists of the international law and of natural rights, prior to the 20<sup>th</sup> century, not seek a human rights framework internationally in the first place, and why do we today?<sup>59</sup> Similarly, why did earlier histories marginalise the salience analysis that may have provided a more critical approach to human rights, rather than an apology for human rights?<sup>60</sup> In reviewing one of the first scholarly histories of human right, Moyn observes, it made 'a decisive move in the direction of salience analysis by claiming that the history of human rights is not about accumulating propositions but rather about political and social transformation—rooted most deeply, [Hunt] argued, in the reconstruction of human emotional responses through reading practices'.<sup>61</sup> In following Moyn's enquiry we further learn that '[h]umanitarianism, like antislavery, had a fascinating and venerable historiography long before human rights did'.<sup>62</sup> Nonetheless, even if humanitarianism powered antislavery activism, human rights claims 'figured only very marginally in it'.<sup>63</sup>

Similarly, the enumeration of minority rights prior to the League of Nations, borne out of a demand for religious freedom of Jewish and Christian communities, may have communicated rights but not with the same stand-alone emphasis as we note today.<sup>64</sup> One line of enquiry has proposed the freedom to change religion was motivated by Christians who wanted that right guaranteed for converts in

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<sup>57</sup> Ibid.125.

<sup>58</sup> Ibid.125. Strikingly, Moyn discloses 'almost no one in the 1970s or 1980s understood their stories of rights at home as leading to the Universal Declaration of Human Rights or to international human rights politics' (126-127).

<sup>59</sup> Ibid. 127.

<sup>60</sup> Ibid. 127. in that vein, Moyn queries Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: Univ of Pennsylvania Press).

<sup>61</sup> Moyn and Bradley, 'Substance, Scale, and Salience: The Recent Historiography of Human Rights. Writing Human Rights History.', (127. see Hunt, *Inventing Human Rights. A History*. However, Moyn suggest, Hunt fails to 'confront scale' or 'to give human rights an account worthy of the best traditions of social theory'.

<sup>62</sup> Moyn and Bradley, 'Substance, Scale, and Salience: The Recent Historiography of Human Rights. Writing Human Rights History.', (130.

<sup>63</sup> Ibid. 130.

<sup>64</sup> Ibid. 130.

Palestine.<sup>65</sup> Further, Linde Lindkvist has argued that the construction of the UDHR occurred as a consequence of the influence of Personalist philosophy of the many Catholic and Christian diplomats and others who contributed to the drafting of the declaration.<sup>66</sup> She follows Moyn's assertion that philosophical Personalism was the central motif in the human rights movement prior to the end of the Second World War.<sup>67</sup> The shift Lindkvist observes is from the previously held theory of minority rights protection for religious communities to a newer and expanded theory we find today in Article 18 of the UDHR. This shift occurred by the reliance on the conceptual utilisation of Christian Personalism, which emphasises the internal and external forums. This understanding made allowance for the subjective space of the inner conscience and its exterior manifestation in Article 18. Lindkvist suggests that Personalism, as described by Moyn, is part of a cluster of 'vague ideological labels that do not correspond to any coherent school of thought'.<sup>68</sup> Further Lindkvist asserts,

The international legal system today is able to ascribe rights to persons just because the Personalist concept of the person was granted such credence in the post-war international settlement.<sup>69</sup>

To Moyn this very conservative idea had significant influence on the drafters of the Universal Declaration of Human Rights, leading to a suspicion of secular and communist theories.<sup>70</sup> Yet as noted in this thesis, the role of Catholicism in shaping these concepts shows how Catholic ideas became a resource in developing our ideas about human rights.

Moyn suggests, that 'outside the UN in 1968, human rights had not yet become a powerful set of ideals [...]'<sup>71</sup> In his view the 'drama of human rights, then, is that they emerged in the 1970s seemingly from nowhere'.<sup>72</sup> Further he asserted that 'human rights emerged historically as the last utopia-one that became powerful and prominent because other visions imploded'.<sup>73</sup> Moyn successfully traces the

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<sup>65</sup> Lindkvist, 'The Politics of Article 18: Religious Liberty in the Universal Declaration of Human Rights', (434).

<sup>66</sup> Ibid. 434. See also G. D. Cohen, 'Elusive Neutrality: Christian Humanitarianism and the Question of Palestine, 1948-1967.', *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, 5/2 (2014), 183-210.

<sup>67</sup> See Samuel Moyn, "Personalism, Community, and the Origins of Human Rights," in *Human Rights in the Twentieth Century*, ed. Stefan-Ludwig Hoffmann (Cambridge: Cambridge University Press, 2010), 85–106.

<sup>68</sup> Lindkvist, 'The Politics of Article 18: Religious Liberty in the Universal Declaration of Human Rights', ( 434).

<sup>69</sup> Simon During 'Modernism in the Era of Human Rights' *Affirmations: of the modern 1.1* (Autumn 2013).

<sup>70</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Kindle edn.; London: The Belknap Press). (Kindle Edition) 209-210.

<sup>71</sup> Ibid. Kindle Edition. Kindle Locations 31-32.

<sup>72</sup> Ibid. Kindle Locations 35-36.

<sup>73</sup> Ibid. Kindle Location 54.

emergence of human rights to an alternative origin viewing it as a political project in the 1930's, and the beginnings of a belief in human dignity inherent in each human being. Moyn's writing challenges the standard account of human rights that proposes it developed from a post-War revulsion towards the Holocaust, and alternatively proposes human rights became a bulwark against the expansion of the modern state.<sup>74</sup> Provocatively he remarks, 'it is true that commitment to human rights crystallized as a result of Holocaust memory, but only decades later, as human rights were called upon to serve brand new purposes'.<sup>75</sup> Moyn's thesis turns on the idea that human rights only became formative in the 1970's when they moved from the moral rhetoric found in the UDHR to judicial and legal rights located in international law.<sup>76</sup> Christopher McCrudden summarises 'Moyn's general thesis about the growth of human rights',

[...] the idea of human rights as a minimalist utopian project succeeded because it filled a vacuum left after the collapse of previous universalistic, utopian movements, including Christianity, socialism, and anti-colonialism.<sup>77</sup>

Human rights activism through non-governmental organisations (hereinafter NGO's) also advanced the transformation of human rights rhetoric becoming a vocabulary critical of the state. It is quite plausible that human rights became part of the demands by emerging NGO's that had previously focused on humanitarian concerns, just as human rights treaties came into force in 1977.<sup>78</sup> This kind of human rights activism gradually replaced revolutionary politics and liberationist struggles, and 'human rights inherited their salience thanks to the collapse of the

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<sup>74</sup> Moyn, *Christian Human Rights*. Kindle Locations 457-459.

The most decisive and illuminating context for the move to constitutional dignity, it turns out, is not in the shocked conscience "after Auschwitz" but in political Catholicism before it, which remained its dominant framework for decades thereafter, when the Holocaust still did not seriously figure in global moral consciousness.

The contrary argument is found in for instance Witte and Green, *Religion and Human Rights: An Introduction*. Kindle Locations 358-359.

The UDHR was born out of desperation in the aftermath of World War II. The world had just stared in horror into Stalin's gulags and Hitler's death camps. It had just witnessed the terror of nuclear warfare in Hiroshima and Nagasaki.

<sup>75</sup> Moyn, *The Last Utopia: Human Rights in History*. Kindle Locations 956-957.

<sup>76</sup> See International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976 (hereinafter "ICCPR") and, International Covenant on Economic, Social, and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976 (hereinafter "ICESCR").

<sup>77</sup> Christopher McCrudden, 'Human Rights Histories', *Oxford Journal of Legal Studies*, Advance Access (Sept 29th, ), 1-34. 8. See also Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', *Harvard Journal of International Law*, 40 (1. and R. Bourke, *Decolonisation and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press).

<sup>78</sup> Moyn and Bradley, 'Substance, Scale, and Salience: The Recent Historiography of Human Rights. Writing Human Rights History.', (134.

revolutionary legacy and through the marginalization of most forms of mobilization in favour of only one kind'.<sup>79</sup> However, that point does seem premature, given that the Berlin Wall did not fall until 1989 a much later period, and radical leftist ideology still retained a strong defence in Western Europe until then.<sup>80</sup>

Moyn's position has received criticism, most notably from Philip Alston who has separated accounts of human rights histories into three separate genres: Linear Progressive Narratives, which trace the development of human rights through the evolution of history leading to the articulation of progressive rights based values, that 'can be used to delegitimize alternative visions'<sup>81</sup>; Precise Timeframe Theories, which pick a moment in human history that formed a catalyst for human rights<sup>82</sup>; and the New Revisionists. Alston associated the third genre to the writing of Samuel Moyn, and others including more recently Stefan-Ludwig Hoffmann.<sup>83</sup> Alston notes 'a new and highly influential new school of revisionist history' that dismisses the quest for a genealogy of rights thought.<sup>84</sup> The approach of revisionists,

[...] systematically downplays the international significance of all but the most recent discourse around human rights, accords minimal importance to treaties in this area and even less significance to courts, and locates the origins of the international human rights movement firmly in the year 1977'.<sup>85</sup>

The revisionist critique of human rights history is led by Moyn, who has significantly influenced the approach. However, Alston notes there is for example 'a powerful argument to be made that there was a strong element of continuity in the evolution of rights discourse'.<sup>86</sup> Further he proposes there is 'a strong genealogical or ancestral component in the sense that one generation has provided the foundation or the impetus for the emergence and shaping of the next generation's

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<sup>79</sup> Ibid. 134.

<sup>80</sup> See for instance Michael Burleigh, *Sacred Causes. Religion and Politics from the European Dictators to Al Qaeda* (London: Harper Collins). 415- 449. Martin Amis, *Koba the Dread* (London: Random House).

<sup>81</sup> Alston, 'Book Review. Does the Past Matter? On the Origins of Human Rights', (2063) [footnote omitted]. For example the Edict of Milan (313), Magna Carta (1215), the English Bill of Rights (1689), the French Declaration on the Rights of Man and Citizen (1789), and the US Constitution and Bill, of Rights (1791). See for instance Griffin, *On Human Rights*. 12-14. Further Alston writes, 'that such narratives yield unwieldy and unpersuasive foundations for today's understanding of human rights'. Those established rights were intended for specific groups at periods in history that do not naturally transfer into universalised language (2064).

<sup>82</sup> See for instance Hunt, *Inventing Human Rights. A History*. Kindle Location 186 ff. The 18<sup>th</sup> century Enlightenment era is the primary beginning point.

<sup>83</sup> Alston, 'Book Review. Does the Past Matter? On the Origins of Human Rights', (2066-2068).

<sup>84</sup> Ibid. 2044.

<sup>85</sup> Ibid. 2044.

<sup>86</sup> Ibid. 2051.

usage'.<sup>87</sup> Alston is particularly severe in his critique of Moyn's historiographical work on human rights.

Alston's critique is also adopted by McCrudden, who rejects Moyn's more radical discontinuity narrative as one that 'ultimately fails to convince' [...].<sup>88</sup> Instead, McCrudden argues that 'a more balanced judgment would conclude that the history of human rights is both one of continuity and discontinuity', and also 'undertaking a history of human rights is an enterprise that requires a deeper engagement with debates on the nature and validity of human rights [...]'.<sup>89</sup> In McCrudden's view it is 'the normative power that human rights possess', that distinguish their importance as they arose throughout human history.<sup>90</sup> Valuably, McCrudden takes up a key observation in Moyn's argument 'that human rights, properly so-called, concern the protections that individuals receive at the international level'.<sup>91</sup> To this point McCrudden extricates the process of human rights project at the international and domestic level to clarify that jurisdiction and protection of human rights most often occurs mundanely at the level of the state. Only when domestic institutions fail are human rights complaints carried to regional or to the international level.<sup>92</sup>

However, central to McCrudden's criticism is that Moyn has 'no well worked out theoretical understanding of human dignity [...]'.<sup>93</sup> Despite Moyn's later examination of early 20<sup>th</sup> century uses of human dignity by Catholic jurists and clergy, McCrudden indicates the language of dignity appears in various contexts in the 19<sup>th</sup> century as well.<sup>94</sup> Nonetheless, even if earlier historical accounts are of human dignity are useful, the assertion that 'the "new" human rights in practice share significant value continuities with what went before' misses the point.<sup>95</sup> Following Moyn's theory of "salience" history, human dignity could be viewed as part of the era of 'political and social transformation' and thereby part of the effort

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<sup>87</sup> Ibid. 2052.

<sup>88</sup> McCrudden, 'Human Rights Histories', (2-3)

<sup>89</sup> Ibid. 3. McCrudden continues,

[Moyn] underestimates the role of dignity in human rights practice (past and present); he underestimates the universal character of 'constitutional' and revolutionary rights; he underestimates the primary importance of domestic actors and mechanisms in the current practice of international human rights; and he underestimates the continuity of human rights borrowing as a prime methodology of how human rights is diffused.

<sup>90</sup> Ibid. 3.

<sup>91</sup> Ibid. 7. See for example, Moyn, *The Last Utopia: Human Rights in History*. Kindle Locations 16-17. 'Over the course of the 1970s, the moral world of Westerners shifted, opening a space for the sort of utopianism that coalesced in an international human rights movement that had never existed before'.

<sup>92</sup> McCrudden, 'Human Rights Histories', (17).

<sup>93</sup> Ibid. 11.

<sup>94</sup> Ibid. 14.

<sup>95</sup> Ibid. 15.

to resolve the problem of the political form of the state in the early 20<sup>th</sup> century. It is the tie to state formation, and to the rhetoric of international relations and diplomacy, that gives the concept of human dignity its new trajectory (and departure) towards the creation of a human rights project.<sup>96</sup>

Moyn's contextualises how human dignity became part of the new political ordering of the state and this is an insight that McCrudden does not appear to consider. The presence of dignity as a judicial concept was scattered across multiple national Constitutions, only to gain prominence much later in its application as a cornerstone to human rights norms.<sup>97</sup> Human dignity was bound to the destiny of individual human rights as part of a new political settlement of the nation state, as states moved towards liberal democratisation. The language of human dignity may have occurred during the 19<sup>th</sup> century but it only became legitimised through the Constitutionalisation of rights in the early 20<sup>th</sup> century, and later the contribution of those Constitutions by states as examples for drafting and establishing the UDHR, and international treaties in the 1970's and later.<sup>98</sup> Certainly, there was an ongoing process of cross-fertilisation and comparative studies of national Constitutional texts but their contribution to establishing the normative texts of human rights could only occur later. The process of human rights international treaty formation in the 1970's did transform human rights from a rhetoric induced from Christian morality, and classical Enlightenment based liberties, into something new, international and cosmopolitan. The tension between McCrudden and Moyn on this point does seem to be one where the different normative approaches to international law clash.

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<sup>96</sup> See for instance, Samuel Moyn, *The Secret History of Constitutional Dignity*, ed. C. McCrudden (Understanding Human Dignity; Oxford: OUP/British Academy).

'The dignity of the individual surged in world public discourse essentially due to *Divini redemptoris*. It was hard not to see the sheer coincidence of these encyclicals as the pope's own version of totalitarianism theory'.

See also, Pope Pius XI, 'Divini Redemptoris (on Atheistic Communism)', *Acta Apostolicae Sedis*, 27 (65-106).

<sup>97</sup> Moyn, *Christian Human Rights*. See also Jeremy Waldron, 'Dignity, Rank, and Rights', *The Tanner Lectures on Human Values* (University of California, Berkeley: University of California). 221. Waldron proposes there was a long process in recognising the value of human dignity,

[..] the modern notion of human dignity involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility.

[...]

We have adopted the idea of a single-status system, evolving a more or less universal status— a more or less universal legal dignity— that entitles everyone to something like the treatment before law that was previously confined to high-status individuals (241).

<sup>98</sup> McCrudden, 'Human Rights Histories', (25. See also Alston, 'Book Review. Does the Past Matter? On the Origins of Human Rights', (2070. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*.

Alston makes some very useful remarks about the difficulties and obstacles in creating a historical account of human rights history, and the type of milestones that are encountered in such an endeavour. He lists a number of points to support the work of tracing the origins of human rights and the contributions which are thereby useful to this work.<sup>99</sup> Nevertheless, the human rights enterprise 'is intrinsically complex and multifaceted'.<sup>100</sup> Human rights 'origins are to be found in different and multiple sites, and they cannot usefully be traced back to any single source or through examining the evolution of a single theme, process, or institution'.<sup>101</sup> Alston proposes that in the case of historical analysis there is a need for an analytical framework. Therefore, Alston proposes: 'Given the polycentric nature of the overall enterprise, a serious historical analysis should spell out more clearly what it is seeking when searching for the roots of human rights'.<sup>102</sup> Further he offers,

As a starting point we should acknowledge that "human rights" might be thought of as: a) *an idea*, including careful consideration of the extent to which vocabularies are interchangeable over time; b) *an elaborated discourse*, going beyond the basic ideas, but not requiring institutional manifestations; c) *a social movement*, including a definition of such a movement and specification of why it is significant; d) *a practice, or an institution*, that resembles in at least some respects the elements that we might consider important today; e) *a legal regime*, either at the national or international level, or both; or f) *a system* that is capable of effectively promoting respect for the rights of individuals and groups.<sup>103</sup>

That said, in Moyn's narration of the history of human rights and in locating human rights continuity and discontinuity his goal has been 'to undermine the credentials of human rights to be our saving truth, but not to trash them either, as if some next utopia were on the horizon either in theory or practice [...]'.<sup>104</sup> In reality, his challenging critique fulfils his own expectation to be a "salience history".<sup>105</sup> It is a determination to single 'out the prominence and believability of human rights as a

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<sup>99</sup> Alston, 'Book Review. Does the Past Matter? On the Origins of Human Rights', (2078).

<sup>100</sup> Ibid. 2078.

<sup>101</sup> Ibid. 2078.

<sup>102</sup> Ibid. 2078.

<sup>103</sup> Ibid. 2078-2079 [emphasis added]. Further Alston writes, '[a]n isolated focus on one or another will inevitably produce different accounts of the origins, antecedents, precursors, and so on, [...]. The choice of focus will also produce different causal accounts'.

<sup>104</sup> Samuel Moyn, 'The Continuing Perplexities of Human Rights', *Qui Parle: Critical Humanities and Social Sciences*, 22/1 (95-115. 112. See Moyn, *The Last Utopia: Human Rights in History*.

<sup>105</sup> See also on this point Alston, 'Book Review. Does the Past Matter? On the Origins of Human Rights', (2073-2074).



language of political ideology, maneuvering, and struggle'.<sup>106</sup> That recognition allows for an account of the relationship of Catholicism to human rights, and to question if human rights are 'the only universalistic language, in which to advance moral claims'.<sup>107</sup> Moyn has not completely dismissed the value of those enquires, though he has suggested 'the "history of human rights" is not a field [he] personally think ought to exist'.<sup>108</sup> However, Moyn's intuition is right about the history of human rights even if his presentation is sometimes uneven and contradictory from time to time, a point he acknowledges.<sup>109</sup> As Moyn express, 'the conviction that mastering the obvious continuity obscures more than it reveals about ourselves—and out of the belief that the past is more useful for challenging rather than confirming our certainties'.<sup>110</sup>

It is not possible to wholly reject the discontinuity thesis Moyn presents in his writting. There is a valuable truth in recognising that from the coming into being of human rights legal treaties in the 1970's the human rights project changed irrevocably. It shifted from a rhetorical and moral discourse used by diplomats and Churches, and dominated by regional and the Western expertise of European states, into the gobal legal framework of international law. From that point something was gained but also something was profoundly lost. In the period when human rights became a modern legal project, overtaken by states, their diplomats and lawyers, other human rights discourses became secondary and peripheral.<sup>111</sup> Through Moyn's recounting of the historical detail we discover a significant way to evaluate how sucessful the human rights project has become today.

### C. Chapter Outline

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The period between the French Revolution and the mid-twentieth century was a period of significant upheaval for Catholic political thought and in its interpretation of its role in relationship to the growth of nationalism, human rights and international relations. Chapter 1 examines how the Church developed Catholic

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<sup>106</sup> Moyn and Bradley, 'Substance, Scale, and Salience: The Recent Historiography of Human Rights. Writing Human Rights History.', (125).

<sup>107</sup> Ibid.125.

<sup>108</sup> Samuel Moyn, 'Theses on the Philosophy of Human Rights History', in Samuel Moyn et al. (eds.), *Humanity* (2016; Philadelphia, PA: Penn Press, 2015 ).

<sup>109</sup> This is a point Moyn acknowledges, see Moyn, 'The Continuing Perplexities of Human Rights', (95-96).

<sup>110</sup> Ibid. 96.

<sup>111</sup> Moyn and Bradley, 'Substance, Scale, and Salience: The Recent Historiography of Human Rights. Writing Human Rights History.', (124). Moyn observes,

A few critics of international human rights worry that in the real world of politics the powerful norms of human rights are best understood for having displaced if not ruled out alternative visions of and approaches to local and global justice; within the theatre of historiography, one must ask what other historical topics a new field pushes to the wings, if not off the stage.

social and political thought through human rights ideas. To examine this question, It begins by examining how the Catholic Church developed a body of ethical reflection on contemporary issues called Catholic Social Thought. Catholicism gradually responded to the emergence of rights based language, which it initially rejected, and only later engaged in active participation in its development, providing propositions for foundational principles upon which human rights ideas might be based. Section 1.2 appraises in what manner the Catholic Church had available a long tradition of reflection on the natural law, and this tradition in particular became a resource to a changing political landscape. Therefore, this chapter broadly sets out toward an assessment of the Catholic tradition of natural law, and the political factors during the French Revolution that shaped Catholic understanding of the nation state. Section 1.3 appraises the Catholics resolution of the tensions in rights language through the development of the philosophy of Personalism, and a reassessment of democracy as a foundation of political life. This chapter concludes in Section 1.4 by presenting where those ideas were reaffirmed in later papal declarations and encyclicals, which offered a point of reference for rights language in Catholicism in the future.

Chapter 2 undertakes to provide a critical narrative of the development and direction of international law as it was characterised by Catholic preoccupations from the medieval and early modern era. Therefore, Section 2.2 surveys the theological and philosophical contribution to the structure of pre-modern international law by Augustine, Thomas Aquinas, Francisco de Vitoria and Robert Bellarmine. They assisted the Catholic Church at crucial moments in its history and left an enduring legacy, which could broadly be described as a foundation for a Catholic approach to international law. Collectively they provided opportunities for reflection on the meaning and purpose of sovereignty and international order. Their contribution might well be described as “hinge moments” in shaping of a Catholic approach to the development of international law and to provide a basis for the Catholic Church’s response to an emerging modern international law. This process is highlighted and then in Section 2.3 is contrasted with early-modern international law as Grotius, Vattel and Hobbes constructed it. The structure of international law that emerged during the eventful 16<sup>th</sup> and 17<sup>th</sup> centuries lead to Catholic political and legal thought becoming a minor key in the development of public international law in the 19<sup>th</sup> century. This distinctively different approach to sovereignty and international order provides an opportunity in Section 2.4 to examine the peripheral place of religion, particularly Catholicism, in the structure of 19<sup>th</sup> century international law. This Chapter concludes by observing in what manner the Catholic Church’s participation in the emergence of temporal and religious

sovereignty and enquires if the development and structure of international law is a construct of history, marked by its interaction with religion, and in the European context, with Catholicism.

By the end of the 19<sup>th</sup> century Catholicism had become a peripheral player in the international arena. This would change in the 20th century as Catholicism would re-emerge as a formative participant in the creation of the Human Rights project. To examine this question, Chapter 3 undertakes to comprehend in what manner Catholicism began moving from the periphery to the centre of international law. The first half of the chapter traces the narrative and begins to distinguish how Catholicism began drawing upon its own understanding of the natural law and the formation of the state. The next segment of this chapter explores in what manner the Catholic Church would shape democratic Constitutions and international law across Europe. The Catholic Church's engagement with the construction of human rights became a vehicle to participation in the international legal system, which mapped out in a number of ways. First in Section 3.3, the Chapter turns to the evolution of Catholic Church as it began to prioritise the civil sphere, becoming more engaged as a non-state actor and developing a theoretical groundwork for Christian democracy with appeared in the post-World War II democratic movements. Secondly, Section 3.4 appraises the Catholic Church's advancement by prioritising the soft power diplomacy of the Holy See, and looks to modern theoretical concepts to understand this process. This emphasis on soft power became a way to counter its isolation from the international community, particularly during the period of the loss of the Papal States and the formation of the League of Nations. Thirdly, Section 3.5 proceed to assess in what manner the Catholic Church began to prioritise the role of the Holy See as an observer state at the United Nations. This reveals increasingly broader participation in the formation of future human rights treaties, with activism taking up by US Catholics, after the establishment of the United Nations. This Chapter concludes by ascertaining how this latter engagement provided the Catholic Church with theoretical underpinnings to further shape the direction of human rights, in its negotiation and engagement with a globalised world.

Sixteenth century jurist, Thomas More, developed the distinction between a Christian utopia and the political autonomy of the state through the formula of a rhetorical work of fiction. Chapter 4 recognises religion's role in contributing to ethical principles to guide political power, without becoming a justification for a political theology of the state. The first Section proceeds with More's emphasises of a common humanism that brought accommodation between temporal and

spiritual sovereignty. There is resemblance in More's approach to the writing of Francisco de Vitoria, the fruition of which is reviewed through the contemporary thought of John Courtney-Murray and Jacques Maritain. The second section ascertains in what manner the Second Vatican Council of the Catholic Church recognised that not alone freedom but the search for the truth is central to political democracy and an open public sphere. Catholic theorists recognise a *prisca theologia* or a semblance of the natural law, and thereby advances in what way the expression of the political form the state takes as a basis for a common humanism. The next chapter section details Maritain's proposed model of Church and state, and delineates Maritain's principal contribution of a theory of "secular democratic faith", as a bridging of Catholicism with liberal democracy and human rights. However, for the Catholic Church this conduit required a culture open to the idea of religion, and built upon a common idea of human dignity, and human rights. This Chapter concludes by enquiring if a "secular democratic faith" in democracy and human rights is possible today.

Human rights would become instrumental in trying to resolve the tensions between religion and the modern state. Chapter 5 commences with the Irish Constitution that illustrates how Catholic political thought would evolve as a civil society project. The use of rights based language within the Constitution was part of the trend to both restrain a newly forming nation state, while at the same time to acknowledge the limits of religion in such a new political polity. During the Cold War the Christian democratic parties consolidated and expanded European political and economic cooperation, and the a section of the Chapter looks at how those who shaped that era began drawing human rights into the confrontation between East and Western Europe by emphasizing religious freedom. In Latin America, human rights became a distinctively different project, and this additional Section examines in what manner human rights was used against state authority and part of a programme of liberation and democratisation. In each of these various contexts Catholicism participated in presenting the value of participating in the human rights project with varying degrees of success.

Having evaluated the long trajectory and contested narrative of the relationship between Catholicism and human rights, does there remains the possibility for a broadly Catholic response to international law? The Catholic Church remains influential in shaping the processes of globalisation, offering competing ideas about the modern state, and international relations. Human rights ideals are problematic for the international community because it has become 'a place-holder for the languages of goodness and justice, solidarity and responsibility'. Christianity retains

its own distinctiveness and contributes by way of an alternate critical approach to international law. That critical approach comes from a cosmopolitanism that is historically sceptical towards the state, and has been established in European culture, as complementary to the use of critical reason. In the view of the Catholic Church, the ethical theory and development of the natural law is a contribution to international law, and its place is arrived at through dialogue about the nature of the relationship between faith and reason. Human rights exist not because they are a modern invention but because they are the practical realisation in law of a prolonged reflection on the just exercise of power.

The just exercise of power is a challenge that remains and it is a challenge that this thesis will now turn by addressing the beginning of the Catholic Church's social justice tradition that remains current, self-directed and drawn from within its own tradition.

## Chapter 1: A Church Developing Catholic Social and Political Thought through Human Rights Ideas.

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### 1.1 Some Historical Origins of Catholic Social Thought

The period between the French Revolution and the mid-twentieth century was a period of significant upheaval for Catholic political thought and in its interpretation of its role in relationship to the growth of nationalism, human rights and international relations. In response, the Catholic Church developed a body of ethical reflection on contemporary issues called Catholic Social Thought. Catholicism gradually responded to the emergence of rights based language, which it initially rejected but later engaged in active participation in its development, providing propositions for foundational principles upon which human rights ideas might be based. The Catholic Church had available a long tradition of reflection on the natural law, and this tradition in particular became a resource to a changing political landscape. Therefore, this chapter broadly sets out toward an assessment of the Catholic tradition of natural law, and the political factors during the French Revolution that shaped Catholic understanding of the nation state. Finally, this chapter looks at how Catholics resolved the tensions in rights language through the development of the philosophy of personalism, and a reassessment of democracy as a foundation of political life. Those ideas were reaffirmed in later papal declarations and encyclicals, which offered a point of reference for rights language in Catholicism in the future.

Anthony Langlois describes the shift in ideas in the following way, as 'Europe moved from the political theology of Christendom towards a Hobbesian state of nature, as theism became deism and agnosticism, secularism and even atheism, the traditional foundation for rights talk became *passé*'.<sup>1</sup> This lengthy passage of time and the emergence of another tradition require some explanation to understand how Catholicism sought to regard human rights as important and valuable over the course of a difficult and long two centuries and how it developed its own social thought and to give prominent place to human rights. It's worth recalling even as we do venture into the history of rights that as Zapatero pointed out, 'the battle between Catholicism and Protestantism (and its concomitant religious wars) impinged severely on the objectivity of the writing of European history'.<sup>2</sup> This is

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<sup>1</sup> Anthony J. Langlois, 'The Elusive Ontology of Human Rights', *Global Society*, 18/3 (2004), 243-61. 251.

<sup>2</sup> Pablo Zapatero, 'Legal Imagination in Vitoria. The Power of Ideas', *Journal of the History of International Law* 11 (2009), 221-71. 266.

evident in turning to the early history of human rights which still remains contested, and more contemporaneously, along new frontiers, between religious and secular perspectives and between Universalists and anti-Universalists theories.<sup>3</sup> Particularly among Catholic academics, a Counter-Reformation reading and evaluation of that turn by western society from the foundational Catholic experience in Europe towards other more secular intellectual sources is proposed. Among Catholics the Reformation initiated a rupture in a previously unbroken tradition and generated a spirit of militancy in the Catholic Church that is expressed in the term “Counter-Reformation”, which asserts a parallel and competing modernity and sense of the modern. It is important to be aware of this tradition in reading the early to modern history of human rights and the contribution Catholicism makes to its evolution. It is also important because the return of Catholicism to prominence in the sphere of human rights in the 20<sup>th</sup> century becomes all the more surprising. As we learn, Catholicism has rich resources to call upon to provide a pre-history to human rights ideas, and those very strengths become a cornerstone to the whole project.

Catholicism had indeed endured many problematic centuries following the Reformation.<sup>4</sup> The reaction of Catholicism to the impact of the Reformation are manifold but most significantly the Council of Trent established a Counter-Reformation thesis which sought to respond both theologically and pastorally to its consequence.<sup>5</sup> A number of Catholic authors have proposed for instance that there were unintended consequences of the Reformation on European history, which includes a misreading by historians of the entire period.<sup>6</sup> This list includes the dramatic secularisation of society, the fragmentation of Christianity in Europe, our understanding of the meaning and place of religion in society and in relation to the State, the place of the individual in relation to authority and the very visceral

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<sup>3</sup> See for instance Alston, 'Book Review. Does the Past Matter? On the Origins of Human Rights', (2078. See also McCrudden, 'Human Rights Histories', (1

<sup>4</sup> Brad S. Gregory, *The Unintended Reformation: How a Religious Revolution Secularized Society* (Kindle edn.; Kindle Edition: Harvard University Press). Harold J. Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Belknap Press of Harvard University Press), Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols. (Cambridge: Cambridge University Press).

<sup>5</sup> The Council of Trent, met in twenty-five sessions which were held in three phases: 13 December 1545 – 16 February 1548; 1 May 1551 – 28 April 1552; 18 January 1562 – 4 December 1563. Its purpose was to clarify both the doctrine and discipline of the Church challenged as a consequence of the Reformation. See James Michael Weiss, 'The Council of Trent', in Joseph A. Komonchak, Maire Ni Choileain, and Dermot A. Lane (eds.), *The New Dictionary of Theology* (Dublin: Dublin: Gill and Macmillan, 1990).

<sup>6</sup> See for example Charles Taylor, *A Secular Age* (Cambridge, Mass.: Belknap Press of Harvard University Press) x, 874 p. William T. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (Oxford University Press. Kindle Edition.). Brad S. Gregory, 'The Intentions of the Unintended Reformation', *Historically Speaking*, 13/3 (2012a). Karen Armstrong, *Fields of Blood: Religion and the History of Violence* (Vintage Digital/ Kindle Edition.: Random House.).

military conflicts which these changes provoked. For example Gregory offers the idea that ‘the Reformation’s influence on the eventual secularization of society was complex, largely indirect, far from immediate, and profoundly unintended’.<sup>7</sup>

Robert Bireley reminds us that European division along religious and sectarian lines has underpinned a number of conflicts and cites: the War of the League of Schmalkeld, the French Religious Wars, the War of Dutch Independence, the Spanish Armada, and the Thirty Years War as examples. Political leaders such as Philip II of Spain (1556–98), Maximilian of Bavaria (1598–1651), and Emperor Ferdinand II (1619–37) embodied this militancy in their effort to defend or advance the interests of the Church. The proposal behind these wars was Re-Catholicisation, undertaken often under considerable pressure in some areas, especially in the lands of the Habsburg monarchy where it continued until 1700.<sup>8</sup>

However, the mood in Europe was far different, and did not comply with a hope of reclaiming a Catholic Europe. The repercussions of the ideas and decisions which shaped Europe following the Reformation began to solidify attitudes towards religion and politics and had determined the checkered response to the question of the place of religion in society especially a religion which is engaged with politics and society as Catholicism tends to do.<sup>9</sup> The broadly conceived notion of the Enlightenment in Europe developed a particular understanding about the nature of religion and the state. It developed as a consequence of a mixture of older Catholicism with the newer Protestantism and subsequently liberalism and secular state. The Enlightenment matured into a parallel culture and then a dominant tradition of individualism and established the discourse based on critique of all propositions through critical reason.<sup>10</sup> That interaction inevitably shaped law which governed those affairs and gradually invoked a language of natural and human

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<sup>7</sup> Gregory, *The Unintended Reformation: How a Religious Revolution Secularized Society*. Kindle Location 39. See also Gregory, 'The Intentions of the Unintended Reformation', ( 'What needs to be explained is not a non-existent uniform secularism but a heterogeneous hyper-pluralism of individuals who hold rival secular and religious truth claims that diversely influence their actions and collectively influence public life'.

<sup>8</sup> Robert Bireley S.J., 'Early-Modern Catholicism as a Response to the Changing World of the Long Sixteenth Century', *The Catholic Historical Review* 95/2 (2009), 219-39.

<sup>9</sup> Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict*

<sup>10</sup> For an assessment of the meaning of the term “Enlightenment” see Anthony Pagden, 'The Enlightenment: And Why It Still Matters', (Kindle edn.; Kindle Edition.: Oxford University Press., 2013). 5 - 11. See also Immanuel Kant, 'Critique of Pure Reason', in Jonathan Bennett (ed.), (Hertford College, Oxford: <http://www.earlymoderntexts.com/>, 2007). 2. A. xii:

Our age is the genuine age of criticism, and to which everything must submit. Religion through its holiness and legislation through its majesty, commonly seek to exempt themselves from it. But in this way they excite a just suspicion against themselves, and cannot lay claim to the unfeigned respect that reason grants only to that which has been able to withstand its free and public examination.



rights which eventually secured the identity of the subject which became a particular concern.

### 1.1.1 The French Revolution 1789

The French Revolution, which ignited drastic anti-clericalism in many ways paralysed Catholicism's ability to adequately respond to the emerging structures of the State and eventually, human rights language. Komonchak suggest that the Catholic Church viewed the Reformation and the French revolution as two dimensions of great political and religious battle which later manifest itself in a variety of ideological positions including liberalism, socialism and Marxism.<sup>11</sup> The Catholic Church at that time strongly condemned both the Revolution and the outcomes,<sup>12</sup>

[f]or accursed men who have given themselves over to myths and who do not uphold the stronghold of Sion [the church] from all sides, they vomit the poison of serpents from their hearts for the ruin of the Christian people by the contagious plague of books which almost overwhelms us. They pollute the pure waters of belief and destroy the foundations of religion.<sup>13</sup>

This very polemical atmosphere conjured up during this period and nurtured by Enlightenment thought stimulated revolutionary and radical ideas. Stephen Marks shows that it is within the French Declaration of the Rights of Man, approved by the National Assembly of France that the human rights momentum properly begins.<sup>14</sup> The drafting of the Declaration of the rights of man and citizens went through multiple reconceptualisations, which resulted in the binding of the ideal of rights to the idea of citizenship.<sup>15</sup> Two different kinds of trends emerged and can be

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<sup>11</sup> Joseph A. Komonchak, 'Modernity and the Construction of Roman Catholicism', *Cristianesimo nella Storia*, 18 (1997), 353-85. 357-8.

<sup>12</sup> Thomas D. Williams, 'Personalism and the Foundations of Human Rights.', (Washington, D.C.). 33. See in particular Pius VI, *Ado Nota* (April 23, 1791).

<sup>13</sup> See Holland, *Modern Catholic Social Teaching: The Popes Confront the Industrial Age, 1740-1958*. 64 - 67. Pope Clement XIII, *Christianae reipublicae* (On the Dangers of Anti-Christian Writings) November 25, 1766 § 1. There were many comments from the papacy at that time. See also Pope Pius VI, *Encyclical Inscrutabile*, promulgated on December 25, 1775. §5. 'They keep proclaiming that man is born free and subject to no one, that society accordingly is a crowd of foolish men who stupidly yield to priests who deceive them and to kings who oppress them, so that the harmony of priest and ruler is only a monstrous conspiracy against the innate liberty of man'.

<sup>14</sup> French Declaration of the Rights of Man, approved by the National Assembly of France, (August 26, 1789). Stephen P. Marks, 'From the "Single Confused Page" to the "Decalogue for Six Billion Persons": The Roots of the Universal Declaration of Human Rights in the French Revolution', *Human Rights Quarterly*, 20/3 (1998), 459-514. 463.

<sup>15</sup> See more completely, Pagden, 'Human Rights, Natural Rights, and Europe's Imperial Legacy', (171. On the various Constitutions see A. Crăiuțu, *A Virtue for Courageous Minds: Moderation in French Political Thought, 1748-1830* (Princeton University Press, 2012). 76 – 79.

observed within the revolutionary enlightenment, a radical and moderate version.<sup>16</sup> Rousseau best exemplifies the ‘radical’ was one of the architects of the French Revolution and had placed a very high value on the idea of liberty. In the Social Contract he had equated it with the core dignity of the human being.<sup>17</sup> He wrote, somewhat sceptically of the Enlightenment,

What man loses by the social contract is his natural liberty and an unrestricted right to anything he wants and can get. What he gains civil liberty and the ownership of everything he possesses.<sup>18</sup>

For Rousseau we were to move from our isolated lives, driven by self-interest and instinct into a society ordered by a common will and justice but that came at the price of our personal liberty. This is a balance that has bedevilled liberalism. Rousseau saw in the social contract a new moral liberty which lifts humanity from its natural disorder.<sup>19</sup> Diderot had confirmed the Enlightenment’s revision of the natural law with an entry on “Natural Law” in his Encyclopaedia (1755). Diderot argued in his entry on natural rights, ‘[s]ay often to yourself: I am a man, and I do not have any other truly *inalienable rights* than those of humanity’.<sup>20</sup> However in contrast to the competing Christian spirit, Diderot had also wrote,

[b]ut if we deny the individual the right to decide about the nature of justice and injustice, from whom are we to seek a judgment on this great question? From whom? From mankind; it is for mankind alone to decide this question, because the good of all is its only passion. Private wills are not to

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<sup>16</sup> This division is debated but it does provide a schema by which we can understand how Catholicism finally established its “aggiornamento” with the modern era. For a critique see Simon Grote, 'Review-Essay: Religion and Enlightenment.', *Journal of the History of Ideas*, 75/1 (2014), 137-60.

<sup>17</sup> Jean-Jacques Rousseau, 'The Social Contract', in Jonathan Bennett (ed.), (Hertford College, Oxford: <http://www.earlymoderntexts.com/>). Book 1, Chapter 4. 'Slavery'. 4.

To renounce your liberty is to renounce your status as a man, your rights as a human being, and even your duties as a human being. There can't be any way of compensating someone who gives up everything. Such a renunciation is incompatible with man's nature; to remove all freedom from his will is to remove all morality from his actions.

<sup>18</sup> Ibid. Book 1, Chapter 8. 'The Civil State'. 9.

<sup>19</sup> Ibid. 9-10. 'We could add on the 'profit' side the fact that in the civil state a man acquires moral liberty, which alone makes him truly master of himself; for the drive of sheer appetite is slavery, while obedience to a law that we prescribe to ourselves is liberty'.

<sup>20</sup> Denis Diderot, 'Natural Rights (Droit Naturel)', in Stephen J. Gendzier (ed.), *The Encyclopedia of Diderot & d'Alembert Collaborative Translation Project*. (5; Online: Ann Arbor: Michigan Publishing, University of Michigan Library, 2009), 115–16. § VII. Dites - vous souvent: Je suis homme, & je n'ai d'autres droits naturels véritablement inaliénables que ceux de l'humanité. See Lauren, *The Evolution of International Human Rights: Visions Seen*. 16.

be trusted: they can be either good or evil; but the general will is always good: it has never deceived, and it never will deceive.<sup>21</sup>

For Diderot, there is no theological dimension in the search for the good but only the will of humanity, which will apparently overcome the will of the individual, no matter how conscientiously invoked. This confidence in humanity's capacity to provide good counsel faced enumerable tests, and for Catholicism it was a fundamental weakness. Inalienable rights as an idea may suggest the centre of a universal morality and a natural foundation but for Catholicism it did not wholly satisfy basic requirements that would explain the basis of that claim. As we note later, there were more essential values attributed to human nature and human reason which would support the claim of inalienable rights.

These examples of the emerging understanding of human liberty, a common or equal human nature and a consciousness of universal humanity, offered a pre-political and pre-judicial resource upon which the French Declaration proclamation might be established.<sup>22</sup> But the very radical claims of the Revolution appeared antithetical to Catholicism and in the ensuing years there was, if not outright rejection, an appeal to a moderate and reconciled approach. If revolution was a fiery spirit kindled by the Enlightenment, it was impossible for a state to remain so bound there, least it was consumed. As Perreau-Saussine succinctly put it, 'the aim was to replace the descending thesis of the *ancien régime* with the ascending thesis of the Revolution'.<sup>23</sup> According to Auguste Comte the revolution of 1789 had begun much earlier with a transformation of ideas which undermined and eventually overthrew the *ancien régime*.<sup>24</sup> Israel comments that Comte's thesis had divided French society into two antagonistic camps – 'a revolutionary segment preponderant in Paris fighting for democracy and equality and a conservative segment, preponderant in the provinces, defending monarchy, aristocracy, and religious authority'.<sup>25</sup> An urban-rural divide that has been perpetuated it would seem to this day, and something Comte agreed would take place. At the root of that divide for Comte was the "*système théologique*", which with education of the

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<sup>21</sup> Diderot, 'Natural Rights (Droit Naturel)'. § VI. Diderot relies on Jean-Jacques Rousseau's recognition of only one natural right, the right to equality. Rousseau found the right to equality in the General Will of the people. See Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Pennsylvania: University of Pennsylvania, 2009). 21.

<sup>22</sup> Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration*. 22.

<sup>23</sup> Emile Perreau-Saussine, *Catholicism and Democracy: An Essay in the History of Political Thought* (Princeton University Press, 2012). 7.

<sup>24</sup> Jonathan Israel, "'Radical Enlightenment' – Peripheral, Substantial, or the Main Face of the Trans-Atlantic Enlightenment (1650-1850)", *Diametros*, /40 (2014-06-25 2014), 26. 75.

<sup>25</sup> Ibid. 75. For a very critical Catholic reading of Comte see Henri De Lubac, *The Drama of Atheist Humanism* (San Francisco: Ignatius Press, 1995) 539 p.

illiterate peasants and a philosophical transformation of the basis of society, would bring its demise.<sup>26</sup> For Comte this demise would consequentially bring social equality in a redistribution of wealth.<sup>27</sup> His view that religion was the enemy of the revolution, of progress and the very many values he cherished persisted and hangs over its interpretation.

The radical enlightenment followers, like Comte, could be encapsulated by a long list of characteristic beliefs which included: 'a monistic metaphysics that ruled out teleology, miracles, providence, revelation, and the immortality of the soul; a denial that moral principles have divine origins; a rejection of ecclesiastical authority; a denial that social hierarchy, noble privilege, and monarchical power are ordained by God; and robust support for freedom of thought and for political egalitarianism'.<sup>28</sup> From Spinoza's ideas they gathered together a collection of basic human rights and 'defended a democratic and revolutionary ideology'.<sup>29</sup>

The development of the idea of moderation in French political thought gives an impression as to how the initial enthusiasm, and embrace of revolution, was tempered to become a political force.<sup>30</sup> This value of political moderation was in due course able to find its way to reconciliation with the place of religion in French society, even if in a more restrained mode. Crăiuțu points out that it was truly the work of the moderate voices in French political life who worked to build representative government on the ruins of the Great Terror.<sup>31</sup> The reason this happened is because it was very much influenced by two different trends within the enlightenment as noted above, a radical and moderate version.<sup>32</sup> The moderates worked to establish 'ordered liberty' and carve out 'a much needed centre between extremes'.<sup>33</sup> It was moderates like Montesquieu and those of similar thought, who more than any, influenced the American founders and shaped the future of French political life.<sup>34</sup> We could say that the American experience was

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<sup>26</sup> Israel, "'Radical Enlightenment" – Peripheral, Substantial, or the Main Face of the Trans-Atlantic Enlightenment (1650-1850)', (76. On Comte's agnosticism which sought to go beyond atheism to view religion as a belief without useful meaning, see De Lubac, *The Drama of Atheist Humanism*. 162 – 167.

<sup>27</sup> This redistribution of course implied great hardship for the Catholic Church with expulsions of clergy, removal of property and dissolution of religious orders.

<sup>28</sup> Grote, 'Review-Essay: Religion and Enlightenment.', (144.

<sup>29</sup> *Ibid.* 144.

<sup>30</sup> Crăiuțu, *A Virtue for Courageous Minds: Moderation in French Political Thought, 1748-1830*. 76 – 79.

<sup>31</sup> *Ibid.* 136

<sup>32</sup> This division is debated but it does provide a schema by which we can understand how Catholicism finally established its "aggiornamento" with the modern era. For a critique see Grote, 'Review-Essay: Religion and Enlightenment.', (137.

<sup>33</sup> Crăiuțu, *A Virtue for Courageous Minds: Moderation in French Political Thought, 1748-1830*. 136

<sup>34</sup> Israel, "'Radical Enlightenment" – Peripheral, Substantial, or the Main Face of the Trans-Atlantic Enlightenment (1650-1850)', (77. This is not to deny the pivotal role of Locke as well. See also A. Ryan, *The*

moderate in respect to religion whereas the French revolution embraced a radical philosophy from the outset. Franklin, Jefferson and Madison, 'took great care to avoid appearing publicly to be systematically attacking religious authority and the essentials of Christian doctrine' even if they were privately agnostic or at least Deist in thought.<sup>35</sup> This ran contrary to the American minority Radical tradition, which had believed society lived under the double despotism of "priest-craft" and "king-craft" and required liberation, a view that dominated the French revolution during its formative stage. Montesquieu saw an alternative approach and emphasised 'an essential feature of a certain type of government, that is, a *moderate government*'.<sup>36</sup> Therefore the U.S. Declaration of Independence is distinguished from the French according to the different emphasis the founders of each took towards religion.<sup>37</sup> What is interesting is that even though the authors of the French Revolution drew significantly from the American experience it treated its relationship to religion in quite a different way. The American Revolution was political and anti-colonial (and allied with the main churches) while the French had a strong element of anti-clericalism and anti-royalist which was influential on its perspective.

The moderate enlightenment, which sought to find compromise with Catholicism in France was developed in part by Catholic so-called *anti-philosophes* of the eighteenth century, and were integral to the moderate turn in French society.<sup>38</sup> They rejected the determinist and materialistic philosophy of the radical movement. While the Counter-Reformation informed much of the theological argument presented by Catholicism, it is the concern for the political and social development of Europe that motivated Joseph de Maistre (1753-1821), Louis de Bonald (1755-1890) and Felicite de la Mennais (also later known as de Lamennais,

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*Making of Modern Liberalism* (Kindle Edition. edn.; Kindle Edition.: Princeton University Press). 436 'Although Montesquieu was the most famous exponent of the doctrine of the separation of powers, in which he located the success of the British form of government in maintaining liberty, the thrust of his work was toward emphasizing the social underpinnings of the formal institutions of government'. See also Armstrong, *Fields of Blood: Religion and the History of Violence*. (Kindle Location 5414). On the influence of Montesquieu on the thought of Edmund Burke see in particular, R. Bourke, *Empire and Revolution: The Political Life of Edmund Burke* (Kindle edn.; New Jersey: Princeton University Press, 2015). 19-21.

<sup>35</sup> Israel, "'Radical Enlightenment" – Peripheral, Substantial, or the Main Face of the Trans-Atlantic Enlightenment (1650-1850)', (77. Israel points out that it was Tom Paine, Joe Barlow and Elihu Palmer who most reflected the Radical enlightenment which publicly criticised Christian theology and authority but the general public had little sympathy with their cause.

<sup>36</sup> Crăiuțu, *A Virtue for Courageous Minds: Moderation in French Political Thought, 1748-1830*. 36. Emphasis included.

<sup>37</sup> U.S. Declaration of Independence (4 July 1776)

<sup>38</sup> Israel, "'Radical Enlightenment" – Peripheral, Substantial, or the Main Face of the Trans-Atlantic Enlightenment (1650-1850)', ( 88.

1782-1854) who all in a variety of ways critiqued the French Revolution for seeking to subordinate the Church to the State.<sup>39</sup>

Lehner suggests that there existed a resistance from Catholicism to certain radical enlightenment ideas who would, however, engage with the moderate and conservative enlightenment.<sup>40</sup> French traditionalism, as expressed by De Maistre, de Bonald and de Lamennais responded to eighteenth and nineteenth century rationalism by appealing to divine revelation as the only source of moral liberties and belief. Similarly, the theologians of Tübingen who sought to respond to Kant's fideism by making the distinction between intuitive reason and discursive reason, were in turn rejected but indicated the resistance to the overwhelming changes occurring in the 18th century.<sup>41</sup> Correspondingly, Printy explains that prior to the revolution there existed a Catholic Enlightenment which was conservative in practice and sought to respond to the anti-clerical features of the period but which was brushed aside by the revolution and its consequences.<sup>42</sup> This era was also coupled with a revival of the popular practice of religion as a response to the effects of the earlier protestant Reformation. The Catholic Church had thrown its weight behind popular piety and a reform of moral theology by supporting leaders such as Alphonsus Maria di Liguori who as a moral theologian strove to find balance in the application of moral instruction and it is believed, 'overcame the negative Augustinian view of human nature that had led Jansenists to follow their rigorist tendencies in moral theology'.<sup>43</sup> This particular Jansenist form of theology

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<sup>39</sup> Paul Misner, 'Catholic Anti-Modernism: The Ecclesial Setting', in D. Jodock (ed.), *Catholicism Contending with Modernity: Roman Catholic Modernism and Anti-Modernism in Historical Context* (Cambridge Cambridge University Press). 58. They also criticised Rousseau's theory of the social contract as an attack on the unity of the throne and altar. Félicité de la Mennais (also called Lamennais after he broke with Rome). Féliciteé de Lamennais, who became the focus of an entire Papal encyclical helped drive the Catholic engagement with modernity and liberalism. On his potential contribution to the development of religious freedom in Catholicism see C. B. Hastings, 'Hugues-Flicite Robert De Lamennais: A Catholic Pioneer of Religious Liberty', *Journal of Church & State*, 20 (1988). 327. See also Alberto Spektorowski, 'Maistre, Donoso Cortés, and the Legacy of Catholic Authoritarianism', *Journal of the History of Ideas*, 63/2 (2002a), 283-302.

<sup>40</sup> See U.L. Lehner and M.O.N. Printy, *A Companion to the Catholic Enlightenment in Europe* (Brill, 2010). 12. Lehner suggests that there existed a resistance from Catholicism from certain radical enlightenment ideas but they engaged with

<sup>41</sup> Gabriel Daly, 'Theological and Philosophical Modernism', in D. Jodock (ed.), *Catholicism Contending with Modernity: Roman Catholic Modernism and Anti-Modernism in Historical Context* (Cambridge Cambridge University Press, 2000).95). Fideism is an epistemological theory which maintains that faith is independent of reason, or that reason and faith are hostile to each other and faith is superior at arriving at particular truth.

<sup>42</sup> Michael Printy, 'The Intellectual Origins of Popular Catholicism: Catholic Moral Theology in the Age of Enlightenment', *The Catholic Historical Review*, 91/3 (438).

<sup>43</sup> Ibid. 440. See also Lehner and Printy, *A Companion to the Catholic Enlightenment in Europe*. This was not at all effective in some parts of Europe where Jansenist and English Victorian morality become cumbersome and unforgiving. In response, Alphonsus Maria di Liguori (1696-1787), composed *Theologia moralis* (1748), a moral theology Compendium in which he assembled seventy thousand quotations on moral instruction from authoritative sources particularly the Fathers and Doctors of the Church. He transformed moral theology into a separate ecclesiastical science rather than as a branch of general theology. See J.F. Fink, *The Doctors of the*

combined with Gallicanism, to form support for a French national church, which also had an impact on the way the revolutionaries thought about their religion.

Because the Catholic Church was primarily, and remained so up until the late 19<sup>th</sup> century, a European church, all the significant ideas about democracy, rights and liberty drew from the European and particularly the French revolutionary context. Catholicism had to learn how to discern between the different kinds of Enlightenments, much the same way as the political classes. The much later Papal Encyclical *Pacem in Terris* (Peace on Earth) offers the fruit of this experience by taking a quotation of Pius XII.<sup>44</sup> Against the radical spirit Pius XII writes,

We would remind such people that it is the law of nature that all things must be of gradual growth. If there is to be any improvement in human institutions, the work must be done slowly and deliberately from within.<sup>45</sup>

Not until the concordat between Bonaparte and Pope Pius VII was signed on 15<sup>th</sup> July 1801 did a potential reconciliation occur.<sup>46</sup> The 1801 Concordat, which had followed a bloody reign of terror, did not confess that Catholicism was the religion of France as the Pope had wished but was of the majority of the people of France. It was prefaced by threats from Bonaparte to follow the model of King Henry VIII and the creation of a national religion. Civil Religion had been the preferred route of the revolutionaries (for example the mention of the 'Supreme Being' in the

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*Church: Doctors of the First Millennium* (Alba House, 2000). 195. See Alphonsus Maria Di Liguori, 'Compendium Theologiae Moralis', in Jean Pierre Gury and Antonio Ballerini (eds.), (Romae Typis civilitatis catholicae, 1866).

<sup>44</sup> As cited in Pius XII's address to Italian workers, Rome, Pentecost, June 13, 1943, AAS 35 (1943) 175. There are many different forms of communication between the Pope and the wider Church, including Papal Bulls, apostolic letters, apostolic exhortations, and "motu proprio" documents, and can contain legislative, doctrinal and pastoral value. An encyclical is a letter addressed principally to the Bishops of the world and by extension to other clergy and the laity. It outlines an official interpretation of Church teaching and guidance from the Pope on pastoral practice. It does not define church dogma but reiterates and explains it more comprehensively in a particular context and period in history. *Pacem et terris* (Peace on Earth) was a papal encyclical issued by Pope John XXIII on 11 April 1963. See Pope John XXIII, 'Encyclical Letter *Pacem in Terris*', *Acta Apostolicae Sedis*, 55 (11 April 1963 1963b). It affirms human rights and responsibilities, drawing together Catholic natural law tradition and the social thought of the Church. It offered a foundation in Catholicism to the Universal Declaration of Human Rights, as recognised and supported in Catholic social thought. See Hünermann et al., *Compendium of Creeds, Definitions, and Declarations on Matters of Faith and Morals*. 3955-3997.

<sup>45</sup> See Pope John XXIII, '*Pacem in Terris*, AAS 55 (1963)', (§62. Pope Pius XII earlier expressed it in these terms: "Salvation and justice consist not in the uprooting of an outdated system, but in a well-designed policy of development. Hotheadedness was never constructive; it has always destroyed everything. It has inflamed passions, but never assuaged them. It sows no seeds but those of hatred and destruction. Far from bringing about the reconciliation of contending parties, it reduces men and political parties to the necessity of laboriously redoing the work of the past, building on the ruins that disharmony has left in its wake."

<sup>46</sup> Owen Chadwick, *The Popes and European Revolution* (Clarendon Press). 487.

Declaration) but it was impossible to realise as Auguste Comte was later to understand.<sup>47</sup>

The struggle for society to negotiate the relationship between religion and revolution was described by the philosopher Charles Péguy, 'we are constantly steering [...] between two kinds of clergy: the ecclesiastical clergy and the laicist clergy [...]; the laicist clergy deny the eternal aspects of the temporal; [...] and the ecclesiastical clergy deny the temporal aspects of the eternal'.<sup>48</sup> The theological reconciliation seemed improbable but more so the possibility of an agreeable relationship between Church and state in France. At least not until the First World War, when different factions fought side by side in the trenches, which saw the 'reintegrated histories of Catholic and republican France'.<sup>49</sup> McMillan suggests that it was during the inter-war period a "*second ralliement*" 'a time of reconciliation between French Catholics and the modern world, which carried on and completed the work first begun by Pope Leo XIII in the 1890s'.<sup>50</sup> In a sense, this was a reconciliation by the moderate forces of the Enlightenment rather than the radical versions of the Enlightenment vision.<sup>51</sup> This suggests that it was the evolving moderation on the side of state and much more gradually by the Catholic Church which led to the compromise position within the Catholic Church of accepting the language of rights in the proceeding later generations. In other words, rather than human rights being a philosophically and theologically well-grounded idea, it was a compromise toward moderation which has helped build democratic and civil order, a position that could only emerge after two World Wars. While the foundation of rights in France was based on liberty, equality and fraternity, it was the precise understanding of those terms which invited clarification from the various traditions that informed those ideas, and the fruits of that process found its way into the development of the Universal Declaration of Human Rights in 1948.<sup>52</sup>

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<sup>47</sup> See Phillips, *Political Theology: A Guide for the Perplexed*. (Kindle Edition) 6. "Civil Religion" was '[f]irst introduced in the work of Jean-Jacques Rousseau (1712–78) [...] civil religion is the set of beliefs, symbols and rituals which amount to a quasi-religion of the nation'.

<sup>48</sup> As cited in Perreau-Saussine, *Catholicism and Democracy: An Essay in the History of Political Thought*. 103. Charles Péguy (1873-1914), was a revolutionary and republican who became Catholic around 1907. He was later killed in World War I. He was a significant voice developing common ground between Catholics and laicists, identifying the desire for peace as the foundation of the state. He welcomed the separation of Church and state, emphasising, as Perreau-Saussine elaborated, that 'it did not entail a complete displacement of Catholicism from public life' (104).

<sup>49</sup> *Ibid.* 103

<sup>50</sup> James F. Mcmillan, 'France', in Tom Buchanan and Martin Conway (eds.), *Political Catholicism in Europe, 1918–1965* (Oxford: Oxford Uni Press, 1996). 8 [footnote omitted]

<sup>51</sup> Burleigh, *Sacred Causes. Religion and Politics from the European Dictators to Al Qaeda*. 33.

<sup>52</sup> Universal Declaration of Human Rights, adopted on 10<sup>th</sup> December 1948, United Nations G.A. Res. 217 A (III), UN Doc. A/810 at 71 (1948).



The unique formation of the idea of *laïcité*, which goes to the heart of the separation of Catholicism and the state in France, has retained the radicalised interpretation of the revolution in its function in political life which separates, institutionally, the role of Church and state. The *laïcité* tradition of France might not have been “liberal” in the sense of the Protestant liberal tradition as it developed into a peculiar Statism unique to Catholic countries, with its attachment to enshrining secular comprehensive ideas in political life, but it did strive to implement the values of rationalism and empiricism found in that liberal tradition.<sup>53</sup> *Laïcité* effectively removed religion from any public institutional role it may have enjoyed in the earlier 18<sup>th</sup> and 19<sup>th</sup> century in France but it did not set out to coerce the private or communal manifestation of religion in public life. In that sense it moved towards a moderate compromise to both the role of the State and religion in French national society but held onto the idea of assimilation.

One of the expectations of the Enlightenment and the French Revolution was that with progress, religion would die out.<sup>54</sup> According to Pagden that expectation came as a result of ‘the historical failure of Christianity to continue to provide the kind of intellectual, and consequently moral, certainty which it had once done’.<sup>55</sup> That uncertainty of course developed as a result of the loss of authoritative religion in Western Europe as a consequence of the Reformation. With the fragmentation of Christianity came the gradual fragmentation of the intellectual bulwark or canopy which it had previously enjoyed. It may not have been inevitable, but it did require a *volte-face* by Catholicism towards a gradual compromise and a meeting of minds around a moderate interpretation of the place of the free exercise of reason and liberty in the public sphere. It meant appropriating the valuable resources which had developed in that era, particularly as the language of rights began to take its place in the traditional understanding of justice and law.

This history influenced our interpretation of rights and the resituating of religion in this history, shaped the development of human rights. The anti-clericalism of the

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<sup>53</sup> Perreau-Saussine, *Catholicism and Democracy: An Essay in the History of Political Thought*. 83-88. This is often termed as Jacobinism and demands thicker communitarian virtues belonging to French republicanism which can often become oppressive towards other practices within the civil space. See also Michael D. Driessen, 'Religious Democracy and Civilisational Politics: Comparing Political Islam and Political Catholicism', (Occasional Paper 12; Qatar: Georgetown University, Centre for International and Regional Studies, 2013). 19-20. Driessen proposes that liberal reforms in Catholic countries required, '*a priori*, dislodging the international power of the Catholic Church over the state, making liberal projects synonymous with the dis-establishment of a national faith tradition'. This led he suggests to a relationship with the state that was 'consequently, more antagonistic and mutually exclusive'.

<sup>54</sup> R. Inglehart and C. Welzel, *Modernization, Cultural Change, and Democracy: The Human Development Sequence* (Cambridge University Press). 46 and 300.

<sup>55</sup> Pagden, 'The Enlightenment: And Why It Still Matters'. 343.

French revolution appears to have forged a particular emphasis on the autonomy of the human subject both from religion as well as from the State. In the overthrowing of the *ancien régime*, which was essentially derived from the ancient marriage of throne and altar, it ensured that both regimes suffered the same consequences. Religion, particularly Catholicism which had embraced the assent of royal power was characterised as inimical to the deliverance of true civil rights.

### 1.1.2 The Response of the Catholic Church

The Response of the Catholic Church was manifold, particularly in its institutional and social forms. There are a number of important instances where Catholicism began to articulate its own social teaching and understanding of rights ideas, both natural rights and human rights. A focal point was the response to both the philosophy of liberalism and Marxism which challenged the perceived natural order. Schuck suggests that the predecessors of Pope Leo XIII ‘considered socialism and communism a derivation, not an antithesis, of the social contract theory of political liberalism’.<sup>56</sup> While Holland remarks that Catholic social teaching emerged as a response to the ‘philosophical and political challenges of liberalism’.<sup>57</sup>

Liberalism developed in the sixteenth century from a desire to progress toleration between religions in Europe.<sup>58</sup> The position of separation of Church and state, was extended from the sphere of religion ‘to other areas of social life where citizens [had] conflicting beliefs about the meaning of life’.<sup>59</sup> The philosophy of liberalism ‘refers also to a heritage of abstract thought about human nature, agency, freedom, and value, and their bearing on the functions and origins of political and legal institutions’.<sup>60</sup> Classical liberalism is associated with many of the prominent philosophers associated with the Enlightenment who developed a cluster of ideas that highlighted the interests of individuals over society and politics.<sup>61</sup> They

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<sup>56</sup>Michael J. Schuck, *That They Be One: The Social Teachings of the Papal Encyclicals 1740-1989*. (Washington, D.C.: Gerogetown Uni Press, 1991). 19.

<sup>57</sup> Holland, *Modern Catholic Social Teaching: The Popes Confront the Industrial Age, 1740-1958*. 12. J. Neuner and J. Dupuis, *The Christian Faith: Doctrinal Documents of the Catholic Church* (London: HarperCollins, 1992). 35. The Catholic Church also responded formally to philosophical rationalism in the Encyclical Letter *Qui Pluribus* (1846). It affirms the positive relationship between faith and reason, without contradiction of each other.

See Ryan, *The Making of Modern Liberalism*. (Kindle Edition) 23. ‘If we define liberalism as the belief that the freedom of the individual is the highest political value, and that institutions and practices are to be judged by their success in promoting it— perhaps the most plausible brief definition...’.

<sup>58</sup> Will Kymlicka, ‘Liberalism’, in Mr Ardon Lyon and T. Honderich (eds.), *The Oxford Companion to Philosophy* (Oxford: OUP Oxford, 2005), 514-16.514.

<sup>59</sup> *Ibid.* 514.

<sup>60</sup> Jeremy Waldron, ‘Liberalism’, in Edward Craig (ed.), *The Shorter Routledge Encyclopedia of Philosophy* (Oxon: Routledge, 2005). 571.

<sup>61</sup> *Ibid.* 572.

believed in individual freedom, particularly from interference or coercion by the State or religion, and in a fundamental individual equality.<sup>62</sup> They also emphasised the rights of individual reason which justified liberty of thought and conscience.<sup>63</sup>

The consequence of these ideas contributed to an extension of universal suffrage and the development humanitarian concern in the eighteenth and nineteenth century society led to a range of social reforms of prisons, child labour, slavery and the rights of women for example but also in developing various positive rights to freedom of speech, assembly and to form or dissolve a family. Stackhouse attributes these to the liberal traditions of Locke and Puritanism found in free-church Calvinism.<sup>64</sup> That reforming spirit and the liberalisation of law to increase protection to the vulnerable are part of the admirable marks of these liberalising movements. However, it is unsurprising that given the association with reformed Christianity which asserted pluralism in thought and belief that the Catholic Church was so resistant in this aspect of reform of the political sphere. Aside from the intellectual challenge, Catholicism's response involved both a political and social reaction. New Catholic social movements, in particular, emerged in parallel to wider social movements but officially their was hostility to social instability.<sup>65</sup>

Liberalism had been defined by the Papacy in the 19<sup>th</sup> century as “the error of the century” and in an effort to correct these errors Pope Pius IX published the encyclical *Quanta Cura* (1864) which included an appendix the infamous “syllabus of Errors” in 1864.<sup>66</sup> It was primarily a doctrinal response to modernism and liberalism.<sup>67</sup> Pope Pius IX therefore authoritatively wrote in 1864 it is ‘an error to

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<sup>62</sup> Ibid. 573.

<sup>63</sup> Ibid. 573.

<sup>64</sup> Max L. Stackhouse, 'Some Intellectual and Social Roots of Modern Human Rights Ideas', *Journal for the Scientific Study of Religion*, 20/4 (301-09. 305).

<sup>65</sup> On the Catholic contribution to the various social movements see Michael J. Schuck, 'Early Modern Roman Catholic Social Thought, 1740-1890', in Kenneth R. Himes and Lisa Sowle Cahill (eds.), *Modern Catholic Social Teaching, Commentaries & Interpretations* (Washington: Georgetown University Press), 99-124. For an example of the Catholic Church and the abolition of slavery see John Francis Maxwell, 'The Corrections of the Common Catholic Teaching Concerning Slavery by Pope Leo XII', in Charles E. Curran (ed.), *Change in Official Catholic Moral Teaching: No. 13 Readings in Moral Theology* (New Jersey: Paulist Press, 2003), 76-79. Diana Hayes, 'Reflections on Slavery', *ibid.*, 65-75.65). Daniel Laqua, 'The Tensions of Internationalism: Transnational Anti-Slavery in the 1880s and 1890s', *The International History Review*, 33/4 (2011/12/01 2011), 705-26. On May 5, 1888, Pope Leo XIII issued one of his lesser-known encyclicals condemning the slave trade, *In Plurimis*.

<sup>66</sup> Robert Aubert, 'Religious Liberty from "Mirari Vos" to the "Syllabus"', *Concilium*, 7/1 (1965). Pope Pius IX, *Quanta cura* Encyclical Letter, (8<sup>th</sup> December 1864). Heim notes that according Ratzinger (Pope Benedict XVI) he believed the Pastoral Constitution On The Church In The Modern World *Gaudium et Spes*, with two other documents of the Second Vatican Council, *Nostra aetate* and *Dignitatis humanae*, would become “a revision of the *Syllabus* of Pius IX, a kind of countersyllabus” (footnote omitted). In other words, a turning toward the “world” in dialogue. See Maximilian Heinrich Heim, *Joseph Ratzinger : Life in the Church and Living Theology : Fundamentals of Ecclesiology with Reference to Lumen Gentium* (San Francisco: Ignatius Press) 614 p. 188.

<sup>67</sup> Daly, 'Theological and Philosophical Modernism'. 94-95. See Pope Pius IX, 'Encyclical Letter *Quanta Cura* ', (8th December 1864). This Encyclical included an appendix titled the 'Syllabus of Errors' which outline various

believe that the Roman Pontiff can or should reconcile himself to, and agree with, progress, liberalism and modern civilisations'.<sup>68</sup> Inevitably, that position became unsustainable. *Quanta cura* and its appendix Syllabus, prepared in 1859 and published five years later offered a summary of the modern errors already identified in the papal documents, *Singular quadam* (1854) and *Maxima quidem* (1862).<sup>69</sup> The progressive laicisation of spheres often traditionally the domain of the church, and the modernism among some of the clergy and laity which could undermine the obligations of religion particularly in intellectual and moral life, all prompted Pius IX to condemn many of these concurrent trends. This encyclical *Quanta Cura* alongside a prior encyclical *Mirari vos* (1832) asserted one element of the Catholic ecclesial response to the 19<sup>th</sup> century.<sup>70</sup> The earlier *Mirari vos* focused on three major challenges to the Catholic faith: rationalism, Gallicanism and liberalism.<sup>71</sup> Particular freedoms were condemned because they contributed to indifference to truth, included freedom of conscience, freedom of the press and the separation of the church from the state.<sup>72</sup> For example in, *Mirari vos*, we find:

From this poisonous spring of indifferentism flows the false and absurd, or rather the mad principle that we must secure and guarantee to each one liberty of conscience; this is one of the most contagious of errors; it smooth's the way for the absolute and unbridled freedom of thought, which, to the ruin of Church and State, is now spreading everywhere, and which certain men, with outrageous impudence, do not fear to represent as advantageous to religion.<sup>73</sup>

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philosophical and theological errors in the eyes of the Church. Modernism would later be condemned by the Papal Encyclicals of Pius X, *Lamentabili* in July 1907 and followed with the encyclical *Pascendi* in September 1907. See Holland, *Modern Catholic Social Teaching: The Popes Confront the Industrial Age, 1740-1958*. 198-201.

<sup>68</sup> Pope Pius IX, 'Encyclical Letter *Quanta Cura* ', (§69).

<sup>69</sup> Aubert, 'Religious Liberty from "Mirari Vos" to the "Syllabus"', (53).

<sup>70</sup> Gregory XVI, Encyclical letter, *Mirari vos*, (On Liberalism and Religious Indifferentism)(August 15, 1832) had condemned the many unsettling and confusing trends of the era including: §12, the proposition of divorce for married couples; §13, indifferentism towards truth found in religion leading to syncretism; §14, liberty of conscience and 'immoderate freedom of opinion, license of free speech, and desire for novelty'; §15, 'freedom to publish any writings whatever and disseminate them to the people' asserting that 'it is evident that this Holy See has always striven, throughout the ages, to condemn and to remove suspect and harmful books'; §17, submission to just authority; §20, the separation of Church and state.

<sup>71</sup> Aubert, 'Religious Liberty from "Mirari Vos" to the "Syllabus"', (49). Gallicanism was a theory of a confessional State, and a particularly French demand for Catholicism to become the civil religion of the French state and the restraint of the papacy over the French church. The first Vatican Council (1869–70) formally declared the alternative Ultramontane view to be the official church position.

<sup>72</sup> Ibid. 49. Indifferentism is a particularly important challenge to Catholic philosophy. It's particularly well explored in Servais Pinckaers, *The Sources of Christian Ethics* (Washington, D.C.: Catholic University of America Press) xxi, 489 p.

<sup>73</sup> Gregory XVI, Encyclical letter, *Mirari vos*, (1832) §14.

However, Aubert suggests that despite the rhetoric of the encyclical, the papal position established that, 'toleration of modern liberties is acceptable in cases in which it cannot be avoided and on condition that the rights of the Church are safeguarded'.<sup>74</sup> But if this manifests itself as emancipation from God or a 'deliberate rejection of the supernatural' such a view would be condemned.<sup>75</sup> In the context of the political and social environment the Church found itself and even contributed to create, particularly following the revolutionary republican ideals of 1789 which subsequently involved the persecution and expulsion of religious in France, the church's reaction was unsurprising. Nevertheless, its doctrinal reflection on the consequences of revolution and emancipation movements was more nuanced than first appearances, offering an opportunity for moderate compromises.

The Syllabus, which was attached to the encyclical *Quanta cura*, and many of the numerous interventions by the papacy garnered hostile responses, particularly as it denounced the pretensions of the State to monopolise many of the vestiges of civil society and older royal sovereign power.<sup>76</sup> The liberal tendency toward naturalism, a philosophy which promoted an assertive individualism over and against communitarian ideas, something particularly found in Christian religion, was also condemned as dangerous and erroneous. But the Church's critique offered an important counterbalance for Catholics to the excesses of the overly rationalistic spirit of the nineteenth century and the temptation to relativism which might unhinge the entire European intellectual edifice to which it had so substantially contributed. Bernard Laurent affirms that Catholic social teaching, in established this jaundice view of liberalism, and also towards the developing free market economy 'when taken as the guiding mechanism of free modern society' became defining points of Catholic social teaching.<sup>77</sup> He therefore emphasises that the Church's 'opposition to liberal ideology, while taking different forms in different periods, has been consistent and persistent'.<sup>78</sup> Laurent proposes the Church had 'sought to stigmatize a world that no longer takes its inspiration from divine law or from natural law'.<sup>79</sup> That difficult summation might be true but the Church also gradually presented its own social teaching on economic and social injustice, and a

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<sup>74</sup> Aubert, 'Religious Liberty from "Mirari Vos" to the "Syllabus"', (51

<sup>75</sup> Ibid. 51

<sup>76</sup> Owen Chadwick, *The Secularization of the European Mind in the Nineteenth Century* (Canto edn.; Cambridge: Cambridge University Press) 286 p. 111.

<sup>77</sup> Bernard Laurent, 'Catholicism and Liberalism: Two Ideologies in Confrontation', *Theological Studies*, 68/4 (2007), 808-38.

<sup>78</sup> Ibid. 814

<sup>79</sup> Ibid. 814

nominal idea about the human person, particularly later concerning the person's dignity and human rights, to exist as ballast to the fluid and ever changing times.

The Catholic Church unpredictably opted to place its support behind a neo-Thomistic turn in Catholic theology. In 1879 Pope Leo XIII published the encyclical letter *Aeterni Patris*, and with that he made Thomistic philosophical and theological ideas 'mandatory for the whole church'.<sup>80</sup> This was not just a return to the ancient tradition of scholasticism with its enumerable resources but a return to the thought of Thomas Aquinas (1225-1274) in particular.<sup>81</sup> As we will discuss later, this decision obviously reduced the Catholic Church's capacity to respond to the multiple challenges of the twentieth century. It did however provide the intellectual certainty which Catholicism urgently required and gave it the confidence to respond to opportunities as well. Granted, by emphasising the natural law, it was a narrow view of the world but it was also clear and with the expansion of empire by many European states, the Catholic Church could provide an intellectual framework to its own ambitions, without dissent, to the expansion of Catholic missions across the world.<sup>82</sup> It managed to establish a theological architecture which sought to restore the relationship between the Catholic faith and culture, unfortunately it was dependent on establishing a bridge to a culture which was now fragmented by Reformations and revolutions.<sup>83</sup> Catholicism might not have had a choice to react to the fluctuations of the era other than reach back to a more secure and well established theological tradition but its suitability soon fell into question as the Catholic Church faced the challenges of the 20<sup>th</sup> century. Nevertheless, that repositioning of Catholicism towards the natural law became the locus for future intellectual enquiry into the foundations of law and the state.

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<sup>80</sup> Pope Leo XIII, 'Encyclical Letter *Aeterni Patris* (on the Restoration of Christian Philosophy)', *Acta Sanctae Sedis*, 12 (4 August 1879), 97-115. Daly, 'Theological and Philosophical Modernism'. 101.

<sup>81</sup> Thomas Aquinas (1224/6–1274), was a member of the Dominican Order of preaching friars founded by saint Dominic. He studied under St. Albert the Great (1200-80) in Cologne and Paris. He was professor at the University of Paris from 1256. His principle work is *Summa theologiae* Ia (Synopsis of Theology, First Part). Written at Rome (1266–68), *Summa theologiae* IIa (Synopsis of Theology, First Part of the Second Part) Written at Rome and Paris (1268–71), *Summa theologiae* IIaIIae (Synopsis of Theology, Second Part of the Second Part). Written at Paris (1271–2), *Summa theologiae* IIIa (Synopsis of Theology, Third Part). Written at Paris and Naples, incomplete (1272–3) and also *Summa contra gentiles* (Synopsis [of Christian Doctrine] Directed Against Unbelievers) Written at Paris, Naples and Orvieto (1259–65).

Richard Schaefer, 'True and False Enlightenment: German Scholars and the Discourse of Catholicism in the Nineteenth Century', *Catholic Historical Review*, 97/1 (24-45). 36.

<sup>82</sup> Other important momentums for the expansion of Catholicism came through the clarity of doctrinal teaching both during the First Vatican Council which confirmed hierarchical authority in Catholicism and the dogma of the Immaculate Conception (Pope Pius IX, *Ineffabilis Deus*, December 8, 1854) which stated that Mary the mother of Jesus was sinless from the moment of her conception. By doing so this also reaffirmed the Catholic understanding of human nature and family life.

<sup>83</sup> Daly, 'Theological and Philosophical Modernism'. 98.

Another response to the changes of the 19<sup>th</sup> century came in the form of the First Vatican Council which was an assembly of the Church in December 8, 1869. The Catholic Church needed to establish its own authority on foot of these challenges particularly in areas of doctrine and the cohesiveness of the church's teaching authority. The emerging nation state had sought to establish its authority over many of the temporal activities associated with the Church, including education, marriage and family life. The First Vatican Council emphasised two important elements of church teaching, the primacy of the pope over the Catholic Church, a point necessary due to egalitarian trends in Europe, and an emphasis on the corporate nature of Catholicism.<sup>84</sup> Therefore the Council reaffirmed the doctrine of papal infallibility proclaimed fifteen years previously and reemphasised the direction of the Church in response to the dilution of religion as it comprehended it. Papal primacy over the church stood in contrast to the theory of conciliarism, a view that implied giving more authority to the episcopal college of Bishops, formulated but never fully implemented in the 14<sup>th</sup> century Councils of Constance (1414-1418) and Basel (1431-1449).<sup>85</sup> It is important to note that later, the Second Vatican Council (October 1962 - December 8, 1965) sought to find a median between the conciliarism of the 15<sup>th</sup> Century and Papalism of the 19<sup>th</sup> century.<sup>86</sup> The Church also drew upon Roman law and developed an ecclesiology which emphasised its nature as a universal corporation deriving its authority from the papal office of the pope.<sup>87</sup> This juridical definition had been a response to the redefining of ecclesiastical discipline during the Reformation which brought a slow end to feudalism and a decline of Church influence in Europe from the seventeenth century.

### 1.1.3. Rerum Novarum 1891

In France, as elsewhere, the publication of Leo XIII's encyclical *Rerum Novarum* in 1891 gave a boost to a wide range of social Catholic initiatives.<sup>88</sup> The authorship of Pope Leo XIII's encyclical *Rerum novarum* in 1891, had built upon the preparatory

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<sup>84</sup> Galician claims by the Assembly of French clergy in 1682, which sought to reign in papal claims. See Boyle, *Church Teaching Authority: Historical and Theological Studies*. 130-133

<sup>85</sup> Francis Oakley, 'History and the Return of the Repressed in Catholic Modernity: The Dilemma Posed by Constance', in Michael J. Lacey and Francis Oakley (eds.), *The Crisis of Authority in Catholic Modernity* (Oxford: Oxford Uni Press, 2011). 33. Jean Gerson (1363-1429), had argued the natural right of people to self defence against unjust authority.

<sup>86</sup> August Franzen, 'The Council of Constance: Present State of the Problem', *Concilium*, 7/1 (1965). 18. "Conciliarism" is usually defined as a Council of Bishops are above the Pope.

<sup>87</sup> Boyle, *Church Teaching Authority: Historical and Theological Studies*. 125. For instance Frédéric Ozanam in 1833 established the Society of Saint Vincent de Paul to respond to the needs of the working classes in Paris. His communal conferences eventually spread across Europe to assist and raise funds for the poor.

<sup>88</sup> Mccmillan, 'France'. 5

work of Catholic lay faithful.<sup>89</sup> Ernest Fortin attributes the papal encyclical *Rerum Novarum* to the burgeoning Catholic movement concerned with social questions of the eighteenth and early nineteenth century.<sup>90</sup> It was the first significant encyclical on social justice issues. The challenges it addressed was not so much the doctrinal content of the Catholic faith which had been address at the First Vatican Council but the social issues and concerns of Christians in society. The Catholic Church focused on providing a “Catholic” stance on the modern developments of the nineteenth century, outside of the formal arrangements by the authority of the state, realising that with the shift in Church–State arrangements, it was another vehicle to present Catholic ideas.<sup>91</sup>

A number of Catholic thinkers strove to come to terms with the modernising conditions brought about by industrialisation and social movements such as socialism. This failure to comprehensively respond or even to acknowledge the transformation of society was acknowledged by Pope Benedict XVI in 2006 stating, it ‘must be admitted that the Church's leadership was slow to realise that the issue of the just structuring of society needed to be approached in a new way’.<sup>92</sup> In a brief summary Pope Benedict does give a flavour of the activity by Catholics in that time recalling ‘concrete needs were met by a growing number of groups, associations, leagues, federations and, in particular, by the new religious orders founded in the nineteenth century to combat poverty, disease and the need for better education’.<sup>93</sup> This came in parallel with the many in civil society who had viewed social reform as the leading priority of the nineteenth century. For instance, Adolph Kolping, a Catholic priest, had promoted a corporative way of Social Catholicism, had exerted a strong influence on the German Archbishop Wilhelm Freiherr von Ketteler of Mainz, who in turn was one of the most influential counsellors of Pope Leo XIII when he prepared the encyclical *Rerum, Novarum*.<sup>94</sup>

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<sup>89</sup> Yves Congar, *Lay People in the Church* (Maryland: The Newman Press). 287. Congar notes that *Rerum novarum* drafting relied on the work of the Fribourg Union, who’s particular competence in social matters contributed to its structure and thought.

<sup>90</sup> Ernest L. Fortin, ‘Sacred and Inviolable’: *Rerum Novarum* and Natural Rights’, *Theological Studies*, 53/2 (202). Pope Leo XIII, ‘Encyclical Letter *Rerum Novarum*’, (§55-57. Fortin notes that the Jesuit Luigi Taparelli d’Azeglio who wrote so authoritatively on Catholic social thought in the early 19<sup>th</sup> century became the educator at the Roman College of Gioacchino Pecci, the future Pope Leo XIII and author of the Social Encyclical *Rerum Novarum*.

<sup>91</sup> Schaefer, ‘True and False Enlightenment: German Scholars and the Discourse of Catholicism in the Nineteenth Century’, (29 -30. Schaefer notes however that some of this presentation was marked by Anti-Semitism and bigotry aimed at Protestants, Jews, Freemasons and liberals.

<sup>92</sup> Pope Benedict XVI, ‘Encyclical Letter *Deus Caritas Est*’, *Acta Apostolicae Sedis*, 96 (25 Dec, 2005), 217–79. § 27.

<sup>93</sup> *Ibid.* § 27.

<sup>94</sup> On October 27, 1991 he was beatified by Pope John Paul II. In Germany today, The International Kolping Society has more than 275,000 members in 2,730 local Kolpingsfamilien (“Kolping families”), making it the



Ernest Fortin has argued, these Thomists who were behind the authorship of *Rerum Novarum*, above all Luigi Taparelli and his students, were not necessarily aware of the difficulty in combining the novel idea of "rights" with "natural law." He suggests their thought suffered from the unfortunate disruption of university life caused by the French Revolution and Napoleonic Wars, which shut down the leading centres of theological learning in the early part of the nineteenth century. Therefore there is a stronger emphasis on the compatibility rather than incompatibility of Thomistic natural law and natural rights as it emerged in the previous centuries. Natural law and natural rights had two very different pedigrees, and their understanding of human nature tended to conflict rather than fuse. Fortin notes that the encyclical highlights two particularly modern ideas, the right to private property and the doctrine of natural rights.<sup>95</sup>

The encyclical goes further in emphasising the place of private property in the economy of the state, which it saw as derived from the natural right to property. This idea had a long history, which had in theory been resolved during the controversy regarding the poverty of the Franciscans in the 14<sup>th</sup> century.<sup>96</sup> A central emphasis being that property is a part of creation gifted by God to all humanity and therefore held in common and not an absolute right. However, Fortin notes that while this was an established idea within Catholicism from that earlier period, the advent of newer natural rights ideas had begun to use a derivative of this theory to argue against a right to private property, particularly as expressed by socialism. Pope Pius VII had briefly noted a challenge to the right to private property from socialists as early as 1800. He stated that 'the enemies of private property and states who are striving to confound all laws, divine and human, hope to effect their wicked plans chiefly by corrupting their young minds'.<sup>97</sup> Pope Leo XIII viewed this document not only as a response to new forms of capitalism but also as a response to socialism. While the document retained its

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largest social federation in the country. Kolping was responsible for the founding of Journeymen Associations in the 19th century to combat the misery of young crafts journeymen in the era of industrialisation. He is co-founder of the Catholic Social Teaching, which has been the basis for the work of Kolping International until today.

<sup>95</sup> Fortin, 'Sacred and Inviolable': *Rerum Novarum* and Natural Rights', (209).

<sup>96</sup> This point is developed later.

<sup>97</sup> Pius VII, Encyclical *Diu satus*, 'On a Return to Gospel Principles' (May 15, 1800). See Holland, *Modern Catholic Social Teaching: The Popes Confront the Industrial Age, 1740-1958*. 71. See also Michael J. Schuck, *That They Be One: The Social Teachings of the Papal Encyclicals 1740-1989*. 9. The Church's reaction to communism would continue with Pius XI, Encyclical *Divini Redemptoris* (on Atheistic Communism) 1937. No 4. It states for instance, 'In Our predecessors, the immortal Leo XIII, in his Encyclical *Quod Apostolici Muneris*, defined Communism as "the fatal plague which insinuates itself into the very marrow of human society only to bring about its ruin." See Pope John Paul II, 'Encyclical Letter *Centesimus Annus*', *Acta Apostolicae Sedis*, 83 (1 May 1991). 60. John Paul II had noted that while Pope Leo XIII had called for the cooperation to respond to the many unruly forces of his time, especially Liberalism and Marxism, many rejected such cooperation with the Church.

deep suspicion towards the secular state and its various manifestations including parliamentary democracy, its target was to establish a clear line between a Catholic social order and that of socialist or communist ambitions.

The principle of *ius gentium* had therefore to be reinterpreted to account for this challenge that Catholic social order was not misinterpreted or appropriated as Marxist or communist in the 19<sup>th</sup> century.<sup>98</sup> It was considered that *jus gentium* was according to Gratian, ‘the division of property and slavery belong to the “right of nations” (*ius gentium*) [...] by the right of nature all things are common and everyone is free’.<sup>99</sup> Similarly, Aquinas has viewed the right to property as derived from the “right of nations” and belonging to positive law (*ius positivum*) which is established and grounded in the natural law.<sup>100</sup> The neo-Thomists were able to assert their emphasis on the “sacred and inviolable right” to private property because they recognised that Aquinas had viewed *jus gentium* as existing between civil or positive rights and natural rights. This assertion could find resonance with the description by Locke who similarly defended the right to property against the natural right to hold the goods of creation in common but of course the neo-Thomists had to establish this natural right from a uniquely Catholic position.<sup>101</sup> However, Fortin saw this as a rather unthoughtful blend of Thomistic natural law and modern "natural rights" which had found its way into the encyclicals, particularly the emphasis on, the existence of a "sacred and inviolable right" to private property.<sup>102</sup>

In addressing the second of these two ideas, the doctrine of natural rights, the encyclical *Rerum Novarum* revealed the beginning of an ongoing evolution in thinking about social justice issues and a concern for the particular obligations due to people from the emerging political state. James Chappel observes that the Church’s political philosophy, ‘distinguished itself as a decentring of sovereignty away from the nation state and towards a cluster of legitimate, non-political

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<sup>98</sup> Fortin, ‘Sacred and Inviolable’: *Rerum Novarum* and Natural Rights’, (211.

<sup>99</sup> *Ibid.* 210. [as cited, footnote omitted].

<sup>100</sup> *Ibid.* 210. [as cited, footnote omitted]. *Summa theologiae*, 1-2, q. 95, a. 4.

<sup>101</sup> {Waldron, ‘God, Locke, and equality: Christian foundations of John Locke’s political thought’, 153-155.

<sup>102</sup> Fortin, ‘Sacred and Inviolable’: *Rerum Novarum* and Natural Rights’, (204. See Pope Leo XIII, ‘Encyclical Letter *Rerum Novarum*’, (§ 46. This would in some way be resolved in the later definition of ‘the universal destination of goods’ according to distributive justice, held by Catholicism to assert that while private property was a right, it was not absolute and the state or indeed natural justice could call on the proper sharing of the goods of creation, particularly with the needy. The roots of the later theme a ‘preferential option of the poor’ can be noticed here. See further Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Catholic Church*.

institutions: notably the family, the profession, and the Church'.<sup>103</sup> This corporatist thinking help establish the idea within Catholicism of the autonomy of civil society from the state, therefore stressing pre-political natural rights.<sup>104</sup> Fortin recognises that this response to the nation state, while certainly caustic in its critique of modern liberal capitalism, also opportuned a criticism of the treatment of workers, who demanded fair wages, and supported the right to form trade unions and establish decent working conditions, while still invoked the feudal corporatism of the pre-modern era.<sup>105</sup> Rooting its theory in basic, unacquired or inherent and God-given natural rights, Catholicism could reformulate and endeavour to surpass many of the socialist objections to unregulated capitalism, particularly by emphasising the human dignity of workers.<sup>106</sup> Contra socialism, the social thought of the Church emphasises the unique place of the individual and a corporate role in the production of capital.

The encyclical addresses the conditions of labour and the right to property as a consequence of industrialisation. The changing conditions of labour and the alteration of the nature of work created a new relationship, often exploitative between employer and employee.<sup>107</sup> But *Rerum Novarum* rejected the enmity between the two that a master verses slave narrative would propose. The encyclical opened with the following statement:

That the spirit of revolutionary change, which has long been disturbing the nations of the world, should have passed beyond the sphere of politics and made its influence felt in the cognate sphere of practical economics is not surprising. The elements of the conflict now raging are unmistakable, in the vast expansion of industrial pursuits and the marvellous discoveries of

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<sup>103</sup> James Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', *Modern Intellectual History*, 8/03 (561-90). 565 [footnote omitted].

<sup>104</sup> See J.P. Corrin, *Catholic Intellectuals and the Challenge of Democracy* (University of Notre Dame Press).

<sup>105</sup> Fortin, 'Sacred and Inviolable': *Rerum Novarum* and Natural Rights', ( 209. For an extended discussion of this critique see Thomas A. Shannon, 'Commentary on *Rerum Novarum* (the Condition of Labour)', in Kenneth R. Himes and Lisa Sowle Cahill (eds.), *Modern Catholic Social Teaching : Commentaries and Interpretations* (Washington, D.C.: Georgetown University Press, 2005), xii, 563 p.

<sup>106</sup> Mary Ann Glendon, 'The Influence of Catholic Social Doctrine on Human Rights', *Pontifical Academy of Social Sciences*, Acta 15 (2010). 68. For example in *Rerum Novarum*, a worker cannot surrender his very soul to Capitalism or be identified completely with the labour he produces because the human soul's own dedication belongs first of all to God from whom a worker derives his dignity and equality. See therefore, Pope Leo XIII, 'Encyclical Letter *Rerum Novarum* ', (§ 40:

No man may with impunity outrage that human dignity which God Himself treats with great reverence, nor stand in the way of that higher life which is the preparation of the eternal life of heaven. Nay, more; no man has in this matter power over himself. To consent to any treatment which is calculated to defeat the end and purpose of his being is beyond his right; he cannot give up his soul to servitude, for it is not man's own rights which are here in question, but the rights of God, the most sacred and inviolable of rights.

<sup>107</sup> Shannon, 'Commentary on *Rerum Novarum* (the Condition of Labour)'. 127

science; in the changed relations between masters and workmen; in the enormous fortunes of some few individuals, and the utter poverty of the masses; the increased self-reliance and closer mutual combination of the working classes; as also, finally, in the prevailing moral degeneracy.<sup>108</sup>

This litany of woes identified by the Pope was common knowledge across Europe but the encyclical did establish a bench mark for social justice and natural rights within Catholicism. The encyclical became a rallying cry for Catholics to participate in practical social justice issues and to bring the resources of Catholic intellectual tradition, particularly its thinking on natural law and natural rights to bear on contemporary situations.

The seeds were sown in the Catholic Church to address, within this framework, the social ills of society by utilising its own resources both social and intellectual. This shift in approach implied bringing to an end the idea of a “fortress Catholicism”, which had resisted the Reformation and the revolutions of Europe. It would become an engagement with the new political landscape, a prospect that had been effectively marked out for the future in the Catholic Church. While the Catholic Church had begun to set out its particular identity in 19<sup>th</sup> century Europe, it would take a long period of experimentation and multiple failures before it could articulate what it believed was a somewhat balanced position between radical socialism and *laissez-faire* capitalism, and thereby respond to the social issues of the time. One important point to retain is that in Catholicism it views itself as neither right nor left wing system but at the centre of its thought is soteriology.<sup>109</sup> In other words, the primary concern of a religion such as Catholicism is not politics but the Catholic teaching about salvation and redemption. What appears incoherence, oscillating as it does in its approaches to both right wing and left wing perspectives, with differing and even often times mixed reactions, is the primary goal of a religion to present its theological ideas in the mixed vocabulary of social concern, political activism, reactionary politics and even marked intolerance to the *zeitgeist* of the age. This central point was and is both an advantage and a liability. It has appears both entrenched and slow to shift ground on important social and moral issues (for instance in the 19<sup>th</sup> century on slavery and woman’s rights) but

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<sup>108</sup> Pope Leo XIII, 'Encyclical Letter Rerum Novarum', (§ 1.

<sup>109</sup> See further Francis Schüssler Fiorenza, 'Redemption', in Joseph A. Komonchak, Maire Ni Choileain, and Dermot A. Lane (eds.), *The New Dictionary of Theology* (Dublin: Dublin : Gill and Macmillan, 1990). 863-851.

also provided an important critique of the harsh extremes of emerging and developing ideologies found in radical forms of socialism and capitalism.<sup>110</sup>

## 1.2. Natural Law Revival and Finding Subjective Rights

### 1.2.1. Introduction to Natural Rights and Natural Law

In 1879, Pope Leo XIII published an encyclical letter *Aeterni Patris* making Thomistic philosophical and theological ideas ‘mandatory for the whole church’.<sup>111</sup> In order to clarify the Catholic approach to the question of social justice and human rights, a close examination of the Catholic theory of natural law rooted in Thomistic thought which saw a revival in the late 19th century is required.<sup>112</sup>

Benestad had observed ‘as early as 1923 Pius XI had already equated Thomistic legal justice with social justice’.<sup>113</sup> The term “social justice” was canonised in 1931 by Pope Pius XI in the Encyclical *Quadragesimo Anno*.<sup>114</sup> As Hittinger suggests by that stage Pius XI was already confident of a doctrine (*doctrina*) handed on (*tradita*) from Leo XIII’s era.<sup>115</sup> There existed confusion for a period as to how legal or social justice might properly fit into the schema of Thomistic thought.<sup>116</sup> Similarly, the terminology defining justice as legal, social or distributive justice in Catholic social thought made it an ambiguous definition. To the contemporary theologian Charles Curran, legal justice ‘referred to the obligation to obey society’s just laws’ which can also give rise, in circumstances of injustice therefore to legitimate forms of civil disobedience.<sup>117</sup> Therefore, there existed an understanding of justice which existed prior to the state and overarching the authority of the state to which Catholic’s owed their first allegiance. That history of natural law is important because it

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<sup>110</sup> Maxwell, 'The Corrections of the Common Catholic Teaching Concerning Slavery by Pope Leo XII'. See also Steven C. Hause and Anne R. Kenney, 'The Development of the Catholic Women's Suffrage Movement in France, 1896-1922', *The Catholic Historical Review*, 67/1 (1981), 11-30.

<sup>111</sup> Pope Leo XIII, 'Ass 12 (1879)', (§ 31. See Daly, 'Theological and Philosophical Modernism'. 101.

<sup>112</sup> John A. Coleman, 'Catholic Human Rights Theory: Four Challenges to an Intellectual Tradition', *Journal of Law and Religion*, (1994), 343.

<sup>113</sup> J.B. Benestad, *Church, State, and Society: An Introduction to Catholic Social Doctrine* (Catholic University of America Press). 151.

<sup>114</sup> J. Newman, *Foundations of Justice: A Historico-Critical Study in Thomism* (Cork University Press). xvi. The notion of canonised suggests that particular ideas are found within the corpus of official texts of Catholicism. See Pope Pius XI, 'Encyclical Letter Quadragesimo Anno', *Acta Apostolicae Sedis*, 23 (15th May, 177 - 228. §58: To each, therefore, must be given his own share of goods, and the distribution of created goods, which, as every discerning person knows, is labouring today under the gravest evils due to the huge disparity between the few exceedingly rich and the unnumbered propertyless, must be effectively called back to and brought into conformity with the norms of the common good, that is, social justice.

<sup>115</sup> Witte and Alexander, *The Teachings of Modern Roman Catholicism on Law, Politics, and Human Nature*. 11.

<sup>116</sup> Newman, *Foundations of Justice: A Historico-Critical Study in Thomism*. xvii

<sup>117</sup> Curran, *Catholic Social Teaching, 1891-Present: A Historical, Theological, and Ethical Analysis*. 197

provides a backdrop to the discussion about human rights in Catholicism and how it is articulated.

The movement within Catholicism from a theory of natural law, through natural rights to human rights ideas was facilitated by the conceptualisation of social justice. Social Justice became an overarching narrative within which each of these sometimes contradictory elements could find their place and expression. Translating natural law into action in society therefore embraced the *lingua franca* of social justice which recognised that society itself was ‘neither a creature of the state nor of the church’.<sup>118</sup> Both institutions in society had concern for the common good, of which social justice was its expression. According to Hittinger, the complex disentanglement of Church and state had produced an opportunity for Catholicism to articulate a uniquely Catholic theory of social justice, however, while relying on Thomistic theology this had to be constructed from a medieval theology, which had little sense of a modern state or an industrial economy, of political parties, social justice and justiciable natural rights.<sup>119</sup> Accordingly, Thomistic theologians sought to provide a response to the newly developing social contract theory of the state which was based on an extrinsic use of social contract while affording interior liberty to the subject of law, in other words, the public–private divide. Thomistic response suggest that there existed an internal ontological unity of humanity, which formed the basis for pluralism found in the make-up of society, ‘beginning with human nature itself, and including matrimony, family, church and body politic’.<sup>120</sup> On the suggestion of a pre-political order they asserted in Hittinger’s question, ‘are there norms anterior to, and higher than, the laws imposed by civil law and contract?’<sup>121</sup> That fundamental enquiry became the substantial concern of Catholic social thought and the basis upon which much of the proceeding drive to provide a bridge between natural law, natural rights and human rights would be founded.

However, even to attempt to approach the question of Catholicism and human rights requires familiarity with the resources upon which such claims are laid. It is also important to see the alternative presentation found in the liberal tradition to show the fluid exchange of ideas that has passed down the centuries to a Catholic presentation of human rights. In 2009 Pope Benedict XVI had suggested ‘*religion*

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<sup>118</sup> Witte and Alexander, *The Teachings of Modern Roman Catholicism on Law, Politics, and Human Nature*. 10.

<sup>119</sup> *Ibid.* 13.

<sup>120</sup> *Ibid.* 14.

<sup>121</sup> *Ibid.* 14.

*always needs to be purified by reason [...]*.<sup>122</sup> While it remains difficult to completely account for the relationship between Catholicism and European culture, it does suggest how a presentation of a catholic theory of human rights might be characterised by not become exclusionary or closed in upon itself.

The history of natural law in Catholicism stretches back to medieval scholasticism and retains this imprint.<sup>123</sup> In the following passage from Cicero's *Republic*, Jean Porter reveals how the early scholastic mind (circa 11<sup>th</sup> century) could read natural law implicit from a theological perspective in classical writings:

True law, however, is *right reason corresponding to nature*, diffused in all, unchanging and everlasting, which commanding, calls to duty, and forbidding deters from wrongdoing. And indeed, it does not command or forbid the upright in vain, although neither its commands nor its prohibition move the wicked. It is not permitted to alter this law, nor is it licit to attempt to derogate from it, nor can it be altogether abolished. Nor indeed can we be freed from it by the Senate or by the people. Neither need we seek for another to explain or interpret it for us. There will not be one law for Rome and another for Athens, nor will there be one law now, and another law in the future, but one everlasting and immutable law will govern all peoples at all times. And there will be one master and ruler common to all, God who is the author, the promulgator, and the judge of this law. And he who does not observe it is a fugitive from himself and rebellious against his own nature, and will thus suffer the worst penalties even if he evades what are commonly regarded as penalties.<sup>124</sup>

This example, commented upon during the historical period called the scholastic era, emphasised the stability of the natural law but also offered techniques for distinguishing between laws of differing kinds. If true law is "*right reason*

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<sup>122</sup> Pope Benedict XVI, 'Encyclical Letter Caritas in Veritate', *Acta Apostolicae Sedis*, 101 (29 June 2009 2009), 653-54. § 56.

*Reason always stands in need of being purified by faith*: this also holds true for political reason, which must not consider itself omnipotent. For its part, *religion always needs to be purified by reason* in order to show its authentically human face. Any breach in this dialogue comes only at an enormous price to human development (Italics included).

<sup>123</sup> Stephen J. Pope, 'Natural Law in Catholic Social Teaching', in Kenneth R. Himes and Lisa Sowle Cahill (eds.), *Modern Catholic Social Teaching, Commentaries & Interpretations* (Washington: Georgetown University Press, 2005).

<sup>124</sup> Cicero, 'De re publica' III.XXII. As translated by Jean Porter in Jean Porter, *Nature as Reason: A Thomistic Theory of the Natural Law* (Grand Rapids, Mich. ; Cambridge: W.B. Eerdmans) xii, 420 p. 2 (Emphasis added). Porter remarks that Cicero 'describes the natural law as a law that is universal in scope, identically the same in all times and places, and unalterable, in such a way as not to admit of abolition, exceptions, or dispensations'. Right reason or '*recta ratio*' is a term used in papal encyclicals to justify the use of human reason in accordance with the natural law.

*corresponding to nature*” then rational exposition of law was also possible. By asserting the universality of law, theologians of the Middle Ages turned to our rational capacities for practical judgement rather than to our indefinite natural behaviour or emotions, and to the basic principles of natural law they had discerned, to guide their future deliberations.<sup>125</sup> Tierney places this development in context stating:

If we are to find an earlier origin for natural rights theories we need to look for patterns of language in which *ius naturale* meant not only natural law or cosmic harmony, but also a faculty or ability or power of individual persons, associated with reason and moral discernment, defining an area of liberty where the individual was free to act as he pleased, leading on to specific claims and powers of humans qua humans.<sup>126</sup>

If the contours of Catholic thought about the natural law are to be followed then two factors are critical—the rational capacity for enquiry and the value of liberty or freedom, as a consequence of a stable and universal natural law. Both elements remained in synthesis with human nature. However, we must also bear in mind that each concept is linked to theological considerations rather than being self-referencing, a view point that is challenged and fragmented in many respects in later thought. McIntyre asserts a claim that a scholastic framework would become undone in the future, and that over a period of centuries the moral agent having become freed ‘from hierarchy and teleology, conceives of himself and is conceived of by moral philosophers as sovereign in his moral authority’.<sup>127</sup> Nevertheless, this suggests that in scholasticism a theory of individual rights slowly but inevitably came to the foreground. Through the examination of *ius* (right) what emerges is that the language of inherent natural rights and human rights began in this earlier period.<sup>128</sup> Of course this is an argument for continuity of the historical sources,

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<sup>125</sup> Christine E. Gudorf, 'Encountering the Other: The Modern Papacy on Women', in Charles E. Curran (ed.), *Change in Official Catholic Moral Teaching, Readings in Moral Theology no. 13* (New York: Paulist Press), 269 - 84. 304.

<sup>126</sup> BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS : STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW, 1150-1625* (EMORY UNIVERSITY STUDIES IN LAW AND RELIGION; ATLANTA, GA.: SCHOLARS PRESS) XI, 380 P. 54. Porter sees this identification as ‘grounded squarely in the received Patristic interpretation of Paul's "unwritten Law" of the gentiles, represented just such a move. Now for the first time, the natural law is identified directly with a subjective faculty of reason rather than with an objective normative order discerned through reason’. Jean Porter, *Ministers of the Law: A Natural Law Theory of Legal Authority* (Cambridge UK;: Eerdmans Publishing Company, 2010). 78. See also Porter, *Nature as Reason: A Thomistic Theory of the Natural Law*. 350.

<sup>127</sup> Alasdair C. MacIntyre, *After Virtue : A Study in Moral Theory* (2nd edn.; Notre Dame, Ind.: University of Notre Dame Press) xi, 286 p. 62.

<sup>128</sup> Brian Tierney, *The Idea of Natural Rights* (Cambridge: Eerdmans Publishing Co). 17. Tierney describes this as an emerging ‘pattern of language’.



which is disputed.<sup>129</sup> The notion that the foundations for human rights is derived from both in the canon law development of natural law as well as the later emergence of natural rights is an unsettling configuration of the history of human rights.

### 1.2.2. Scholastic Natural Law and Canon Law

Harold J Berman argues although prior to the eleventh century, 'law did not exist as a distinct system of regulation or as a distinct system of thought', the potential presented itself to move beyond the customary, regional or local tribal and feudal authorities to consider the development of a common law which was both rationally accessible and applicable to all.<sup>130</sup> Tracing a particular historical narrative can assist in disclosing a claim of continuity between the history of rights in the Medieval period and the later modern development of rights. The *discordantium canonum* (a Concordance of Discordant Canons) written circa 1140, marked 'one of the great turning points in the history of canon law'.<sup>131</sup> Gratian drew upon the early texts of Roman law and works of Burchard, Bishop of Worms in his *Decretum* (1012) and Ivo, Bishop of Chartres *Decretum* (1095) and some years later his *Panormia*.<sup>132</sup> Gratian provides texts for various sources for *ius* and divisions or distinctions among the various types.<sup>133</sup> He synthesises, in an orderly way, the accumulated and often conflicting canons, decretals and patristic works that for over one thousand years had been accumulated in the Church.<sup>134</sup> Gratian's *Concordantia* similarly mirrored the Justinian Code *Corpus Iuris Civilis* which was rediscovered in the eleventh century and which emphasised the role of Roman law as a system based in natural law and Greek philosophy's with an emphasis on stoic

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<sup>129</sup> O'donovan, 'The Language of Rights and Conceptual History', ( Wolterstorff, *Justice: Rights and Wrongs*.

<sup>130</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983). 85.

<sup>131</sup> See *ibid.* 562, footnote 6. Gratian was a Camaldulense monk and a *magister divinae paginae* (master of theology) in the monastery of Ss. Felix and Nabor at Bologna. Berman notes that Gratian developed an integrated of legal systems with the idea of a hierarchy of the sources of laws, to provide clarity in occasions of a conflict of laws. Therefore custom yields to enactment, enactments yields to natural law, and natural law yields to divine law. Berman therefore sees by implication that customs, 'which were far the most widespread form in which law appeared at that time, were to be evaluated in terms of reason and if found to be unreasonable were to be rejected'.

<sup>132</sup> *Ibid.* 143-151. Gratian for instance defines the relationship between divine law, natural law, human law, the law of the church, enacted law, customary law etc, following the work of earlier Roman jurists and their use of Aristotelian distinctions.

<sup>133</sup> Michael Shortall, *Human Rights and Moral Reasoning : A Comparative Investigation by Way of Three Theorists and Their Respective Traditions of Enquiry: John Finnis, Ronald Dworkin and Jurgen Habermas* (Tesi Gregoriana Serie Teologia; Roma: Editrice Pontificia Universita Gregoriana, 2009) 434 p. 27.

<sup>134</sup> Brian Tierney, 'Medieval Canon Law and Western Constitutionalism', *The Catholic Historical Review*, 52/1 (1966), 1-17. 4.

reason.<sup>135</sup> Both Justinian's Code and Gratian's *Concordatia* 'became the authoritative texts in jurisprudence and political reflection of the Middle Ages'.<sup>136</sup> Later generations of canon lawyers could not but address the question of *ius natural* because it formed the very principle upon which Gratian's jurisprudence took shape. Gratian differentiates his theory of natural law from that of the various usages of urban law, customs, and various civil laws that existed at the time. Therefore, Gratian *Decretum* begins:

The human race is ruled by two (means) namely by natural law and by usages. Natural law (*ius*) is what is contained in the Law and in the Gospel by which each is commanded to do to another what he wants done to himself and forbidden to do to another what he does not what done to himself.<sup>137</sup>

Gratian follows this distinction from other types of law but ambiguity remains about the content of *ius* as it often used in terms of 'either a moral code or an objective law, revealed by Scripture or accessible by reason'.<sup>138</sup> Brian Tierney argues that following from the canonists such as Gratian and the Decretists who developed the jurisprudence of the later twelfth century we can locate 'an important shift of language, a new understanding of the old term *ius naturale* as meaning *a kind of subjective power* or ability inhering in individuals, along with an influential doctrine of permissive natural law'.<sup>139</sup>

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<sup>135</sup> Stoicism in particular emphasised the idea of *logos*, which was appealing to early Christian theologians beginning with Clement of Alexandria (c. 200) and was transmitted through various legal and theological texts because as John Finnis puts it: 'For the Stoics, human life has its meaning, choice its significance, practical reason its objectivity, just in so far as they fit into the vast divine plan (*logos*) of the cosmos, one aspect of which is the cosmopolis of gods and men in the harmony (*homologia*) of their respective communions'. Finnis, *Natural Law and Natural Rights*. 376. See also Berman, *Law and Revolution: The Formation of the Western Legal Tradition*. 55. Christian thinkers took up the view 'propagated by Philo, that philosophy simply provides the means of interpreting authoritative texts which embody divine wisdom' [footnote omitted]. Ulpian had similarly coined the phrase, 'Isu naturae est, quod natura omnia animalia docet' (natural law is that which nature has taught to all creatures).

<sup>136</sup> Shortall, *Human Rights and Moral Reasoning : A Comparative Investigation by Way of Three Theorists and Their Respective Traditions of Enquiry: John Finnis, Ronald Dworkin and Jurgen Habermas*. 27. See Berman, *Law and Revolution: The Formation of the Western Legal Tradition*. 55. Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 58 -69. See also Lisa Sowle Cahill, 'Feminist Ethics', *Theological Studies*, 51/1 (49. 43. One particularly interesting contribution of Gratian was to the role of equity in law. By recognising human frailty and the duty to "save souls" he understood natural law to possess transcendent values. This was followed by Hostiensis (1200-1271) who viewed equity found in natural justice to be bound with evangelical mercy and so limit law.

<sup>137</sup> Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 58.

<sup>138</sup> Shortall, *Human Rights and Moral Reasoning : A Comparative Investigation by Way of Three Theorists and Their Respective Traditions of Enquiry: John Finnis, Ronald Dworkin and Jurgen Habermas*. 28.

<sup>139</sup> Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 8 [Italics added]. See Pope, 'Natural Law in Catholic Social Teaching'. 42-43. The Decretists were legal commentators who worked in the various new schools such as Bologna and Paris to produce commentaries on the *Decretum* particularly between 1140 and 1190 ad.

To Porter the quality and significance of this shift within scholastic natural law thinking can be found in earlier patristic thought. Drawing on the early Church teaching the scholastics identified the natural law with the “inner law” which is referred to at Romans 2:14, where Paul asserts that the Gentiles distinguish what the Law requires through an inner law.<sup>140</sup> The early Christian theologian Origen was able to identify the law of nature with the law of God, and Ambrose could identify the natural law with the Law of Moses. Jerome, another patristic theologian identifies the inner law found in scripture with the natural law, evaluating this law as *synderesis* (a term we develop later in this section) as a capacity that cannot be extinguished.<sup>141</sup> Therefore, in the opening words of Gratian’s *Decretum* we discover *ius naturale* as understood as the Golden Rule of Christian scripture ‘by which we are commanded to do unto others we what we would have them do unto us [...]’, and was combined further with the precepts of the Decalogue to underpin the natural law.<sup>142</sup> Another important consideration which Porter stresses from the Ordinary Gloss of the *Decretum* and drawing upon the scriptural reference relying on the inner quality of the natural law.

For the image cannot be so far extirpated from the human soul by the stain of earthly desires that not of its lineaments should remnant in it. For that is not altogether removed which was impressed there through the Image of God when the human person was created.<sup>143</sup>

This version of the natural law as containing an inner subjective quality was prepared by earlier patristic authors who wrote in the preceding centuries.<sup>144</sup> As we distinguished, they combined multiple sources to formulate their

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<sup>140</sup> Porter, *Nature as Reason: A Thomistic Theory of the Natural Law*. 12. [Footnote omitted] Romans 2: 14-15: ‘Indeed, when Gentiles, who do not have the law, do by nature things required by the law, they are a law for themselves, even though they do not have the law. They show that the requirements of the law are written on their hearts, their consciences also bearing witness, and their thoughts sometimes accusing them and at other times even defending them’. New International Version (NIV). Porter further follows Tierney,

[...] it was only a small step from Huguccio’s preferred definition of the natural law in terms of reason, to the scholastic identification of the natural law in terms of reason, to the scholastic identification of the natural law with a force, capacity, or power of the individual person; and from there it is a further step to an idea of a right as a subjective power of the individual (350).

See also Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 58 -69.

<sup>141</sup> Porter, *Nature as Reason: A Thomistic Theory of the Natural Law*. 12.

<sup>142</sup> See Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 23. Tierney suggests that in the mind of some this undermined the classical definition of natural law and thereby created the conditions for the development of subjective rights.

<sup>143</sup> Porter, *Nature as Reason: A Thomistic Theory of the Natural Law*. 4.

<sup>144</sup> Servais Pinckaers states, ‘It is in our free will that St. Thomas perceives the true image of God within us, for it is in our mastery over our actions that we show forth his image (Prologue, Iallae). Pinckaers, *The Sources of Christian Ethics*. 327.

contemporaneous idea of natural law.<sup>145</sup> This led them to produce a formula to consider the natural law as an ‘interior power or capacity for moral discernment [...]’ something that went beyond the theories of the Stoics and of Cicero. While an objective natural law might be formulated from the cosmos, the canonists strove to understand that inner sense of the law at its source. Various formulations tried to ascertain the nature of this “certain force” of *ius*, not unlike Cicero’s *innata vis*.<sup>146</sup> Odo of Dover (1170) wrote, ‘more strictly, natural *ius* is a certain force divinely inspired in man by which he is led to what is right and equitable’.<sup>147</sup> Interestingly, and useful for our later discussion on Thomas Aquinas, Simon of Bisignano writes ‘Natural *ius* is said to be a force of the mind the superior part of the soul, namely reason which is called *synderesis*’.<sup>148</sup> Tierney is suggesting therefore, that the subjective element of *ius* was already being formulated by the canonists without articulating any clear theory of natural rights, which would come much later. This evolutionary perspective towards the natural law produces the possibility of qualitative leaps driven on by innovations in emerging ideas of individualisation, claims to autonomy and self-direction.<sup>149</sup>

Porter also refers to the Ordinary Gloss, a text found among the commentaries of the various *Decretum* including the commentaries of Boniface VIII, available to the scholastics, and became known as the decretalists.<sup>150</sup> Here both biblical and classical natural law ideas are interwoven and include a broad understanding of both *ius* and *lex* as complementary, as was suggested in both the texts from Cicero and Paul. The medieval canon lawyers continued to expand upon the original Gratian and decretalists works to resolve controversies or case often listing various lists of the kinds of meaning *ius naturale* might have to fill in the gaps that became apparent in Gratian’s thought.<sup>151</sup> It was a period ‘saturated with a concern for

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<sup>145</sup> Steven P. Marrone, ‘Medieval Philosophy in Context’, in A.S. McGrade (ed.), *The Cambridge Companion to Medieval Philosophy* (Cambridge University Press, 2003). 25-26. Marrone remarks that, ‘the growing tendency among twelfth-century thinkers to view the cosmos as a rationally ordered structure, amenable to investigation and analysis by the rational mind ...’

<sup>146</sup> Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 63.

<sup>147</sup> *Ibid.* 63.

<sup>148</sup> *Ibid.* 63.

<sup>149</sup> Porter, *Nature as Reason: A Thomistic Theory of the Natural Law*. 348 See Shortall, *Human Rights and Moral Reasoning : A Comparative Investigation by Way of Three Theorists and Their Respective Traditions of Enquiry: John Finnis, Ronald Dworkin and Jurgen Habermas*. 30-31. See footnote 37: ‘the individual is referred to, according to contexts, as *homo, fidelis, civis, subiectus, singularis pesona or just quisque* (anyone)’.

<sup>150</sup> Porter, *Nature as Reason: A Thomistic Theory of the Natural Law*. 4. See also Pope, ‘Natural Law in Catholic Social Teaching’. 43 – 46. Bernard of Parma is attributed as the author (d. 1266).

<sup>151</sup> Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 60. Many of the Popes published collections of their decretal letters which included legislative prescriptions that sought to resolve conflicts of laws. This includes the *Liber Extra* written by Raymond of Penyafort and commissioned by Pope Gregory IX and promulgated in the Bull *Rex Pacificus* in 1234. It became the definitive text and binding law to replace Gratian’s *Decretum*. Reid states that it remained in force as binding

rights' as Tierney suggests.<sup>152</sup> Interesting, Tierney asserts that because of the dual state of power distributed between throne and altar medieval government could never congeal 'into a rigid theocratic absolutism in which rights theories could never have taken root'.<sup>153</sup> It was through the interplay of these two poles of power in which early rights are asserted and commanded.

As we have illustrated it is possible to discern a shift in emphasis in language from the Stoic and Roman understanding of natural law towards a more subjective and interior meaning of natural law, in the framework of Christian subjectivity. It is by combining Christian inner conviction with the duty of the natural law, which can, in turn, be rationally understood and universally applied, that we have a close proximity to a very early foundation for expressing rights in the Christian sense. Positioning this approach of Catholicism to human rights suggests a path from objective to subjective rights in Catholic thought. At this point of development when speaking of an objective right, we are considering the object of justice, as something due to another.<sup>154</sup> There is no clearly definitive way to yet say that during this period there was a strong idea that a right existed in the inherent sense as something an individual possessed.

For Aquinas objective right or "*jus*" (*ius*) 'primarily means 'the fair' or "the what's fair".<sup>155</sup> This understanding is taken by Aquinas primarily from canon law which relied on notions like *Physei Dikaion* found in Aristotle's *Nicomachean Ethics* or *ius* used in classical Roman law and is presented as a right derived from an objective sense of justice as something owed to another.<sup>156</sup> Tierney remarks that 'it is not surprising that, when Aristotle or Aquinas sought to define *dikaion* or *ius*, they did not proclaim the rights and powers of individuals. They were concerned rather

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ecclesiastical law in the Catholic Church until 1917. The *Corpus Juris Canonici*, would be the culmination of the various versions of canon law to emerge from the middle ages. The full text of the *Corpus Juris Canonici* is scanned and online and available on the Bavarian State Library website [<http://www.bsb-muenchen.de/index.php>]. See Jr. Charles J. Reid, 'The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry', *BOSTON COLLEGE LAW REVIEW*, 33/37 (1991-1992). See also Pope, 'Natural Law in Catholic Social Teaching'. 44.

<sup>152</sup> Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 54.

<sup>153</sup> *Ibid.* 55.

<sup>154</sup> Annabel Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge University Press).

<sup>155</sup> Finnis, *Natural Law and Natural Rights*. 206. In agreement with this point see Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 22. See also A.J. Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (New York: Clarendon Press). 228-232.

<sup>156</sup> Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*. 3.

with a harmonious structure of relationships, right portion, *juste partage*'.<sup>157</sup> In the *Summa Theologiae* Aquinas gave a formal definition of *ius*:

Justice has its own special object apart from the other virtues and this is called the just, and this indeed is *ius*, so it is evident that *ius* is the object of justice [...] in its original meaning *ius* signifies the just thing [...] law (*lex*) is not *ius* itself but rather the basis of *ius*.<sup>158</sup>

Tierney notes that it was believed that the objective sense of rights was restored by Aquinas even as it was lost by the earlier scholastics and similarly lost by the later Ockham and the nominalist tradition which followed.<sup>159</sup> Brian Tierney suggests that,

[...] our tradition of natural law, from which the idea of natural rights has grown, is not dependant wholly on Christian sources. The church fathers took ideas of natural law partly from the Stoics. St. Thomas Aquinas taught that human reason could discern natural law without any specific Christian revelation.<sup>160</sup>

The natural law did not rely on canon law and Christian scriptures alone but drew upon Greek philosophy and Roman law. It was against this backdrop that Thomas Aquinas could formulate a theory of natural law that could be discerned by human reason without recourse to Christian revelation but also consistent with the potential of Christianity to complement the natural law as well. If he was to make this assumption he could do so because of the belief that Christian ideas did not destroy human reason but complemented and built upon it.<sup>161</sup>

While Aquinas did not develop an explicit doctrine of inherent natural rights he did deploy the word *ius* in a possessive or moral sense, but this application did not refer to the right of an individual or as an inherent individual right.<sup>162</sup> Tierney further notes that 'in fact Thomas followed the common usage of his age in which

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<sup>157</sup> Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 22. [emphasis mine].

<sup>158</sup> *Summa Theologiae*, 2. 2ae. 57.1

<sup>159</sup> Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 23.

<sup>160</sup> 315

<sup>161</sup> *Summa Theologica* Ia. 1, 8 ad 2. "Since therefore grace does not destroy nature but perfects it, natural reason should minister to faith ..." (Cum enim gratia non tollat naturam, sed perficiat, oportet quod naturalis ratio subserviat fidei).

<sup>162</sup> Tierney, *The Idea of Natural Rights*. 23. See also Brian Tierney, 'Natural Law and Natural Rights Old Problems and Recent Approaches', *The Review of Politics*, 64/3 (389-406.392).

*ius* and *lex* could sometimes be used interchangeably'.<sup>163</sup> He therefore proposed that this approach was part of the harmonious tradition since the classical era.

In Roman law *ius* meant not only objective right order but also a body of legal or moral precepts, as in *ius civile* and *ius gentium*. Similarly the canonists emphasised the meaning of *ius* as moral precept, equivalent to *lex*, but they did not lack the meaning of objective right order'.<sup>164</sup>

Tierney outlines the way Aquinas could reconcile both understandings by suggesting they are based on the same principle affirmed in the natural law.<sup>165</sup> Both meanings of *ius*, the objective right relationship and a precept of the natural law, 'retain the underlying sense of rightness or fairness'.<sup>166</sup> This cross-pollination was common in the scholastic era, and while it may today lead to some confusion over what might be taking place, that simple sense of equity, found in the golden rule or similar principles, could bridge the conditions to where *ius* might be required in new circumstances.

### 1.2.3. Synderesis and Ockham

As noted in section 1.2.2, one of the particular and unique contributions of Catholic theology to the understanding of natural law is the concept of synderesis.<sup>167</sup> Synderesis is at the centre of the intellectual life, 'intelligence, which is the practical reason's direct knowledge of first principles'.<sup>168</sup> Scholastic theology 'was to discern a natural habit in this primordial, stable knowledge and to call it *synderesis*'.<sup>169</sup> From this sense, it was possible to understand basic goods, for instance life, sustenance, to know the truth, to love.<sup>170</sup> The centrality of the concept of synderesis remains because it identifies two levels of conscience, which of itself is

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<sup>163</sup> Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 25.

<sup>164</sup> *Ibid.* 25

<sup>165</sup> *Ibid.* 26

<sup>166</sup> *Ibid.* 26 Tierney remarks that these two meanings of *ius* will in time, 'relate to the third one, of particular interest to us, *ius* considered as subjective right'.

<sup>167</sup> Jack Donnelly, 'Natural Law and Right in Aquinas' Political Thought', *The Western Political Quarterly*, 33/4 (520-35. 523. Donnelly remarks, 'Since human law is said to be derived from natural law, such questions of how the principles are known and by whom are of great importance'.

<sup>168</sup> Pinckaers, *The Sources of Christian Ethics*. 384.

<sup>169</sup> *Ibid.* 384. Pope Emeritus Benedict had in a speech to the US Bishops of Dallas, Texas in 1991 suggested using the Platonic concept of anamnesis. Joseph Cardinal Ratzinger, 'Conscience and Truth', *10th Workshop for Bishops*, (Dallas, Texas.: United States Catholic Bishops Conference, 1991).

<sup>170</sup> Pinckaers, *The Sources of Christian Ethics*. 384. Much has been written on the natural inclinations and "goods" or capabilities we can attribute to human beings as a basis for natural rights. See *ibid.* 406-408. Finnis, *Natural Law and Natural Rights*. Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge: The Belknap Press). Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction*, Russell Hittinger, *The First Grace: Rediscovering the Natural Law in a Post-Christian World* (Paperback edn.; Wilmington: ISI Books).

formative in the Catholic articulation of conscience as the basis of human rights ideas and as an expression of a Catholic notion of liberty or freedom which has underpinned human rights thought. The scholastics therefore identified *synderesis* and *conscientia*. *Synderesis* acts as an expression of the divine imprint, which views the person as originated in the divine and retaining a divine image from which springs an orientation toward the true and the good. From this primordial layer, the activity and habit of practical reason, which follows freely the dictates of conscience, recognises what is true and good and pursues it. *Conscientia* is therefore the working out deliberately, the interaction between the will and those first principles (as indicated by *synderesis*) and ordered by reason towards its proper end.<sup>171</sup>

The observation by later scholasticism and neo-Thomistic thought is the disruption of this inner equilibrium between *synderesis*. Whereas what was just an attribute of the natural law which might be discerned, it was via the tradition which followed Ockham that relegated the fixture of justice to the freedom of the will, without the ordering of reason towards the good and true. The point would be to see Ockham as pre-empting the utilitarian philosophy attributed to the Enlightenment.<sup>172</sup> Essentially, Ockham and the nominalist philosophy which followed him, has placed free choice between opposing goods, and indifference toward evil (as consequently established by Christian theology), at the centre of his philosophy. As Pinckaers proposed,

[w]e could not be bound by a past action or obliged to a future one without losing the radical freedom that is ours at each moment. Thus human conduct became a succession of individual actions, drawn as it were with perforated lines, the dots being the unrelated moral atoms.<sup>173</sup>

Many consequences have been placed at the feet of Ockham. The replacement of the moral law rooted in natural law with a positivistic legalism; the demotion of virtue and the *habitus* which inculcates them for a radical freedom; a limitation of the natural inclinations and even a rejection of conformity with inclinations as such;

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<sup>171</sup> Benedict says the following: Aquinas describes *anamnesis* [*synderesis*] as an inner repugnance to evil and an attraction to the good. The act of conscience applies this basic knowledge to the particular situation. It is divided according to Thomas into three elements: recognizing (*recognoscere*), bearing witness (*testificari*), and finally, judging (*judicare*). For a more recent survey of the place of conscience in Catholic thought see, Anthony R. Lusvardi, 'The Law of Conscience: Catholic Teaching on Conscience from Leo XIII to John Paul II', *Logos: A Journal of Catholic Thought & Culture*, 15/2 (Spring 2012), 13-41.

<sup>172</sup> John Kilcullen, 'The Political Writings', in P.V. Spade (ed.), *The Cambridge Companion to Ockham* (Cambridge: Cambridge University Press, 1999). 319

<sup>173</sup> Pinckaers, *The Sources of Christian Ethics*. 243.



and the autonomy of the individual from a theological ontology.<sup>174</sup> The fragmentation of the relationship between Christian morality and law might certainly be a consequence of the nominalist revolution instigated by Ockham, but it also was inspired by the arrival of individual liberty which laid the foundation of the particular autonomy and thereby natural rights which drove Enlightenment thought. Unintended consequences might indeed be the hallmark of the European condition.

Just how seminal Ockham's writings and the nominalism he inspired have been is contested. That said, he remains an important figure as his thought indicated a turn, and to his critics redirected, the intellectual energies of entire generations away from Aristotelian thought and towards the reversal of those assumptions.<sup>175</sup> Pinckaers attributed a prominent position to Ockham in the movement to articulate subjective rights, and particularly subjective natural rights (developed in the Enlightenment), which are found to be independent from a power of dominion (*dominium*).<sup>176</sup> Ockham was preoccupied with defending the Franciscan view on property and the limits placed on authority, from which he formed his view on rights.<sup>177</sup> According to Tierney, we find 'a tacit shift from an argument about natural law to one about natural rights'.<sup>178</sup> Following the commentators on the *Decretum*, Ockham had understood that *ius naturale* could be used in several different senses. There are of course, like many topics related to rights, a range of interpretations and opinions on Ockham and his writings. To Pinckaers, Ockham was a significant author among others, who worked out a new concept of freedom that gave rise in thought to the liberty upon which the voluntarist idea developed in the later modern era.<sup>179</sup> Ockham's voluntarism was established in the view 'that free will *preceded* reason and will in such a way as to move them to their acts'.<sup>180</sup> He could therefore state, '[F]or I can freely choose to know or not to know, to will or not to will'.<sup>181</sup> Ockham's stance on the capacity of freewill to be indifferent to the dictates of reason and will stood in contradiction to the insight of Aquinas. Pinckaers put it, 'to St. Thomas, freedom was rooted in the soul's spontaneous

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<sup>174</sup> Ibid. 240-253.

<sup>175</sup> Dominion as seen to be the power of authority or hierarchy. See Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*. 50-51. Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 216.

<sup>176</sup> Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*. 49.

<sup>177</sup> Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 171.

<sup>178</sup> Ibid. 175 Tierney notes that Ockham also develops the idea of alienable natural rights, 'which could be renounced at the will of the right holder'.

<sup>179</sup> Pinckaers, *The Sources of Christian Ethics*. 329.

<sup>180</sup> Ibid. 331. Emphasis in text.

<sup>181</sup> Ibid. 331.

inclinations to the true and the good. His entire moral doctrine was based on the natural human disposition towards beatitude and the perfection of good, as to an ultimate end'.<sup>182</sup> Whereas the Scholastics applied two basic principles, that of Cicero's *sequi naturam*, which might be translated as living according to our rational nature, particularly in the enjoyment of the good, the true, and bond of community, and secondly, the good or happy life as an end in itself, which to the scholastics entailed the beatitude of heaven and the vision of God.<sup>183</sup> To Ockham and his successors, human freedom no longer fulfilled these primary purposes but we might choose contrary paths, based not in their objective moral worth and in harmony with these natural inclinations but in their subjective value. To the contemporary legal philosopher John Finnis this can 'usefully be compared with modern "choice" theories of rights and with Hart's notion of a right as "small scale sovereignty"'.<sup>184</sup>

From this brief assessment of scholasticism and the change brought about by nominalism, which in turn set a course for natural rights developed in the era we have broadly termed the Enlightenment, we can acknowledge the contribution of multiple intellectual traditions but also the fragmentation of the pre-modern era on the meaning of terms such as liberty, subjective rights and duty towards to that which is good or true. That cultural milieu which is the common heritage of European society in particular and which can be drawn upon, from many sometimes conflicting traditions, give a sense of both continuity and discontinuity.

The narrative of natural rights and natural law as it contributed to the shape of human rights from the perspective of Catholicism can also be extended to include the place of Francisco de Vitoria (c.1492-1546) and Francesco Suárez (c.1548-1617) and the experience of Bartolomé de Las Casas.<sup>185</sup> Thomistic natural law had been

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<sup>182</sup> Ibid. 332.

<sup>183</sup> Ibid. 334-335.

<sup>184</sup> See notes of Finnis, *Natural Law and Natural Rights*. VIII.3. 228.

<sup>185</sup> The history of scholasticism has been divided in to a 'golden age', between the years of 1250 to 1350 and a 'silver age' which arrived approximately 175 years later, from 1525 to 1625. See Jorge Gracia, 'Suárez (and Later Scholasticism)', in J. Marenbon and S.R.F.L.J. Marenbon (eds.), *Routledge History of Philosophy Volume Iii: Medieval Philosophy* (III; London: Taylor & Francis, 2003).452.

For a fuller treatment of the contribution of primitive scholastic thought to traditional and modern international law see David Kennedy, 'Primitive Legal Scholarship', *Harvard International Law Journal*, 27/1 ( See also Carlos A. Casanova, 'The Influence of Christianity on the Spanish Conquest of America and the Organization of the Spanish-American Empire', *Logos: A Journal of Catholic Thought & Culture*, 14/4 (2012). And Ramon Hernandez, 'The Internationalization of Francisco De Vitoria and Domingo De Soto', *Fordham International Law Journal*, 15/4 (1991). On the contribution of Las Casas to our understanding of human rights by opposing the *encomienda* system which treated Indians as property see Roger Ruston, *Human Rights and the Image of God* (London: SCM Press). 120-138. 121:

All the gold, silver, precious stones, pearls, jewels, gems and all other metal and precious objects that the Spaniards, since the time of the discovery of that world up to now, have obtained from

revitalised by Cardinal Cajetan (Thomas de Vio, 1468-1534) who provided a complex commentary on Aquinas thought.<sup>186</sup> The renewed interest in Thomistic thought came as Catholic theologians were responding to the emerging humanist philosophy and the impact of the Reformation in the 16<sup>th</sup> century. The discovery 'of new literary, philosophical and artistic works from the ancient world had given rise not only to a renewed interest in pagan ideas, but to a change of attitude in the intellectual community that seemed to many to pose a threat to the integrity of the Christian faith'.<sup>187</sup> Secondly, and later, the Reformation had transformed theology into a polemical and apologetic discourse used to counteract the arguments against the Church.<sup>188</sup> The centres of Catholic learning has also begun to shift from the traditional centres at Oxford, Cambridge, Bologna, Naples and Rome but especially Paris, to include the Iberian peninsula, of Coimbra, Alcalá and particularly Salamanca.<sup>189</sup> Many of the debates which ensued in the 16<sup>th</sup> century began to address concerns that were not wholly theological and had become philosophical and to concentrated upon the secular preoccupations of the state, including the expansion of empire.<sup>190</sup>

Ramón Hernández recounts the influence of Peter Bruslense (or Crockaert), professor of philosophy in Paris 'who introduced Aquinas's *Summa Theologiae* as the standard textbook in Paris, and, in so doing, broke with the centuries-old tradition theology on the basis of Peter Lombard's *Sentences*'.<sup>191</sup> Bruslense's student Francisco de Vitoria worked with him in 1512 on his edition of the theology work of Thomas Aquinas.<sup>192</sup> Hernández reveals the various influences that shaped the thought of de Vitoria in particular, which provided 'the foundation of his internationalism and pointed concern with American themes', including his humanism, nominalism, and Thomism.<sup>193</sup> In these traditions, de Vitoria influenced the direction of theological and philosophical thought when he took up a position

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underground, from the surface of the land or from waters – all of it has been robbed, unjustly, usurped and perversely seized and, in consequence, the Spaniards have committed a huge theft that was, and is now, subject to restitution [footnote omitted].

<sup>186</sup> Luis Cortest, *The Disfigured Face: Traditional Natural Law and Its Encounter with Modernity* (New York: Fordham University Press).7.

<sup>187</sup> Gracia, 'Suárez (and Later Scholasticism)'.453-4.

<sup>188</sup> Ibid. 454.

<sup>189</sup> Ibid. 453-4.

<sup>190</sup> Ibid. 453.

<sup>191</sup> Hernandez, 'The Internationalization of Francisco De Vitoria and Domingo De Soto', ( 1036-7. One of the most influential twelfth-century theological work was the *Sentences* written by Peter the Lombard circa. 1155–7. They were valued for their orthodoxy and inspired many commentaries, which further produced theological and philosophical works between the 13<sup>th</sup> and 15<sup>th</sup> centuries. J Marenbon, 'The Twelfth Century', in J. Marenbon and S.R.F.L.J. Marenbon (eds.), *Routledge History of Philosophy Volume Iii: Medieval Philosophy* (III); London: Taylor & Francis). 178.

<sup>192</sup> Hernandez, 'The Internationalization of Francisco De Vitoria and Domingo De Soto', (1037.

<sup>193</sup> Ibid. 1035.

first at the college of San Gregorio of Valladolid in 1523 and later at the University of Salamanca in 1526.<sup>194</sup> De Vitoria, following his teacher replaced the *Sentences* of Peter the Lombard with more scientific and theological *Summa Theologica* of Aquinas.<sup>195</sup> The humanist influence in his work enabled him to undertake study in practical matters of the state. It is suggested that de Vitoria is the father of Spanish Thomism because he adapted the study of Aquinas to addressing both theological matters and also the philosophical and secular affairs of the state. Therefore de Vitoria contributed to bringing about of a revival of the Thomistic philosophy and theology.<sup>196</sup> Six of de Vitoria's annual theological reflections addressed secular subjects including the secular authority of the Papacy, and the discoveries of the New World. De Vitoria and later Suarez 'participated in a series of juridical and philosophical debates concerning the legitimacy of the Spanish Conquest of the New World'.<sup>197</sup>

Nevertheless, Tierney observes 'there is no consensus in modern writing about Vitoria's teaching on natural rights'.<sup>198</sup> He had the capacity to draw on a long tradition of Catholic moral theology and produce a response to the discoveries on the Indies. From these debates 'a Western European understanding of the human and the good emerged, in part, out of the early modern debates about empire—and in particular the Spanish debates about the Indians of the New World'.<sup>199</sup> Further Brunstetter suggests that philosophically, the discovery of the new world, 'was the catalyst for debates in Spain about *the notion of the human* which took place over the course of the first half of the sixteenth century'.<sup>200</sup> That encounter with the New World and the reliance of scholastic theologians of Salamanca upon their tradition which they adapted to a new environment led Zapatero to suggest that thinkers such as de Vitoria and other theologians,

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<sup>194</sup> Ibid. 1037. Hernandez notes it was in Valladolid 'that in 1512 the First Laws of the Indies had been drafted by the junta of Burgos and it was here that many young Dominicans were being trained for missionary work in the New World'.

<sup>195</sup> Ibid. 1038.

<sup>196</sup> Cortest, *The Disfigured Face: Traditional Natural Law and Its Encounter with Modernity*.7.

<sup>197</sup> Ibid.7.

<sup>198</sup> Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 257 See also Penelope Simons, The Emergence of the Idea of the Individualized State in the International Legal System *Journal of the History of International Law* 5: 293–336, 2003.

<sup>199</sup> Daniel R. Brunstetter, 'Sepúlveda, Las Casas, and the Other: Exploring the Tension between Moral Universalism and Alterity', *The Review of Politics*, 72/03 (2010), 409-35. 411. See also Pagden, 'Human Rights, Natural Rights, and Europe's Imperial Legacy', ( 192

<sup>200</sup> Brunstetter, 'Sepúlveda, Las Casas, and the Other: Exploring the Tension between Moral Universalism and Alterity', (411 [my italics]).

[...] did have extensive impact on the slow, collective formation of the doctrine of human rights; these include: 1) the unity of mankind, 2) the dignity of all men, and 3) equality among people.<sup>201</sup>

That basic structure of universalism, human dignity and the underlying equality of humanity seemed to echo persistently in the theological academies of Europe. Possibly with some exaggeration, Zapatero could further suggest that the writings of de Vitoria were at the apex of the humanism that would emerge in the period which followed him, suggesting he was 'certainly a humanist thinker. However, the nucleus of his philosophy lies at the intersection of the Doctrinal tradition of the Middle Ages and the budding phenomenon of Humanism'.<sup>202</sup> This humanist legacy is of course a contested one because as Zapatero acknowledges, "'human rights" is one of the 'crown jewels' of modern legal theory'.<sup>203</sup> Therefore humanism's pre-history and genealogy exists at the intersection of many cultural and philosophical traditions, it what could be more likely termed a common intellectual tradition. The revival of interest in de Vitoria exists in parallel to the thought of Grotius as a foundation to international law and human rights, including that humanist dimension which asserted itself in that period.<sup>204</sup> No doubt this is so because of the parallels with the ideals and philosophy of the French and American Revolution, and ties in with the aspirations of human rights norms as well.

Luis Cortest identifies a similar gravitation towards the thought of Francesco Suárez.<sup>205</sup> Gracia suggests that Suárez could be understood as 'the last major medieval theologian and the first major modern philosopher'.<sup>206</sup> Suárez emphasis on developing philosophical argumentation without recourse to theology separates

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<sup>201</sup> Zapatero, 'Legal Imagination in Vitoria. The Power of Ideas', ( 266.

<sup>202</sup> Ibid. 264.

<sup>203</sup> Ibid. 266. See for example Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution', *University of Toronto Law Journal*, 61 (Winter2011, 1-36, Hernandez, 'The Internationalization of Francisco De Vitoria and Domingo De Soto', ( Robert John Araujo, 'Our Debt to De Vitoria: A Catholic Foundation of Human Rights', *Ave Marla Law Review*, 10/2 (2012). Antonio Garcia Garcia, 'The Spanish School of the Sixteenth and Seventeenth Centuries: A Precursor of the Theory of Human Rights', *Ratio Juris*, 10/1 (25.

<sup>204</sup> Hugo Grotius, Richard Tuck, and Jean Barbeyrac, *The Rights of War and Peace*, 3 vols. (Indianapolis, Ind.: Liberty Fund). On Grotius contribution to the formation of international law see Kennedy, 'Primitive Legal Scholarship', ( For a critique of the desire to return to early modern natural law see Martti Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law', *European Journal of International Relations*, 15/3 (September 1, 2009 2009), 395-422. On Grotius contribution to natural rights see Joan Lockwood O'donovan and Oliver O'donovan, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100-1625* (Grand Rapids, Mich. ; Cambridge: William B. Eerdmans Pub. Co., 1999) xx, 838 p. On Grotius contribution to a just civic society see Annabel Brett, 'Natural Right and Civil Community: The Civil Philosophy of Hugo Grotius', *The Historical Journal*, 45/01 (2002), 31-51. On a revision of Grotius' theological background and its influence in his thought see William P. George, 'Grotius, Theology, and International Law: Overcoming Textbook Bias', *Journal of Law & Religion*, 14 (2000).

<sup>205</sup> See for instance Brust, '10 Ave Maria L. Rev. 343 2011-2012', (343.

<sup>206</sup> Gracia, 'Suárez (and Later Scholasticism)'. 459.

him from past theologians and points in the direction of modern philosophy.<sup>207</sup> Suárez influence can be seen in his development of natural rights and also in his contribution to shaping the revival of scholastic theology in the later nineteenth century.<sup>208</sup> Significantly, Cortest observes that the works of Thomas Aquinas came primarily via Suárez's writing, and therefore those who sought to respond to 19<sup>th</sup> century liberalism and Marxism of the period did so as Suárezians.<sup>209</sup> Suárez was a jurist as well as a theologian, and therefore would have been familiar with the long tradition of applying different meanings used to explain *ius naturale* including the subjective one which saw it as a faculty or power 'inherent in human nature'.<sup>210</sup> When Suárez developed his own doctrine of rights and used *ius in re* and *ius ad rem*, 'he was well aware that he was using a long-established technical vocabulary'.<sup>211</sup> This vocabulary therefore was potentially transmitted into the Neo-Scholasticism of the nineteenth and early twentieth centuries and prepared the way for the acceptance of human right language within Catholicism.<sup>212</sup> According to Finnis, there is a point in the history of rights between Aquinas and Suárez which results in having "crossed a watershed".<sup>213</sup> Suárez understands *jus* as 'a kind of moral power [*facultas*] which every man has, either over his own property or with respect to that which is due to him'.<sup>214</sup> Finnis suggests that Suárez and in a different tradition, Hugo Grotius, have contributed to developing and to an extent redefining the meaning of *jus*. Therefore '*jus* is essentially something someone *has*, and above all (or at least pragmatically) a *power* or *liberty*'.<sup>215</sup> Here, what emerges is the intersection where Catholic natural law and natural rights engage to become a foundation in the future of the Catholic human rights tradition.

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<sup>207</sup> Ibid. 460.

<sup>208</sup> Cortest, *The Disfigured Face: Traditional Natural Law and Its Encounter with Modernity*. See also Brust, '10 Ave Maria L. Rev. 343 2011-2012', ( Garcia, 'The Spanish School of the Sixteenth and Seventeenth Centuries: A Precursor of the Theory of Human Rights', (25).

<sup>209</sup> Cortest, *The Disfigured Face: Traditional Natural Law and Its Encounter with Modernity*. 7. See extensive work on the topic by Jürgen Mettepenningen, *Nouvelle Théologie - New Theology: Inheritor of Modernism, Precursor of Vatican II* (London; New York: T&T Clark) xv, 218 p. In fact returning to the primary sources of Thomistic scholasticism did not peak until the emergence of the group of scholars known idiosyncratically as the *Nouvelle Théologie* at the turn of the twentieth century and prior to World War I.

<sup>210</sup> Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 58 & 76. The canonists therefore understood the difference between claimed rights and active rights. Rights were being actively asserted and demanded.

<sup>211</sup> Ibid. 76.

<sup>212</sup> Tierney suggests that another path for subjective rights came via the nominalism of Ockham via Gerson (1363-1429).

<sup>213</sup> Finnis, *Natural Law and Natural Rights*. 207. [Emphasis mine]. See also Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction*. See further Jean Porter, 'justice, Equality, and Natural Rights Claims: A Reconsideration of Aquinas's Conception of Right', *Journal of Law and Religion*, 30/3 (2015), 446 - 60.

<sup>214</sup> *De Legibus*, I, ii, 5. As cited in Finnis, Finnis, *Natural Law and Natural Rights*. 207.

<sup>215</sup> Ibid. 207. [Italics included].

#### 1.2.4. Criticism of the Catholic Natural Law Tradition

Natural rights and natural law intersect at various points during the history of Catholic thought on the moral law and justice. Catholic reflection on natural law did at various times respond to opportunities for development such as in the medieval period and the expansion of colonists into the New World but it also responded to the challenging of new interpretations of natural rights thinking, initially inspired by the rise of protestant theologians and philosophers who sought to ground the basis of law in nature or empiricism and latterly during the Enlightenment. We can identify an emerging idea of rights with both subjective and objective features in this natural law tradition. Finnis suggests that from this notion of rights which has become detached from the former historical tradition of natural law, we are led to understanding how Hobbes begins to develop natural rights from his theory of the state of nature.<sup>216</sup>

The movement from within Catholic thought was one in which natural law could be interpreted as sustaining natural rights as it was sustained by the scholastic recognition that human beings had inclinations towards a particular end or telos. However, that understanding was reinterpreted towards a subjective inner sense of a right which someone has, and which both scholasticism and the later Liberal tradition, that emphasised liberty, retained. This suggests that there existed both a linear continuity with the historical natural law tradition and a departure from the tradition. Tierney writes, '[W]e might learn to see modern doctrines of rights, not as innovations of the seventeenth century or the age of Enlightenment, but as the final product of a developing tradition of thought from the twelfth and thirteenth centuries onward'.<sup>217</sup> For Tierney, the debt of secular arguments for natural rights which Locke so innovatively interpreted for the times he lived in, would not have been possible had they not circulated in a previous era whose milieu was much more religious.<sup>218</sup> Tierney goes on remark that while modern human rights theory is today heavily influenced by the Kantian doctrine of autonomy and self-legislation, other older traditions have survived and continue to give the theory of

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<sup>216</sup> Ibid. 208.

<sup>217</sup> Brian Tierney, 'Response to S. Adam Seagrave's "How Old Are Modern Rights?: On the Lockean Roots of Contemporary Human Rights Discourse"', *Journal of the History of Ideas* 72/3 (2011 ), 461-68.

<sup>218</sup> See John Locke (Translation by Jonathan Bennett), 'Second Treatise of Government ', in Peter Millican and Amyas Merivale (eds.), (Hertford College, Oxford: www.earlymoderntexts.com, 2008). See in particular Waldron, *God, Locke, and Equality : Christian Foundations of John Locke's Political Thought*. Locke's Second Treatise of Government (1689) is often seen as the first fully developed natural rights theory. Locke offers a theory of the good which could be viewed as thin or minimalistic which offers us the possibility of satisfactory life. See Ruston, *Human Rights and the Image of God*. 284.

human rights a more expansive reach.<sup>219</sup> Tierney concludes, that the theory of rights, ‘emerged as the result of a long process of growth and adaptation from century to century, shaped by a series of constructive responses to unforeseen contingent situations,’<sup>220</sup> ideas which had their origins in religious concepts and writings were later defended by secular arguments.<sup>221</sup> Although Seagrave challenges Tierney’s reading and argues, ‘Locke’s natural rights theory departs from those of his predecessors, and in certain respects continues what Tierney terms the Hobbesian “aberration,” not by inventing new words or ideas but rather *by altering the order of priority* and relative importance among pre-existing ideas,’<sup>222</sup> Tierney rightly observes, ‘[i]f, within a given system of thought, natural law and natural rights are seen as correlative, there is no necessary reason to regard one as fundamental and the other as derivative. They may be seen as just correlative, and *as derived from a common source* that is the fundamental cause of both’.<sup>223</sup>

### 1.3. Personalism and Christian Anthropology

The contribution of 19<sup>th</sup> century and early 20<sup>th</sup> century philosophy of Personalism to a Catholic understanding of human rights leads us to review some of the significant theorists who have developed this philosophy along Catholic lines.<sup>224</sup> That idea of “person” in Catholic theology is different from that found in the modern term “individual”.<sup>225</sup> Christian anthropology is derived primarily from scripture, particularly the opening chapters of the Book of Genesis, emphasising the human person as made in the *image of God*.<sup>226</sup> It is suggested that the concept

<sup>219</sup> Tierney, 'Response to S. Adam Seagrave's "How Old Are Modern Rights?: On the Lockean Roots of Contemporary Human Rights Discourse"', (468).

<sup>220</sup> Ibid., 468. Finnis, *Natural Law and Natural Rights*.

<sup>221</sup> Tierney, 'Response to S. Adam Seagrave's "How Old Are Modern Rights? On the Lockean Roots of Contemporary Human Rights Discourse"' *Journal of the History of Ideas*, Volume 72, Number 3, July 2011, pp.

<sup>222</sup> S. Adam Seagrave, 'How Old Are Modern Rights?: On the Lockean Roots of Contemporary Human Rights Discourse', *Journal of the History of Ideas* 72/2 (2011b).

<sup>223</sup> Brian Tierney, 'Response to S. Adam Seagrave's "How Old Are Modern Rights?: On the Lockean Roots of Contemporary Human Rights Discourse"', *ibid.*/3 (2011), 461-68. 464. [Emphasis mine]. He continues, 'Locke certainly never stated and I don't think he ever believed that natural rights were primary and that all natural law duties were derived from natural rights'. See also S. Adam Seagrave, 'Self-Ownership Vs. Divine Ownership: A Lockean Solution to a Liberal Democratic Dilemma', *American Journal of Political Science* 55/3 (2011a), 710–23.

<sup>224</sup> . See Moyn, *The Last Utopia: Human Rights in History*. Samuel Moyn, ' Jacques Maritain, Christian New Order, and the Birth of Human Rights. ', Available at SSRN: <http://ssrn.com/abstract=1134345> or <http://dx.doi.org/10.2139/ssrn.1134345>, (1. The historian Samuel Moyn has paid particular interest to this aspect of Catholicism which was formative in the thought and writing of those who drafted the Universal Declaration of Human Rights.

<sup>225</sup> International Theological Commission, 'Communion and Stewardship: Human Persons Created in the Image of God', (Vatican: Congregation for the Doctrine of the Faith, 2004). (§ 10).

<sup>226</sup> Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Catholic Church*. § 27. For further discussion see for instance the recent document from the Congregation for the Doctrine of the Faith, International Theological Commission, 'Itc Communion and Stewardship'. This document strives to set out 'the



of the “person” was first developed by Boethius in his treatise *Contra Eutyches and Nestorius* (c 513) when he wrote of an ‘individual substance of a rational nature’.<sup>227</sup> This term for the person, became normative for the entire Catholic tradition and found its way in the work of Thomas Aquinas and later authors.<sup>228</sup> For instance Richard St. Victor could define personhood as ‘*naturae intellectualis incommunicabilis existentia*’ (an intellectual nature existing incommunicably).<sup>229</sup> At the ontological level, the human being is orientated towards a higher or incommunicable existence and, as such, is a unique expression of being, even in their finite existence. Within Catholic theology in this tradition of personhood, there was perceived an unconditional dignity ‘because it is never a means to an end, but always an end in itself’.<sup>230</sup>

Williams identifies distinct characteristics of the philosophy of personalism distinct from traditional Thomism as a contribution to Catholic social thought and grounding human rights in that tradition.<sup>231</sup> Thomistic personalism distinguished

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main elements of Christian anthropology and certain elements of moral theology and ethics as they are illuminated by the theology of the *imago Dei* (image of God, § 5), emphasising the relational nature of the human person (§ 10). It is also a response to the dualistic philosophies influenced by Platonic or Cartesian anthropologies or modern variations of those ideas (§ 27). It points out the Catholicism follows ‘Thomistic anthropology which, drawing upon the philosophy of Aristotle, understands body and soul as the material and spiritual principles of a single human being’ (§ 30). Therefore the Church speaks of *forma substantialis* (the vital principle or organising unity of the soul) following Aquinas’ writings on Aristotle. For these sources see therefore § 405 The General Council of Vienna (1311-1312), § 410; The Fifth Lateran General Council (1513), § 421; Pastoral Constitution *Gaudium Et Spes* (1965) § 12, in Jacques Dupuis and Josef Neuner, *The Christian Faith, in the Doctrinal Documents of the Catholic Church* (5th edn.; London: HarperCollinsReligious).

<sup>227</sup> Walter Kasper, *The God of Jesus Christ* (London: SCM). 153 See also Boethius, ‘Liber De Persona Et Duabus Naturis Contra Eutychen Et Nestorium Ad Joannem Diaconum Ecclesiae Romanae (Book Concerning the Person and Two Natures, against Eutyches and Nestorius, to John, Deacon of the Church of Rome)’, in Jacques-Paul Migne (ed.), *Patrologia Latina Database* (Online edn., 64; Alexandria, VA: Chadwyck-Healey Inc., 1996), Col. 1337. Available at <http://pld.chadwyck.com/> See also Johan De Tavernier, ‘The Historical Roots of Personalism.’, *Ethical Perspectives*, 16/3 (361-92. 362).

<sup>228</sup> Kasper, *The God of Jesus Christ*. 153 and 260. The concept of person as applied to the person of God in Catholic theology was done so by analogy, *persona est ineffabilis* (the person is ineffable). This definition of personhood historically had required greater clarity in Catholicism because of various controversies about the nature of God as Trinity and the personhood of Jesus as a divine person. With the Council of Constantinople (381) the Catholic Church could eventually resolve the East-West controversy by interchanging the Byzantine *hypostaseis* and the Latin *subsistentiae* and the Byzantine *prosōpa* and Latin *personae*. An example of a reconciliation of doctrinal and ideological differences, it also contributed to Western thought’s definition of singular human personhood. In classical Catholic theology, pure personhood is primarily attributed to God, and thereby attributed by degree to other beings, including human beings. Whereas the human being is the highest apex of animal life, with intellect and free will, he remains at the lowest among spiritual and intellectual beings, which include the angels and God. The human person is therefore a vulnerable and contingent being who experiences temporality and material life, as opposite to God, who is immutable, omnipotent, omniscient, eternal being. Therefore the human being shares in the dignity of God, in a relational way and by degree, and this becomes the basis of human personhood. See further Williams, ‘Personalism and the Foundations of Human Rights.’. 146-164

<sup>229</sup> Kasper, *The God of Jesus Christ*. 153.

<sup>230</sup> *Ibid.* 154.

<sup>231</sup> Williams, ‘Personalism and the Foundations of Human Rights.’. 117-120.

radically between persons and non-persons, 'requiring a completely different paradigm from that used to describe dealings with non-personal realities'.<sup>232</sup> This distinction is rooted in a Thomistic ontological essentialism that sets human beings apart from other entities in the natural world (because this is also a theologically grounded philosophy, the supernatural is also considered by this philosophy). A core assertion in this Thomistic Personalism is the affirmation of the dignity of the person 'which is the quality that constitutes the unique excellence of personhood and gives rise to specific moral requirement'.<sup>233</sup> This proposal emphasises the inherent value of the person as "someone" and not "something" which distinguishes the person from other creatures. The ethic of duty towards the other, found in the traditional idea of justice therefore presumes this distinction. Thomistic Personalists also emphasised the interiority, subjectivity, personal freedom and autonomy of the person to a greater degree, which transcends creatureliness and the human condition, without proposing a dualism between the body and mind. They concluded that if the person is essentially different from other entities then they are to be treated differently, as 'an independent ethical category' to non-persons with wholly distinct teleological goals. A development in this thought would recognise a distinctively subjective and singular dimension to this teleological account. However, this retained the characteristic of the unique nature of the person as a social being, thereby retaining the classical communitarian elements associated with Catholic social thought. In this account of Personalism, which is marked by Thomistic thought, Williams asserts, the person 'finds his human perfection only in communion with other persons'.<sup>234</sup> Personalism, particularly Thomistic personalism could be viewed as an overcoming the previous scholastic dualistic theology of the person, which predominated much of Catholic theology following the Reformation and tended towards Neo-Platonism and therefore saw the person as divided between the material and the spiritual.

Personalism's value is that this philosophy has become the normative philosophy, as a Catholic theological anthropology, to form the basis of the Catholic understanding of human rights and human dignity.<sup>235</sup> McCool notes that this

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<sup>232</sup> Ibid. 118.

<sup>233</sup> Ibid. 118.

<sup>234</sup> Ibid. 120.

<sup>235</sup> Matthew Schaeffer, 'Thomistic Personalism: A Vocation for the Twenty-First Century', *American Catholic Philosophical Quarterly*, 86/2 (2012), 181–202. For a useful and thorough review of Catholic theological anthropology see in particular John J. Coughlin, 'Canon Law and the Human Person', *Journal of Law and Religion*, 19/1 (2003 - 2004), 1-58. And also John J. Coughlin, 'Pope John Paul II and the Dignity of the Human Being', *Harvard Journal of Law & Public Policy*, 27/1 (Fall2003), 65-79.

development is attributed once again to Pope Leo XIII's encyclical, *Aeterni Patris*.<sup>236</sup> Charles Renouvier used the term "personalism" in his book *Le personalisme* (1903) to describe his approach to philosophy, although reference to the phrase might also be attributed to writing of F.D.E. Schleiermacher (1768–1834).<sup>237</sup> However, there were a wide variety of Personalist theories even though common themes emerged, even if they were collectively described as Personalists because they broadly followed this philosophy.<sup>238</sup> According to Mounier 'personalism is a philosophy, it is not merely an attitude. It is a philosophy but not a system'.<sup>239</sup> Influential philosophers of the period are Martin Buber (1878-1965) Emmanuel Lévinas (1906-95) and Gabriel Marcel (1889-1973). It is thought their ideas shaped the thought of Pope John Paul II and, in turn, the theology of Catholicism during the Second Vatican Council.<sup>240</sup>

The Catholic philosophy of Personalism emerged through the influence of neo-Catholic philosophers particularly Edward Mounier and Jacques Maritain, in response to various currents of individualism and totalitarian collectivism present in the early 20<sup>th</sup> century.<sup>241</sup> They therefore sought a middle or third way between both movements. Mounier had established the journal *Esprit* in 1932 to assert a doctrine which took and developed the philosophy of Personalism but overall it

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<sup>236</sup> Pope Leo XIII, 'Ass 12 (1879)', (§1. Gerald A. Mccool, 'From Leo XIII to John Paul II: Continuity and Development', *International Philosophical Quarterly*, XL, No. 2/158 (2000).

<sup>237</sup> De Tavernier, 'The Historical Roots of Personalism.', (365. Bernard A. Gendreau, 'The Role of Jacques Maritain and Emmanuel Mounier in the Creation of French Personalism', *The Personalist Forum*, 8/1 (1992), 97-108.

<sup>238</sup> For an account of this history see generally Williams, 'Personalism and the Foundations of Human Rights.'

<sup>239</sup> Emmanuel Mounier, *Personalism* (Kindle Edition: Read Books Ltd, 1950). vii.

<sup>240</sup> The philosophical movement of Phenomenology particularly by the Gottingen Circle of Edmund Husserl (1859-1938) and Max Scheler (1874-1928), are also said to have been significant. The theology of Dietrich von Hildebrand (1889-1977) and Romano Guardini (1885-1968) are now considered to have been targeted against German fascism's totalising philosophy in 1930's Germany. See D. Von Hildebrand and J.H. Crosby, *My Battle against Hitler: Faith, Truth, and Defiance in the Shadow of the Third Reich* (Doubleday Religious Publishing Group, 2014). and Romano Guardini, *Das Ende Der Neuzeit: Ein Versuch Zur Orientierung* (Wurzburg: Wurzburg : Im Werkbund-Verlag). also Robert Anthony Krieg, 'Romano Guardini's Theology of the Human Person', *Theological Studies*, 59 (1998). For a broader history of Catholic theologians in pre-war Germany see Donald J. Dietrich, *Human Rights and the Catholic Tradition* (New Brunswick, N.J.: Transaction Publishers) ix, 225 p. and Robert Anthony Krieg, *Catholic Theologians in Nazi Germany* (New York: Continuum, 2004) ix, 234 p. For an interesting exposition and comparison of the personalism of John Paul II, Immanuel Kant and Max Scheler see Michael Waldstein,

'Three kinds of personalism: the philosophical underpinnings of John Paul II's theology of the Body', *Forum Teologiczne*, 10 (2009), 151-71. For an exposition of further contributions to Catholic theology see especially, Williams, 'Personalism and the Foundations of Human Rights.'

<sup>241</sup> Joseph Koterski, 'Human Nature from a Catholic Perspective', *American Journal of Economics and Sociology*, 71/4 (2012), 809-39. Bernard A. Gendreau, 'The Role of Jacques Maritain and Emmanuel Mounier in the Creation of French Personalism', (97. The work of Jacques Maritain and Emmanuel Mounier also contains a distinct political theory. See Dries Deweer, 'The Political Theory of Personalism: Maritain and Mounier on Personhood and Citizenship', *International Journal of Philosophy and Theology*, 74/2 (2013/05/01, 108-26. This topic is more completely addressed the second chapter.

was a project for the development of a broader Christian civilisation.<sup>242</sup> He believed individualism was the prevailing and challenging ideology of the bourgeois society in Western Europe in the 18th and 19th centuries.<sup>243</sup> Even as it was one of many versions of the Personalist philosophy, Catholic Personalism responded to the impersonal rationalism, the pantheistic and deistic thought of the period, most prominently shaped by the positivism of Comte (1798–1857) and the impersonal determinism of nature suggested in the work of Charles Darwin.<sup>244</sup> Distinguishing personalism from individualism, Mounier stated ‘the first condition of individualism is the centralization of the individual in himself, the first condition of personalism is his decentralization, in order to set him in the open perspectives of personal life’.<sup>245</sup> This implied that individualism sought a form of self-actualisation through concern with one’s own life, whereas for Mounier there is a turning to the other and towards relationship, collaboration and solidarity. The ambition of both Mounier and Maritain was to establish a humanism which could overcome the materialism and positivism dominant at the time with the introduction of the spiritual sources through their personalist philosophy.<sup>246</sup>

Elliott remarks that by the 19th century, ‘this ‘cult of the individual’ could be seen in a wide variety of rationalised endeavours directed toward an increasingly individualized existence’.<sup>247</sup> That tendency was also present in the 19<sup>th</sup> century rationalism in which ‘reason was an independent, self-grounding, disembodied form of thought, systematically divorced from Christian revelation in its operation’.<sup>248</sup> McCool states that the ‘thought and culture of the 19th-century’s

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<sup>242</sup> Deweer, 'The Political Theory of Personalism: Maritain and Mounier on Personhood and Citizenship', (115. According to Papini ‘Mounier had developed the opened the debate on the [French] Declaration of 1789 in Esprit in 1941 suggesting he ‘rebuked the Declaration of 1789 for having an excess of nationalism and individualism’ see Roberto Papini, 'The Debate About the Principles of the Declaration of 1948: Questions of Yesterday and Questions of Today', in Luigi Bonanate, Roberto Papini, and William Sweet (eds.), *Intercultural Dialogue and Human Rights* (Cultural Heritage and Contemporary Change. Culture and Values,, 41; Washington, D.C.: The Council for Research in Values and Philosophy, 2011), 1-31. This debate gave rise to consideration of the French contribution to the Universal Declaration of Human Rights.

<sup>243</sup> Mounier, *Personalism*. Kindle Location 538. Schaffer suggests that personalism was a reaction against collectivism and individualism and sought a third way between the two. See Schaeffer, 'Thomistic Personalism: A Vocation for the Twenty-First Century', (183 - 184. Among those influencing or influenced by Personalism we can include: henri Bergson, Maurice Blondel, Has Urs von Balthasar, Romano Gaurdini, Henri de Lubac, Paul Ricoeur, Martin Buber and Emmanuel Levinas).

<sup>244</sup> Schaffer suggests that personalism was also a reaction against collectivism and individualism. It sought a third way between the two ideas of society. See Schaeffer, 'Thomistic Personalism: A Vocation for the Twenty-First Century', (183 - 184.

<sup>245</sup> Mounier, *Personalism*. Kindle Locations 550-551.

<sup>246</sup> Bernard A. Gendreau, 'The Role of Jacques Maritain and Emmanuel Mounier in the Creation of French Personalism', (98.

<sup>247</sup> On the importance of the idea of the notion of the individual for human rights see Michael A. Elliott, 'Human Rights and the Triumph of the Individual in World Culture', *Cultural Sociology*, 1/3 (343–63. 352.

<sup>248</sup> Gerald A. Mccool, 'From Leo XIII to John Paul II: Continuity and Development', (178.

liberal ruling classes were dominated by it, as had been the mind-set of the 18th-century Enlightenment. Its rejection of revelation provoked in the 19<sup>th</sup> century, the contradictory responses of fideism and rationalism'.<sup>249</sup> The former took recourse to reliance of faith alone while the latter responded by demanding that faith must be placed under the scrupulous lens of critical reason. In response Catholicism sought a middle ground, believing in both of these cases, reason and faith, would be impoverished without the other.<sup>250</sup> This turn to the philosophy of personalism parallels the turn to the subject and subjectivity in mainstream modernist philosophy. They realised that it had become insufficient to address the wider social dimension of individualised person that had found expression during that period and a response reliant on Thomistic philosophy alone would be insufficient. Catholic personalism was an acknowledgement of that clarification of individualisation and emerging sense of self and citizenship which culminated in a new articulation of human need and place in society.<sup>251</sup> The humanist concerns of the Catholic personalist philosophers focused on distinguishing their philosophy from the materialistic theory proffered by liberalism and socialism, particularly as a response to the totalising humanism of Marxism.<sup>252</sup>

### 1.3.1. Personalist Basis for Human Rights

By far the most significant author of personalism in the early to mid-20<sup>th</sup> century has been Jacques Maritain, who establishes an intellectual bridge between Catholicism and human rights from very early on.<sup>253</sup> Maritain's idea philosophical

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<sup>249</sup> Ibid. 179.

<sup>250</sup> In fact the Catholic Church responded to the crisis of modernism in 1870 during Vatican I, Dogmatic Constitution Dei Filius (on the Catholic Faith), ch. 4 On Faith and Reason. See Hünermann et al., *Compendium of Creeds, Definitions, and Declarations on Matters of Faith and Morals*. § 3000 - 3045. This topic will be addressed in Chapter II, in more depth.

<sup>251</sup> See generally, Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge University Press).

<sup>252</sup> De Tavernier, 'The Historical Roots of Personalism.', (361. And Kevin M. Dirksen and Paul T. Schotsmans, 'The Historical Roots of Personalism', *Bijdragen*, 73/4 (2012/01/01, 388-403. On a theory of total humanism that so concerned Catholicism, and developed by Marxists in the twentieth century, see Ingo Hermann, 'Total Humanism: Utopian Pointers between Coexistence and Pluralism', *Concilium: Church and World*, 6/2 (June).

<sup>253</sup> Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction*. 227-228. During World War II, Maritain left Europe and taught at Princeton University (1941-42) and Columbia (1941-44) and became the French ambassador to the Holy See from 1944-48. Maritain had begun to lay down the basis of his approach to understanding of human dignity and a thomistic understanding of the person through Personalism as early as 1925. Bernard A. Gendreau, 'The Role of Jacques Maritain and Emmanuel Mounier in the Creation of French Personalism', (98 -99 [footnote omitted] This work was called *Trois Réformateurs* (1925). Joseph W. Evans, 'Jacques Maritain's Personalism', *The Review of Politics*, 14/2 (1952), 166-77. See also Valmai Burdwood Evans, 'Jacques Maritain', *International Journal of Ethics*, 41/2 (1931), 180-94. He further develops this theory in ensuing work on wider themes including the political state. See for instance, Jacques Maritain, *Man and the State* (Washington, D.C.: Catholic University of America Press) vi, 219 p. Jacques Maritain, *Christianity and Democracy, the Rights of Man and Natural Law* (Ignatius Press). Jacques Maritain, *Integral Humanism*;

Personalism was to be an anthropological study to discover the basis of society, particularly as it was articulated as part of a practical Christian vision for democracy.<sup>254</sup> In his view, he distinguishes the human capacity to be both an individual in society and a person who exists prior to society. To Maritain all existing things are individual and distinct for each other but the human being is also a person, which transcends individuality.<sup>255</sup> The human being is never a mere individual, as a purely determined element of society but is in possession of 'a nature, or an ontological structure which is a locus of intelligible necessities, man possesses ends which necessarily correspond to his essential constitution and which are the same for all [...]'<sup>256</sup>

Maritain 'distinguished a historical capacity for progress of the human conscience and argued that a strong emphasis on human rights was compatible with Aquinas's formulation of human law, even if such an emphasis was not present in his writings'.<sup>257</sup> According to Fanning, Maritain also responded to the emerging secular formulation of human rights deriving from Locke. Therefore in *Man and the State*, Maritain 'argued that the positivism of the Enlightenment had unreasonably elevated expectations about the extent to which the natural law could be understood by mankind', in the absence of the ontological foundation found in natural law.<sup>258</sup> Maritain believed that the excessive emphasis on reason and nature 'as abstract divinities sitting in a Platonic Heaven' and rooted in Enlightenment philosophy and which lacked a realist basis, was at the root of the lack of a foundation for human rights.<sup>259</sup> Maritain sought to 're-establish human rights on the basis of a true philosophy'.<sup>260</sup> Maritain relies upon an ontological argument, which subscribes to an order which is inscribed in our very nature and that this natural order, or natural law, is knowable by human reason, and is indeed a classical natural law defence. By default human rights are derived from the natural law which provide 'our most fundamental duties, and by virtue of which every law is binding, is the very law which assigns to us our fundamental rights'.<sup>261</sup> The justification for the order of things, to which he appeals, is 'because we are

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*Temporal and Spiritual Problems of a New Christendom* (Notre Dame University of Notre Dame Press, (1936) 1973).

<sup>254</sup> Deweer, 'The Political Theory of Personalism: Maritain and Mounier on Personhood and Citizenship', (108.

<sup>255</sup> Evans, 'Jacques Maritain's Personalism', ( 171-172.

<sup>256</sup> Maritain, *Man and the State*. 86. See also Evans, 'Jacques Maritain's Personalism', ( 171-172.

<sup>257</sup> Bryan Fanning, 'George Tyrell, Jacques Maritain and the Challenge of Modernity', *Studies: An Irish Quarterly Review*, 101/403 (2012), 291-99. 296.

<sup>258</sup> Ibid. 296-7.

<sup>259</sup> Maritain, *Man and the State*. 81-82. Langlois, 'The Elusive Ontology of Human Rights', (253.

<sup>260</sup> Maritain, *Man and the State*. 84.

<sup>261</sup> Ibid. 95.

enmeshed in the universal order, in the laws and regulations of the cosmos and of the immense family of created natures [...].<sup>262</sup>

### 1.3.2. The Autonomy of Freedom

Maritain's theory of the autonomy of freedom is essentially expanded upon by John Paul II in his "personalistic principle" or the "personalistic norm".<sup>263</sup> Maritain developed his idea about the autonomy of freedom, something he distinguishes from freedom of choice, in distinction to the thought of Rousseau and Kant's notion of the sovereign individual.<sup>264</sup> Maritain understands freedom of the person as ordered towards metaphysical goals but he also allows for the arrival of personal goals within that larger framework. This autonomous freedom is pursued individually as a unique expression of the personality and dignity of the person. Williams describes this as the basis of and groundwork for the Catholic personalist ethic underpinning human rights. In Pope John Paul II's apostolic exhortation *Christifideles Laici* we find it stated that the person 'unlike non-personal objects, may never be a mere instrument of action'.<sup>265</sup>

In virtue of a personal dignity the human being is always a value as an individual, and as such demands being considered and treated as a person and never, on the contrary, considered and treated as an object to be used, or as a means, or as a thing.<sup>266</sup>

In an effort to strike a balance between the teleological principle found in traditional scholastic philosophy, which places transcendent goals as the ultimate end of human existence, and the Personalist idea that we may find liberty according to our own dignity and unique expression in life, there is recognition of

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<sup>262</sup> Ibid. 95.

<sup>263</sup> Born Karol Józef Wojtyła was pope of the Catholic Church from 16 October 1978 until his death on 2 April 2005. One of the most prominent exponents of Thomistic personalism Pope John Paul II, he is also the most formative source of personalistic thought within Catholicism today. It has been suggested that Pope John Paul II did not explicitly define the natural law in his writing but 'simply takes for granted the existence of the natural law', and he also draws upon scripture and the wider spiritual tradition of Catholicism to counter balance the excessively scientific and deterministic description of the human person. See Williams, 'Personalism and the Foundations of Human Rights.'. 160. See also Pope, 'Natural Law in Catholic Social Teaching'. 58. See for instance, Pope John Paul II, 'Encyclical Letter Laborem Exercens', *Acta Apostolicae Sedis*, 73 (5 November 1981). Pope John Paul II, 'Encyclical Letter Sollicitudo Rei Socialis ', *Acta Apostolicae Sedis*, 80 (30 December 1987 1988). Pope John Paul II, 'AAS 83 ', ( McCool similarly suggests that John Paul's philosophy 'would not qualify as Thomism' in the narrow sense. Gerald A. McCool, 'From Leo XIII to John Paul II: Continuity and Development', (177.

<sup>264</sup> Evans, 'Jacques Maritain's Personalism', (175.

<sup>265</sup> Williams, 'Personalism and the Foundations of Human Rights.'. 160. See also Pope John Paul II, *Love and Responsibility* (Ignatius Press, 1993a).

<sup>266</sup> Pope John Paul II, 'Apostolic Exhortation Christifideles Laici', *Acta Apostolicae Sedis*, 81 (December 30, 1988, 393-521. 37.

the subjective value inherent in the human being. This can be explained in reference to Section 1.2.1. of this Chapter, where we described the classical Ciceronian description of true law as *right reason corresponding to nature*, and in Section 1.2.3, we explained that in Catholic thought *synderesis* is at the centre of the intellectual life and the highest faculty of the human person in nature, as ‘intelligence, which is the practical reason’s direct knowledge of first principles’.<sup>267</sup> In reference to both the writing of Augustine and John Paul II, Williams argues that the human person is ‘an *intermediate end in himself*, and also *a being for God*, his ultimate end’.<sup>268</sup> Such a reading of the human, which recognizes its inherent value and worth, establishes a way to present human dignity as developed in Personalism, in synthesis with the natural law and Catholic scholastic tradition, which had reflected upon both the subjective and objective understanding of rights and duties.

A significant outcome of the Personalist philosophy of Pope John Paul II’s writing is called the ‘Theology of the Body’, which has recently become part of the theological and anthropological foundation for human rights.<sup>269</sup> This Personalistic account of the human person has gained significant attention within Catholicism but little outside that environment. It brings together the moral and theological insights of the Catholic Church with a spiritual and an anthropological vision of human freedom.<sup>270</sup> Pope John Paul II turns to Catholic tradition, which has presented the human person as a unity of body and soul.<sup>271</sup> Accordingly, ‘the rational soul is *per se et essentialiter* the form of his body’.<sup>272</sup>

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<sup>267</sup> Pinckaers, *The Sources of Christian Ethics*. 384.

<sup>268</sup> Williams, ‘Personalism and the Foundations of Human Rights.’. 162-163. [emphasis in text] See also International Theological Commission, ‘The Dignity and Rights of the Human Person’, (Vatican: Congregation for the Doctrine of the Faith, 1983). 2.1.2.

<sup>269</sup> Waldstein, ‘Three kinds of personalism: the philosophical underpinnings of John Paul II’s theology of the Body’, ( For the philosophical basis of John Paul II’s personalism see his work, K. Wojtyła, *The Acting Person* (Springer Netherlands, 1979). Pope John Paul II, ‘Encyclical Letter Redemptor Hominis’, *Acta Apostolicae Sedis*, 71/10 (4 March 1979 1979).

<sup>270</sup> Charles E. Curran, *The Moral Theology of Pope John Paul II* (Georgetown University Press). 111

<sup>271</sup> See Dupuis and Neuner, *The Christian Faith, in the Doctrinal Documents of the Catholic Church*. See therein Ecumenical Council of Vienne, Constitution Fidei Catholicae: DS, 902; Fifth Lateran Ecumenical Council, Bull Apostolici Regiminis: DS, 1440. The Church has applied various theoretical ideas drawn from both Aristotle and Plato to define the body-soul relationship. For instance form/matter distinction or substance/accidental.

<sup>272</sup> Pope John Paul II, ‘Encyclical Letter Veritatis Splendor’, *Acta Apostolicae Sedis*, 85 (6 August 1993). § 48. The spiritual and immortal soul is the principle of unity of the human being, whereby it exists as a whole — *corpore et anima unus* – as a person. See also Vatican Council II, ‘Gaudium Et Spes (Pastoral Constitution on the Church in the Modern World)’, *ibid.* 58 (1025-115 § 14:

Now, man is not wrong when he regards himself as superior to bodily concerns, and as more than a speck of nature or a nameless constituent of the city of man. For by his interior qualities he outstrips the whole sum of mere things. He plunges into the depths of reality whenever he enters into his own heart; God, Who probes the heart, awaits him there; there he discerns his proper destiny beneath the eyes of God. Thus, when he recognizes in himself a spiritual and immortal soul, he is not being



A good example of John Paul II's writing on Personalism is found in his encyclical *Veritatis Splendor* in which he defends, '*the place of the human body in questions of natural law*'.<sup>273</sup> He comments on the theory of human freedom which views individual freedom as an absolute end but in consequence treats the human body 'as raw datum, devoid of any meaning and moral values until freedom has shaped it in accordance with its design'.<sup>274</sup> The human body becomes he believes therefore becomes '*as presuppositions or preambles, materially necessary for freedom to make its choice, yet extrinsic to the person, the subject and the human act*'.<sup>275</sup> Moral decisions are therefore not a decision of either the inner life of the individual with no consequence on the body and equally vice versa, all bodily acts have a moral content which impact on the inner dignity of person. Pope John Paul II is rejecting the hyper-dualism occasionally evident in Catholic theology and beyond.<sup>276</sup> In this view the subjective interior of the person is not distinct from the objective physical body and excluding the dissonance that may be evident, particularly when questioning gender and sexuality become manifest. In Catholicism the moral law is not just a relative value which instructs the inner conscience but also the imprints itself on the physical body and is the measure of the person without as an organic unity of body and soul, with a teleological destiny.

Calling to mind the words of Saint Augustine, John Paul II affirms the classical Catholic teaching that the natural law is inscribed on the heart of the person.<sup>277</sup> It therefore obtains universality and is immutable.<sup>278</sup> All human activity cannot subscribe to a lesser dignity than that of humanity itself, it must be proportionate to

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mocked by a fantasy born only of physical or social influences, but is rather laying hold of the proper truth of the matter. [footnote omitted].

<sup>273</sup> Pope John Paul II, 'Encyclical Letter *Veritatis Splendor*', *ibid.* 85 (6 August 1993 1993b). § 48 (Italics included in text). For a critique of *Veritatis Splendor* and the natural law see Curran, *The Moral Theology of Pope John Paul II*. 111 - 124. Curran makes the point that the encyclical relies heavily on physicalism, naturalism and biologism. Curran relies on appeals to situation ethics, historical contextualism, a revision of the applicability of universal natural law and of a traditional understanding of human nature.

<sup>274</sup> Pope John Paul II, '*Veritatis Splendor*, AAS 85 (1993)', (§ 48).

<sup>275</sup> *Ibid.* § 48

<sup>276</sup> Useful recent examples which have challenged this position would be Todd A. Salzman and Michael G. Lawler, *The Sexual Person: Toward a Renewed Catholic Anthropology* (Moral Traditions Series; Washington, D.C.: Georgetown University Press, 2008) xvii, 334 p. and Margaret A. Farley, *Just Love : A Framework for Christian Sexual Ethics* (New York: Continuum International Pub. Group, 2006).

<sup>277</sup> The full quote is,

"Where then are these rules written", Saint Augustine wondered, "except in the book of that light which is called truth? From thence every just law is transcribed and transferred to the heart of the man who works justice, not by wandering but by being, as it were, impressed upon it, just as the image from the ring passes over to the wax, and yet does not leave the ring". See Augustine, *De Trinitate*, XIV,15, 21: CCL 50/A, 451.

<sup>278</sup> Pope John Paul II, '*Veritatis Splendor*, AAS 85 (1993)', (§ 48).

the value and worth we place on human beings.<sup>279</sup> This challenging moral philosophy became commonplace in Catholic Personalism as a source to affirm human dignity and reject social and economic theories that undermined human worth. It is this tradition though which Catholicism critiques the modern human rights theory. In itself however, the exalted idea of the person also give rise to unrealistic and static social and political notions of a renewed Christian social order that can slip toward the rejection of pluralist society.

Charles Curran indicates there is an absence of an explicit mention of the natural law in many of the latter twentieth century encyclicals penned by Pope John Paul II.<sup>280</sup> He suggests that in the post-Synod Church 'it objected to the sharp distinction between the supernatural and the natural'.<sup>281</sup> He sees the natural law disappearing behind a "*total Christian perspective*" which is in effect the turn in Catholic theology from the beginning of the twentieth century towards Christology.<sup>282</sup> It is within the *total Christian perspective* context in which the issues that obscured the relationship between faith and reason and also the natural and supernatural, are again directed towards resolution. John Paul II indicated the prominence of Christology to fully appreciate his personalistic philosophy and as a way to renew the anthropological basis of Catholic moral theology. Speaking with the International Theological Commission he said 'an answer in accordance with truth and goodness can find a genuine solution only if the anthropological and Christological foundations of the Christian moral life are recovered'.<sup>283</sup> In doing so he was able shift the criticism of Aquinas from the type of legalism Curran identifies towards the larger Christian tradition from which the natural law is derived and upon which human rights in Catholicism are based.

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<sup>279</sup> Gerald A. McCool, 'From Leo XIII to John Paul II: Continuity and Development', ( See also the personalistic philosophy used by Pope John Paul II, 'Laborem Exercens, AAS 73 (1981)', (§ 6.

<sup>280</sup> Curran, *The Moral Theology of Pope John Paul II*. 121. As an example of the reliance on natural law Curran references *Pacem et terris*, Pope John XXIII, 'Pacem in Terris, AAS 55 (1963)', (§ 30. While Pope John Paul II, 'Encyclical Letter *Fides Et Ratio*', *ibid.*91 (Sept 14, 1998 1999).

<sup>281</sup> Curran, *The Moral Theology of Pope John Paul II*. 121.

<sup>282</sup> James F. Keenan, 'Virtue, Grace and the Early Revisionists of the Twentieth Century', *Studies in Christian Ethics*, 23/4 (November 1, 2010 2010), 365-80.

<sup>283</sup> As cited in Williams, 'Personalism and the Foundations of Human Rights.'. 117. See also G. Filibeck, *Human Rights in the Teaching of the Church: From John XXIII to John Paul II: Collection of Texts of the Magisterium of the Catholic Church from Mater Et Magistra to Centesimus Annus (1961-1991)*, ed. Pontificia Commissio Iustitia Et Pax Libreria Editrice Vaticana Congregatio Pro Doctrina Fidei. (Libr. Ed. Vaticana, 1994). 2.

### 1.3.3. A New Personalist Ecclesiology

The 20<sup>th</sup> century has also involved a shift in moral theology and Canon law to respond to the social and political changes of the era.<sup>284</sup> This important chapter in Catholic moral theology and its connection to the development of a philosophical basis on which to establish a Catholic anthropology suitable for human rights, was the turn from the *Summa casuum conscientiae*, the summary of the cases of consciences, in the 17<sup>th</sup> century which was a development for the mandated programme of the Council of Trent to respond to the Reformation, to the surprising turn to Christology following the Second World War.<sup>285</sup> Therefore, what follows is an outline of the various factors that shaped these changes and why this particular time was so formative in arriving at a moral theology that could respond to the idea of human rights in the 20<sup>th</sup> century.

Daly notes three developments in moral theology that spanned one hundred years.<sup>286</sup> Reform theology (1860), a theology described by Rome as Modernism and thirdly, *nouvelle théologie*, all were a shift in methodology rather than a liberal departure in theology. Various Catholic theologians began to take seriously the particular methods identified in liberal Protestantism but in general did not assent to the conclusions because of the rigorous expectations of the Church in the late 19<sup>th</sup> early 20<sup>th</sup> century. However, these departures did indicate other avenues of research in the quest to respond to modern ideas. Neo-Thomism of the 19<sup>th</sup> century had dealt a 'serious blow to the mild pluralism which had traditionally been permitted to exist in Catholic theology'.<sup>287</sup> This environment had previously been open to debates between the various Franciscan and Dominican theological schools that had laid greater emphasis on the role of the affections and of feelings in matters of faith.<sup>288</sup> The possible return to the pluralism lost to the Thomism in 1879 had a fateful start. This reliance on Thomism contributed to the further reliance on classic textbooks existing since the Council of Trent, called "moral manuals" which encouraged an excessive intellectualism and rigourism in moral theology.<sup>289</sup> The

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<sup>284</sup> Richard R. Gaillardetz, 'The Ecclesiological Foundations of Modern Catholic Social Teaching' in Shannon, 'Commentary on Rerum Novarum (the Condition of Labour)'.

<sup>285</sup> Keenan, 'Virtue, Grace and the Early Revisionists of the Twentieth Century', (367. Christology is a branch of theology relating to the person, nature, and role of Christ. See the entry on Jesus Christ, Anonymous, in Joseph A. Komonchak, Maire Ni Choileain, and Dermot A. Lane (eds.), *The New Dictionary of Theology* (Dublin: Gill and Macmillan, 1990). 542.

<sup>286</sup> Daly, 'Theological and Philosophical Modernism'. 99.

<sup>287</sup> *Ibid.* 96.

<sup>288</sup> *Ibid.* 96.

<sup>289</sup> *Ibid.* 96. See also Keenan, 'Virtue, Grace and the Early Revisionists of the Twentieth Century', (365. James F. Keenan, 'Vatican II and Theological Ethics', *Theological Studies*, 74/1 (2013), 162-90.

condition of moral theology was clearly inadequate and presented Catholicism as mechanical and often remote from the ordinary lives of Christians.<sup>290</sup>

A turning point has been traced to some degree by Keenan, who identified the experience of many Catholic theologians who responded to the consequences of two World Wars. In Keenan's study of the text books used, called moral manuals, which is also described as the 'manual tradition', he found an emphasis on moral legalism, such that with the 'singular focus on the commandments' sins had a profound impact on moral theologians' understanding of grace and virtue'.<sup>291</sup> He notes that in the absence of a fully developed theology of grace, there was little emphasis on personal freedom in interpretation of the moral theology of the time, and therefore a need to structure a theology of conscience, other than problematic consciences from that which was prescribed, (therefore the false, doubting, perplexed, scrupulous, and lax conscience).<sup>292</sup> The Second World War drew in those who were fully engaged in theological research to the brutal events of conflict. It precipitated a dramatic shift in which Keenan suggests that European moral theology 'had a radical reorientation'.<sup>293</sup> Keenan places the experience of World War II in this context, suggesting it,

[...] marks *the most critical moment in modern history* when moral theology would either shrivel and die from its complete incapacity to speak to the now-haunted conscience of the post-war, modern world, or it would need to reconstitute itself completely, repudiating what the moral manual had become and offering an entirely new framework, method, and vision for the moral formation of conscientious Christian communities'.<sup>294</sup>

This is undoubtedly true. The formative experience of the war shook not only Catholic moral theology but the very substance of intellectual life and moral purpose of a generation. Theologians such as Johann Baptist Metz focused his theological career on coming to terms with the Holocaust and applying the importance of memory, particularly "dangerous memory" and memory that unsettles, to the present.<sup>295</sup> There was a sense of failure of the manual tradition of moral theology in assisting Catholicism to confront the totalitarian regimes of

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<sup>290</sup> As noted previously, this however, this was often supplemented by the multiplication of popular devotions and various lay organisations which sprung up from the turn of the nineteenth century.

<sup>291</sup> Keenan, 'Virtue, Grace and the Early Revisionists of the Twentieth Century', (368. These manuals were disseminated from up until the early 20th century.

<sup>292</sup> Ibid. 369.

<sup>293</sup> Keenan, 'Vatican II and Theological Ethics', (163.

<sup>294</sup> Ibid. 164. Emphasis added.

<sup>295</sup> Ethna Regan, *Theology and the Boundry Discourse of Human Rights* (Washington: Georgetown University Press). 114 -133.

Fascism and Nazism through a more adequate development of independence of conscience.<sup>296</sup> The theological tradition in Catholicism had invariably retreated moral theology into canon law.<sup>297</sup> Keenan goes on to show that even as the theological tradition in Europe began to rethink its presentation of moral theology, the theologians in the United States held out for much longer.

There had been some ground prepared already in moral theology. Between the World Wars there had begun to emerge new thinking about the role of theology in Christian life. This might be summarised as a turn towards Christology and the rediscovery of the human in Catholic theology. While various emphases in Catholic theology can be identified in different epochs of church history, it was the event of World War I and the cold specter of further conflict, which gave rise to new thinking about the usefulness of a particularly narrow reading of scholastic theology and philosophy. Keenan shows that in the 1930's the source of the change in moral theology began to appear with an emphasis on Christian discipleship and charity.<sup>298</sup> It led to a theological renaissance of 'a theological foundation for anyone interested in the formation of conscience'.<sup>299</sup> While space does not allow further elaboration here, the effort to develop 'mature self-governing Christians' and the return to Christology, parallels with the emphasis on personalism at the philosophical level, and again with the presentation of social justice as a priority for Catholicism at the turn of the 20<sup>th</sup> century.<sup>300</sup> This particular anthropological vision became prominent during the Second Vatican Council through the many theologians who were shaped by these new burgeoning and some might say rediscovered tradition.<sup>301</sup> Their emphasis on human freedom becomes a reemphasis on the Thomistic understanding of the human desire to participate in beatitude and the person's highest good.<sup>302</sup> Keenan suggests that theology in the United States remained overshadowed by the manual tradition until the 1960's, apart from the writing and direction of theologians such as John Ryan and John Courtney Murray who had focused most particularly on social justice and liberty of

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<sup>296</sup> Keenan, 'Vatican II and Theological Ethics', (164. The 'manual tradition of moral theology' describes the writing of texts books of moral instruction for clergy, especial those who heard confession of the laity. It was initiated after the Reformation to provide guidance on moral questions but also led to an over reliance on these text books instead of intellectual moral enquiry.

<sup>297</sup> Ibid. 165.

<sup>298</sup> Ibid. 167.

<sup>299</sup> Ibid. 168.

<sup>300</sup> Ibid. 168. Keenan emphasises theologians such as Bernard Häring, who's experience of the Second World War shaped his theological ethics. His decisive words were: "The principle, the norm, the centre, and the goal of Christian Moral Theology is Christ" [footnote omitted].

<sup>301</sup> Such trends are evident in the movement called *Nouvelle Théologie*, see Mettepenningen, *Nouvelle Théologie - New Theology: Inheritor of Modernism, Precursor of Vatican II*. Joseph A. Komonchak, 'Theology and Culture at Mid-Century: The Example of Henri De Lubac', *Theological Studies*, 51/4 (1990), 579.

<sup>302</sup> See generally on this rediscovery, Pinckaers, *The Sources of Christian Ethics*.

conscience and religion.<sup>303</sup> Their engagement with practical social ethics broke away from the formal tradition that existed otherwise, and which had maintained aloof and with remote indifference to politics. Thereby they could recognise the utility of rights language that had begun to emerge in the exploration of Thomistic theology.<sup>304</sup>

The Code of Canon Law also required what had been called a *recognitio*, a rethinking of the Code. As the emphasis in moral theology shifted from legalism to Christology, the Code began to address these changes. From 1959 the process began, and culminated in the new Code of Canon Law on January 25, 1983.<sup>305</sup> The transformation from the previous 1917 Code, itself an innovation from Canon laws adapted from the Middle Ages, is discernible in the priority of the pastoral concerns of the Church from an emphasis on Roman legal concepts.<sup>306</sup> Legalism is tempered by attention given to the virtues of humility, moderation and charity, for example.<sup>307</sup> Other shifts towards subsidiarity in the governance of the Church and collegiality emphasising greater liberty and equality across the structures of the Church indicated the in spirit of the Vatican Second Council the Church had begun to reassess the place of Catholicism in relation to a post-War Europe, and adopt to its self-understanding as a globalised religion. This repositioning informed this new approach to church law. The Code had responded to Tridentine legalisms within the Church hierarchy, which had developed since the Reformation and emphasised centralisation and bureaucratisation. The new 1983 Code aspired to reverse this exaggeration of the nature of the Church, coined as “hierarchology” by Yves Congar, to re-emphasise the overarching sacramental, pastoral and mysterious nature of Catholicism as *religare*.<sup>308</sup>

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<sup>303</sup> Keenan, 'Vatican II and Theological Ethics', ( 175.

<sup>304</sup> On the important contribution of Ryan to social justice in the United States see Harlan R Beckley, 'The Legacy of John A. Ryan's Theory of Justice', *American Journal of Jurisprudence*, 33 (61).

<sup>305</sup> Boyle, *Church Teaching Authority: Historical and Theological Studies*. 95. *Codex Iuris Canonici auctoritate Iohannis Pauli PP. II promulgatus* (Libreria Editrice Vaticana, 1983). See also Stephan Kuttner, 'Code of Canon Law in Historical Perspective', *Jurist*, 28 (129).

<sup>306</sup> Pio-Benedictine Code of 1917 was unique in many ways. It replaced the Decretalium (1234) of Pope Gregory IX which had provided a primary source of law to the Church for several hundred years. It offered a comprehensive and singular text for the Church in contrast to the multiple sources originating in the Decretalium. The 1917 Code was promulgated by Pope Benedict XV on 27 May 1917 and entered into force on Pentecost 1918 (19 May).

<sup>307</sup> Boyle, *Church Teaching Authority: Historical and Theological Studies*. 96.

<sup>308</sup> *Ibid.* 96. See Congar, *Lay People in the Church*. 45. Congar offers an historical account of the post-Reformation emphasis of the Catholicism as a 'rule of faith, of hierarchical powers and very particularly of the papal primacy, and of the visibility of the Church and her members', in the 'face of civil power and, in the face of liberal Protestantism and its modernist extensions', as a response to Protestantism who had inclined to reduces the church 'to an inward Christianity, to salvation and by so doing were dissolving ecclesiology'. On the various models of the Church generally see Avery Dulles, *Models of the Church* (New York: Random House).

In later decades, human liberty is presented as a foundation by the theologian David Hollenbach, and as a basis for the Catholic theory of human rights.<sup>309</sup> That particular version of freedom attributed to Catholicism is shaped by other intellectual forces found in Thomistic Personalism, which stand in contrast to the liberal theory of freedom.<sup>310</sup> Hollenbach identifies the classical Catholic third way, which stands between political liberalism and the alternative political movement, Marxism. Therefore, as Coleman notes, Hollenbach is able to say about the Catholic tradition, it 'has developed an approach to human rights which is both activist and theoretically rigorous. It has 'sought to take seriously both liberal democratic and socialist perspectives'.<sup>311</sup> This is essentially a reinterpretation of the understanding of liberty found in the 19<sup>th</sup> century encyclical *Mirari vos* (1832) and the encyclical *Quanta Cura* (1864) but also of the voluntarist concepts of liberty, and a return to the earlier scholastic understanding of *synderesis*, which determines human liberty as an expression of the deepest human truth as orientated towards the true and the good.<sup>312</sup> While such a tradition is clearly not consistent or even theoretically rigorous, it was a turn in catholic moral theology towards re-evaluating the liberal tradition of liberty of conscience.

The approach of Personalist Philosophy charts the way Catholicism sought to distinguish itself from liberal individualism between the 19<sup>th</sup> and early 20<sup>th</sup> century. It offers an outline of how ideas like human dignity, which underpins human rights, is distinctly different when handled with the theology and philosophical anthropology of Catholicism. It measures the human person not alone with a set of temporal and humanistic goals, with the various and civil and political rights associated in that vein but also evaluated personhood with teleological and transcendent goals which are aligned with the Catholic understanding of the natural law. That natural law theory seeks to hold in tension the subjective personal norms of rights bearers and also the objective sense of rights duties, stemming as it does from the scholastic development of the terms used to describe law and justice. By describing a 'total Christian perspective' of the nature of the person in natural law and dignity, it was set to counteract the "total humanism" of the prevailing ideologies in the 20<sup>th</sup> century, towards which this view was

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<sup>309</sup> Coleman, 'Catholic Human Rights Theory: Four Challenges to an Intellectual Tradition', ( 346.

<sup>310</sup> On the Christian notion of freedom see in particular Pinckaers, *The Sources of Christian Ethics*.

<sup>311</sup> Coleman, 'Catholic Human Rights Theory: Four Challenges to an Intellectual Tradition', (347. Hollenbach, *Claims in Conflict: Retrieving and Renewing the Catholic Human Rights Tradition*. 34.

<sup>312</sup> Aubert, 'Religious Liberty from "Mirari Vos" to the "Syllabus"', (49. Pope Pius IX, 'Encyclical Letter Quanta Cura ', (§1.

directed.<sup>313</sup> It sought to provide a moral theology as a basis for human rights as developed from these resources.

However, that perspective encountered many responses, particularly from various liberation theologies, which initially took shape in Latin America and began to form Catholic feminism and various third world approaches to theology. These topics are covered somewhat in the next section and in more detail in the fifth chapter, when we examine human dignity more thoroughly.

## 1.4. The Emergence of Human Rights Discourse in Catholicism

In the United States, Jacques Maritain met with several of the main protagonists in the American social justice movement in Catholicism.<sup>314</sup> It was the influence of the American Catholic Church that led to European Catholicism overcoming its hostility to democracy, particularly because this antagonism was shaped by its experience in France. American Catholicism had thrived in the democratic model of a church-state separation, and provided an opportunity to reassess Catholicism's previous hostility to democratic ideas.

Human rights and human dignity began to be articulated as a medium for participation in civil society. According to Moyn, it was Maritain who,

[...] took what would be *a fateful step for postwar intellectual history as a whole*, making the claim that a revival of natural law implies a broad set of prepolitical human right.<sup>315</sup>

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<sup>313</sup> Hermann, 'Total Humanism: Utopian Pointers between Coexistence and Pluralism', (69).

<sup>314</sup> It has yet to be shown that Maritain met with John Courtney Murray, yet there thought is surprisingly similar on many issues. See also John Pollard, 'Pius XI's Promotion of the Italian Model of Catholic Action in the World-Wide Church', *The Journal of Ecclesiastical History*, 63/04 (2012), 758-84. More broadly see Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (Cornwall: Yale University Press). 132-142 Maritain had been influenced by the development in Catholicism during the 1920's and 1930's of Catholic Action, a European phenomenon which had seen the politicisation and social engagement of Catholicism. See further Moyn, 'Jacques Maritain, Christian New Order, and the Birth of Human Rights.', (3. Moyn writes, 'Maritain's break with his reactionary affiliates around Action Française in the late 1920s (precipitated by the Pope's condemnation of the group) did not by itself transform this thinker into a supporter of rights'.

<sup>315</sup> See Moyn, *Christian Human Rights*. Kindle location 1134 [emphasis added]. Moyn proposes:

Thanks to Maritain above all, the older view that Christianity's political and social doctrine could not be reformulated in terms of rights was dropped in exchange for the claim that only the Christian vision placing the personal entitlements in the framework of the common good afforded a persuasive theory of rights.



It was a time for example, when in August 1939 the Committee of Catholics to Fight Ant-Semitism became the Committee of Catholics for Human Rights.<sup>316</sup> In the speeches and encyclicals of Pope Pius XI the language of human rights and human dignity began to appear, asserting that there existed a longstanding tradition in Catholicism, which was quite an extraordinary claim. Pope Pius XI wrote,

In view of this organized common effort towards peaceful living, Catholic doctrine vindicates to the State the dignity and authority of a vigilant and provident defender of those divine and human rights on which the Sacred Scriptures and the Fathers of the Church insist so often.<sup>317</sup>

His successor, Pope Pius XII, also began to express Catholic policy in terms of human rights and human dignity.<sup>318</sup> It was also a period, during the crisis of the Second World War, when Pope Pius XII began to articulate a preference for, rather than indifference to, democracy.<sup>319</sup> His Christmas Messages began to be expressed in the language of democracy and human dignity as a bulwark to totalitarianism.<sup>320</sup> The National Catholic Welfare Conference, co-ordinated a draft declaration of human rights and it was sent to the United Nations in February 1947, and became one of the texts which the UN Commission referenced.<sup>321</sup> The Welfare Conference

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See also Jacques Maritain, *The Rights of Man and Natural Law* (Michigan: Gordian Press, 1971). and Moyn, 'Jacques Maritain, Christian New Order, and the Birth of Human Rights.', (19.

<sup>316</sup> The New York Times, 'Catholic Group Renamed', *New York Times*, August 17 1939 p. 17. See further, Moyn, *The Last Utopia: Human Rights in History*. Kindle Edition. 50.

<sup>317</sup> Pope Pius XI, 'Divini Redemptoris, AAS (1937)', (§ 33.

<sup>318</sup> The New York Times, 'Text of Pope Pius' Appeal for Peace', *New York Times (1923-Current file)*, 1943 Sep 02 1943a p. 4. This text explicitly speaks of human rights: 'In all nations aversion is growing against the brutality of the methods of total war, which goes beyond all honest limits, all rules of divine and human right'. Pope Pius XI, 'Quadragesimo Anno AAS 23 (1931)', (§1. Using Thomistic language, Pius XI began to use the term, rights and duties, more frequently in this text.

<sup>319</sup> John P. Langan, 'The Christmas Messages of Pius XII (1939-1945): Catholic Social Teaching in a Time of Extreme Crisis', in Kenneth R. Himes and Lisa Sowle Cahill (eds.), *Modern Catholic Social Teaching: Commentaries and Interpretations* (Washington, D.C.: Georgetown University Press), xii, 563 p. 182-182. Langan summarises Pius XII "the five milestones" on the road to a better post-war future in the Christmas Message of 1942, 1) the dignity of the human person; 2) defence of social unity; 3) the dignity of Labour; 4) the rehabilitation of juridical order; 5) a Christian conception of the state.

<sup>320</sup> See Moyn, *Christian Human Rights*. Kindle location 1193. Moyn describes, that by 1944,

[...] the rights of the human person, as galvanized by Maritain's enthusiastic promotion and as the ground of his reappropriation of democracy, were understood by activist Catholics to be the main bulwark against Hitlerian racism.

<sup>321</sup> Special to the New York Times, 'Catholics Draft Human-Rights Aim', *New York Times (1923-Current file)*, 1947 Feb 02 1947 p. 4. 192. See further Joseph S. Rossi S.J., *Unchartered Territory. The American Catholic Church at the United Nations, 1946-1972* (Washington: Catholic University Press). 93-97. W.A. Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge University Press, 2013). 196-197. it is important to note that as early as 14<sup>th</sup> April 1941 the Jesuit scholar, Rev. Wilfred Parson S.J., presented an International Bill of Rights, at the Fifteenth Annual Conference of the Catholic Association of International Peace. See The Catholic Association for International Peace, 'An International Bill of Rights', in Rev. Wilfred Parsons S.J. (ed.), *America's Peace Aims: A Committee Report* (Washington D.C.: The Catholic Association for

was regularly present, among other Catholic organisations at the UN Commission with Non-Governmental Organisation consultation status.

Both Maritain and Courtney Murray saw freedom of religion, dignity and human rights as the primary buttress against totalitarianism, a particular viewpoint which had become common in the encyclicals of the Popes of the era.<sup>322</sup> Maritain and Murray also would become part of a movement that endeavoured to turn away from an antimodernist and anti-democratic Catholicism toward democracy and democratic ideals. For example, Courtney Murray had become involved in the International Committee for Peace, a US based movement peace movement during World War II.<sup>323</sup> This particular organisation began to explicitly use the language of human rights in proposals it made to the United Nations as it drafted the Universal Declaration of Human Right. However, these efforts received mixed response during the 1950's. There were periods when Murray, among other theologians who were described as introducing the modernist ideas and a *Nouvelle théologie*, were forbidden to publish for lengthy periods by Rome on Church-state relations and religious freedom.<sup>324</sup>

Maritain's influence extended in other directions as well. Maritain was close with the founders of the New York Catholic Workers Movement, Peter Maurin and Dorothy Day.<sup>325</sup> This relationship had a formative influence on Maritain's understanding of social justice at street level, which he valued as a presentation of Catholic social thought in the political sphere. In turn, Maritain influenced the more radical and emancipatory idea of Liberation Theology founded by of

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International Peace, 14 April 1941). The further history of the contribution of Catholic NGO's and the Holy See to the drafting of the Universal Declaration and the two Covenants will be elaborated in Chapter three.

<sup>322</sup> John T. McGreevy, 'Democracy, Religious Freedom and the Nouvelle Théologie', *Catholicism and American Freedom. A History* (New York: W. W. Norton & Company, 2003).

<sup>323</sup> John Courtney Murray, 'The Pattern for Peace and the Papal Peace Program', in Catholic Association for International Peace (ed.), (Washington D. C.: Paulist Press, 1944). The text of the document can be found, The New York Times, 'Religious Leaders Issue Peace Plan', *New York Times (1923-Current file)*, 1943 Oct 07 1943b p. 15. For a broader discussion on the ecumenical Declaration for World Peace in October 17, 1943 and its development see Joseph S. Rossi S.J., *Unchartered Territory. The American Catholic Church at the United Nations, 1946-1972*. 34-36.

<sup>324</sup> McGreevy, 'Democracy, Religious Freedom and the Nouvelle Théologie'. Maritain was included in the broadly termed *Nouvelle Théologie*. See Mettepenningen, *Nouvelle Théologie - New Theology: Inheritor of Modernism, Precursor of Vatican II*. 29.

<sup>325</sup> M. Zwick and L. Zwick, *The Catholic Worker Movement: Intellectual and Spiritual Origins* (Paulist Press, 2005). 177. Dorothy Day (1897-1980) began as a left-wing journalist during the Great Depression in the US, involved with the trade union movement and communism and later having become Catholic, developed the Catholic Worker movement in the 1930's. Her blend of socialism, pacifism and grass-roots social Catholicism initiated a contemporary way to challenge Laissez-faire capitalism and engagement with the work for peace. See the helpful article on her life, Brianna Leavitt, 'Peace Profile: Dorothy Day', *Peace Review*, 9/3 (1997/09/01, 431-38).

Gutiérrez, who had met with Maritain in the period 1968-1971.<sup>326</sup> According to Cavanaugh, Gustavo Gutiérrez adopted Jacques Maritain's thought and 'made possible an autonomous political action based on justice and human rights rather than on the agenda of the Church'.<sup>327</sup> Maritain is also later attributed by Pope Paul VI as being his teacher in social thought, and he is cited in the social justice encyclical *Populorum Progressio* (1967).<sup>328</sup> Although Maritain is considered conservative because of his reliance on Thomistic theology, his emphasis on social Catholicism and human rights in this period reveals the efforts he and others went to moderate and in some respects compromise with the modern democratic and human rights project of the time, to the point of providing direction and a source of reflection.

From this point the development of human rights and human dignity began to take shape in the theology of the Second Vatican Council.<sup>329</sup> Courtney Murray had extensively taken up the task of assessing the relationship between democracy and the Church and particularly the place of religious freedom in the 1950's and 1960's. It was an era significant reflection on the relationship between church and state. While there was an input into the development on the Universal Declaration of Human Rights by Catholic laymen, which historian Samuel Moyn suggests was formative, it was the developments prior to and following the Council which grounded human rights in the theology of the Church.<sup>330</sup> Much as the French Declaration on the Rights of Man bound the ideal of rights to the idea of

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<sup>326</sup> William T. Cavanaugh, *Torture and Eucharist : Theology, Politics, and the Body of Christ* (Oxford: Blackwell Publishers) xi, 286 p. 178. See Gustavo Gutiérrez, *A Theology of Liberation: History Politics, and Salvation* (New York: Orbis Books). 35-6.

<sup>327</sup> Cavanaugh, *Torture and Eucharist : Theology, Politics, and the Body of Christ*. 178.

<sup>328</sup> Pope Paul VI, 'Encyclical *Populorum Progressio* (on the Development of Peoples)', *Acta Apostolicae Sedis*, 59 (March 26, 1967), 257-99. Pope Paul VI, cited Maritain's vision of society stating 'the ultimate goal is a full blooded humanism' as an alternative to secular humanism, which he viewed as a closed account of human reality.

<sup>329</sup> The Second Vatican Council, the twenty-first ecumenical council in the history of the Church, met in four sessions from October 9, 1962 to December 8, 1965, each lasting approximately three months. Up to 3,000 bishops attended each of the Council sessions, travelling from around the world to Rome, representing many millions of Catholics. For the texts of the Second Vatican Council see Austin Flannery, *Vatican II: The Basic Sixteen Documents, Constitutions, Decrees, Declarations* (Dublin: Dominican Publications, 1996). Useful commentaries on the Vatican Documents include G. Alberigo and J.A. Komonchak, *History of Vatican II* (Orbis, 1995), Lamb and Levering, *Vatican II : Renewal within Tradition.*, M. Faggioli, *Vatican II: The Battle for Meaning* (Kindle edn.: Paulist Press, 2012). For a summary of the significant shifts in theology which the Council brought to the Catholic Church see Mary Grey, 'Feminist Theology: A Critical Theology of Liberation', in Christopher Roland (ed.), *The Cambridge Companion to Liberation Theology* (2nd edn.; Cambridge: Cambridge University Press, 2007), 105-22. 108 and Keenan, 'Vatican II and Theological Ethics', (162. See also Mary Daly, *The Church and the Second Sex* (London: Geoffrey Chapman). 8: 'In this new atmosphere of change and free discussion the problem of anti-feminism in the Church has come into the open'.

<sup>330</sup> Moyn, *The Last Utopia: Human Rights in History*. (Kindle Edition) 64.

citizenship, so the various papal documents bound Catholicism to the theory of human rights.<sup>331</sup>

Pope John XXIII (1958-1963) began to use the language of rights more frequently, particularly in the encyclicals, *Mater et Magistra* (1961) and *Pacem et Terris* (1963).<sup>332</sup> This era of papal encyclicals emphasised the importance of solidarity with the modern project of progress and development, and also the growth of civil society, returning to the tasks outlined in *Rerum Novarum* (1892).<sup>333</sup> In *Mater et Magistra* there is a strong continuation of the importance of the human dignity of workers and their rights and a concern for economic injustice which impinges on human rights. However, it is in *Pacem et Terris*, where we begin to see most clearly human rights as aligned and integral to Catholicism. *Pacem et Terris* embodies many of the principles contained within the Universal Declaration of Human Rights (1948), including the call for peace, but particularly its idealism and hope for the future, placing human dignity at the root of the Declaration and of Catholicism's understanding of human rights.<sup>334</sup> Emphasising the spiritual nature of human beings and the moral life, which had been outline in the encyclical *Mater et Magistra*, this encyclical noted that it is 'generally accepted today that the common good is best safeguarded when personal rights and duties are guaranteed'.<sup>335</sup> It thereby continues,

The chief concern of civil authorities must therefore be to ensure that these rights are recognized, respected, co-ordinated, defended and promoted, and that each individual is enabled to perform his duties more easily. For "to safeguard the inviolable rights of the human person, and to facilitate the performance of his duties, is the principal duty of every public authority." Thus any government which refused to recognize human rights or acted in violation of them, would not only fail in its duty; its decrees would be wholly lacking in binding force.<sup>336</sup>

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<sup>331</sup> See more completely, Pagden, 'Human Rights, Natural Rights, and Europe's Imperial Legacy', (1 On the various Constitutions see Crăiuțu, *A Virtue for Courageous Minds: Moderation in French Political Thought, 1748-1830*. 76 – 79.

<sup>332</sup> Pope John XXIII, 'Mater Et Magistra, (on Christianity and Social Progress)', *Acta Apostolicae Sedis*, 53 (1961b). § 21. Pope John XXIII, 'AAS 55', (§ 143)

<sup>333</sup> Pope Leo XIII, 'Encyclical Letter Rerum Novarum', (§1)

<sup>334</sup> Pope John XXIII, 'AAS 55', (§20). Human dignity is mentioned 31 times and linked with juridical rights. Other themes include the role and duties of the state in international relations, the equality of men and women, the rights of refugees, the place of liberty of conscience, the just treatment of minorities and a call to disarmament.

<sup>335</sup> Ibid. § 60-61. Cf. Pope Pius XI, 'Encyclical Letter Quadragesimo Anno', *ibid.* 23 (15th May, 177 - 228. 215.

<sup>336</sup> Pope John XXIII, 'Pacem in Terris', *ibid.* 55 (1963a). § 60.

The document goes on to emphasize the importance of the Charter of the United Nations, and the creation of Universal Declaration, developed as 'clear proof of the farsightedness' suggesting it is to be, 'considered a step in the right direction, an approach toward the establishment of a juridical and political ordering of the world community'.<sup>337</sup> On the Universal Declaration, the encyclical states,

The preamble of this declaration affirms that the genuine recognition and complete observance of all the rights and freedoms outlined in the declaration is a goal to be sought by all peoples and all nations. It is a solemn recognition of the personal dignity of every human being; an assertion of everyone's right to be free to seek out the truth, to follow moral principles, discharge the duties imposed by justice, and lead a fully human life.<sup>338</sup>

The encyclical also presents a challenge to governments to see that the Declaration became legally binding insisting, 'that a clear and precisely worded charter of fundamental human rights be formulated and incorporated into the State's general constitutions'.<sup>339</sup> Rights and duties are to be set in balance in any future charter, and that in emphasising the pre-political natural law basis of the state, Governments must, 'reject the view that the will of the individual or the group is the primary and only source of a citizen's rights and duties, and of the binding force of political constitutions and the government's authority'.<sup>340</sup> The encyclical turns to social and economic rights and notes that where 'political, economic and cultural inequities among citizens become more and more widespread when public authorities fail to take appropriate action' the consequence is 'that human rights and duties are thus rendered totally ineffective'.<sup>341</sup>

The emphasis of the encyclical *Pacem et Terris* is on the desire for peace. At the time, it was believed that human rights and global governance through international institutions would achieve this goal. It was penned with the assistance of Pietro Pavan, the Italian version of Jacques Maritain, whose life affirming optimism appealed to Pope John XXIII, and who believed that human liberty and Christian liberty was best secured by the existence of a state, which is

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<sup>337</sup> Ibid. § 144.

<sup>338</sup> Ibid. § 143-144.

<sup>339</sup> Ibid. § 75.

<sup>340</sup> Ibid. § 78.

<sup>341</sup> Ibid. § 63.

grounded in justice, truth and charity.<sup>342</sup> *Pacem et Terris* was the beginning of a political philosophy that could recognise the value of collaboration with secular society where people of goodwill could share a common cause.<sup>343</sup>

The new doctrine of human rights asserted in this encyclical recalls the subjective rights affirmed in scholastic tradition, and also affirmed a rational and stable, universal natural law. It also promoted the natural right to private property, and it asserts the humanist ideas and natural rights views of de Vitoria, Suárez and Bartolomé de Las Casas who attributed equality to natives of the New World and which established the view that such natural rights were universally innate to all human beings. It similarly affirms Maritain's belief in the natural law, which provided "we are enmeshed in the universal order, in the laws and regulations of the cosmos and of the immense family of created natures". It is indeed utopian, and captured the optimism of the age, that believed human rights would restore a sense of global order and inequality and injustice could effectively be counterbalanced by law.

The Catholic Church's further official response to human rights, however, was somewhat more complex. During and following the Second Vatican Council, the conciliar documents shaped the future articulation of human rights ideas in the Catholic Church.<sup>344</sup> This Ecumenical Council is for some 'comparable only to the impact of the Council of Trent on European Catholicism'.<sup>345</sup> A "World Church", emerged at the Council and with that 'a rich, culturally and linguistically diversified, politically sensitive' church took shape.<sup>346</sup> The influences on these documents were

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<sup>342</sup> Drew Christiansen, 'Commentary on *Pacem in Terris* (Peace on Earth)', in Kenneth R. Himes and Lisa Sowle Cahill (eds.), *Modern Catholic Social Teaching : Commentaries and Interpretations* (Washington, D.C.: Georgetown University Press, 2005), xii, 563 p. 222.

<sup>343</sup> John Courtney Murray, 'The Peace That Comes of Order: Reflections Upon the Encyclical *'Pacem in Terris'*', *Studies: An Irish Quarterly Review*, 52/207 (294-311).

<sup>344</sup> The Second Vatican Council, the twenty-first ecumenical council in the history of the Church, met in four sessions from October 9, 1962 to December 8, 1965, each lasting approximately three months. Up to 3,000 bishops attended each of the Council sessions, travelling from around the world to Rome, representing many millions of Catholics. For the texts of the Second Vatican Council see Flannery, *Vatican II: The Basic Sixteen Documents, Constitutions, Decrees, Declarations*. Useful commentaries on the Vatican Documents include Alberigo and Komonchak, *History of Vatican II.*, Lamb and Levering, *Vatican II : Renewal within Tradition.*, Faggioli, *Vatican II: The Battle for Meaning*. For a summary of the significant shifts in theology which the Council brought to the Catholic Church see Grey, 'Feminist Theology: A Critical Theology of Liberation'. 108 and Keenan, 'Vatican II and Theological Ethics', ( See also Daly, *The Church and the Second Sex*. 8: 'In this new atmosphere of change and free discussion the problem of anti-feminism in the Church has come into the open'.

<sup>345</sup> Faggioli, *Vatican II: The Battle for Meaning*. (Kindle Location 123). The Council of Trent, met in twenty-five sessions which were held in three phases: 13 December 1545 – 16 February 1548; 1 May 1551 – 28 April 1552; 18 January 1562 – 4 December 1563. Its purpose was to clarify both the doctrine and discipline of the Church challenged as a consequence of the Reformation. See Weiss, 'The Council of Trent'.

<sup>346</sup> Faggioli, *Vatican II: The Battle for Meaning*. (Kindle Location 123). Faggioli noted that through the Catholic journal *Concilium*, a forum for Catholic feminists emerged who combined feminist theory, liberation theology and the documents of Vatican II.

consciously, and somewhat unconsciously, formed by the combination of various streams of intellectual thought so far discussed, which is detailed in a review of the writings during this period. In reviewing 12<sup>th</sup> century scholastic and 16<sup>th</sup> and 19<sup>th</sup> century neo-Thomistic natural law theology, and philosophy; 19<sup>th</sup> and early 20<sup>th</sup> century personalist philosophy and the significant turn in the early 20<sup>th</sup> century towards Christology in the moral theology of the church; and the influence of *Nouvelle Théologie* which drew upon patristic theology from the 2<sup>nd</sup> to 4<sup>th</sup> centuries in Christianity; the significant documents of the Second Vatican Council is revealed.

During the Second Vatican Council, *Dignitatis Humanae* (the declaration on Religious Freedom) and *Nostra Aetate*, (the declaration on the relationship of the church to non-Christian religions), as well as *Gaudium et Spes* (Pastoral Constitution on the Church in the Modern World), opened Catholicism to a greater dialogue with religions, and various traditions with which it shared a common heritage, and indeed those which were alien to Catholicism.<sup>347</sup> Those documents in particular grasped the essence of the modern project and began to express Catholicism as clearly concerned with the common good, and in solidarity with human rights principles. Certainly the construction of the understanding of human rights and religious freedom is drawn from an essentially natural law approach and a scholastic tradition which emphasised the alignment of human reason and will towards the greatest good and truth—a rejection of the Ockham theory of voluntarism and the charge of indifference to the teleological principle at the heart of Catholic moral philosophy. But in recognition of the human liberty of conscience, which at its core lay the theological idea of synderesis, and freedom of religion, it also moved towards pluralism in the public sphere, advocating dialogue rather than the older Tridentine theology that “error has no rights”. This implies that while the Catholic Church continued to maintain its doctrine, it also acknowledged the human search for truth and a common good which did not require the state to uphold Catholicism as the established religion. *Dignitatis Humanae* could therefore state,

The council further declares that the right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself. This right of the

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<sup>347</sup> Vatican Council II, 'Gaudium Et Spes, AAS 58 (1966)', (§1. Vatican Council II, 'Declaration on the Relation of the Church to Non-Christian Religions Nostra Aetate', *Acta Apostolicae Sedis*, 58 (1966c), 740-44. Vatican Council II, 'Dignitatis Humanae (Declaration on Religious Freedom)', *Acta Apostolicae Sedis*, 58 (1966a), 929-46.

human person to religious freedom is to be recognized in the constitutional law whereby society is governed and thus it is to become a civil right.<sup>348</sup>

By linking human dignity and religious freedom, the Catholic Church provided a theological foundation for human rights, which supported the view that dignity is only realised by the human search for truth. For the Church, the highest truth is in this reasoning, a religious and revealed truth, and is found in Catholicism. The various human rights, expressed through previous papal encyclicals and United Nations conventions therefore exist to essentially enable the full expression of this fundamental dignity. All other human goods, which might be presumed, as innate or a natural right are regarded as flowing from this fundamental understanding of human dignity. The Church insisted on a hierarchy of values which places the spiritual needs of the person above those of other important values. In that sense it provides a context into which human rights are understood.<sup>349</sup>

The assessment of law as a suitable means of channelling Catholic theories of social justice and human rights have been considerably questioned since then, as it was over the last one hundred years. Canon lawyers such as Coughlin returned to the thought of the scholastic theologian Gratian and Aquinas to assert a basic tenet in Catholicism, that positive law 'is man-made law, which must always be in harmony with divine and natural law'.<sup>350</sup> In assessing the liberal theory of law, Coughlin surveys some of the major theorists in the 20<sup>th</sup> century and identifies several issues that arise when this theory is applied within Catholic teachings. The first is that the objectivity of law which is temporal and assessed according to the standards of the time applied. This contravenes Catholic teachings, which believes in 'exceptionalness moral norms that prohibit intrinsic evil'.<sup>351</sup> Secondly, addressing the modern liberal theory as attributed to Rawls, the '*intellectus* of mainstream legal theory often neglects the spiritual nature of the human person' thereby limiting the 'role for theological values and language in public discourse'.<sup>352</sup> Coughlin here suggests that the 'exclusively secular language of liberal theory neglects potential linguistic allies'.<sup>353</sup> Thirdly, Coughlin emphasises, 'the *intellectus* of the law based on mainstream theory may result in the perception that the law's power to bind is conferred by political power alone'.<sup>354</sup> Notwithstanding

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<sup>348</sup> Vatican Council II, 'Dignitatis Humanae, AAS 58 (1966)', (52).

<sup>349</sup> Pope John XXIII, 'Encyclical Letter Mater Et Magistra', *ibid.* 53 (15 May 1961. 175.

<sup>350</sup> Coughlin, 'Canon Law and the Human Person', (27).

<sup>351</sup> *Ibid.* 51.

<sup>352</sup> *Ibid.* 52. This important topic of the role of theology in the public sphere and "comprehensive worldviews" is taken up in latter chapters.

<sup>353</sup> *Ibid.* 52.

<sup>354</sup> *Ibid.* 52.



Enlightenment's strong critique of the fallibility of natural law, Coughlin's points summarise the Catholic response to law in the modern setting. These are topics we take up in Chapter four, but what is important to note here, is that when moving from the papal Encyclical tradition, which began to express human rights in theological and philosophical terms to law, the Catholic Church meets these three points of resistance and thereby reveals how Catholicism presents a different voice within the human rights landscape.

Indeed, the critique of human rights can be particularly stinging from natural law scholars in the Catholic tradition. For instance, Williams maintains that 'sensible ideas can sometimes arise from contaminated philosophies'.<sup>355</sup> Therefore he states, 'once de-contaminated-which is to say, once we understand human rights according to an adequate ontology of the human person-rights turn out to be neither alien nor secondary as a language for locating moral truth'.<sup>356</sup> Williams' argument, that when human rights is presented in secular and liberal terms, and underpinned by positivistic legal theory, it is contaminated and unfit for purpose, is one of the responses to the human rights movement that comes from within Catholicism.

Various natural law philosophers in the Catholic tradition have continued to affirm a philosophical basis for human rights.<sup>357</sup> For example, Lisska provided a tentative description of a human right from the Thomistic tradition, which builds upon our description of the shifts in scholastic thought up to and beyond Grotius and Suárez.<sup>358</sup> More recently, the Catholic Church has adopted the language of human ecology, as a way to present the Church's natural law position in various bio-ethical debates as they relate to human dignity and human rights.<sup>359</sup> This particular direction in Catholic thought seeks to link the theology of creation, modern ecological concern for the natural world and the human place within the ecosystem. It emphasises a return to the natural law and recognition of human beings place in the created world, which gives rise to solidarity with others.

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<sup>355</sup> Williams, 'Personalism and the Foundations of Human Rights.'. 79.

<sup>356</sup> Ibid. See also, Book Review by Russell Hittinger *First Things*, no 158 December 2005, p50-51 *Person and Rights, Who Is My Neighbour? Personalism and the Foundations of Human Rights*

<sup>357</sup> See for example Finnis, *Natural Law and Natural Rights*.

<sup>358</sup> Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction*. 223-246. See also Finnis, *Natural Law and Natural Rights*.

<sup>359</sup> See for instance Mary Taylor, 'A Deeper Ecology: A Catholic Vision of the Person in Nature', *Communio: International Catholic Review*, 38/Winter (2011). J. Brian Benestad, 'Three Themes in Pope Benedict XVI's', *Nova et Vetera (English Edition)*, 8/4 (Fall2010), 723-44.

## 1.5. Conclusion

The process of Reformation and revolution that took place within the Catholic Church between the 16<sup>th</sup> and 20<sup>th</sup> centuries gave rise to an alternative view of human autonomy and human rights that has underpinned the liberal human right regime. This began with a scholastic natural law tradition anchored in the thought of Thomas Aquinas and the alternative view that began to emerge in voluntarism, initiated by William of Ockham, and de Vitoria and Suárez, and revived in the significant Neo-Scholastic encyclical *Aeterni Patris*.<sup>360</sup>

The shift in the 19<sup>th</sup> century towards social Catholicism was initiated in encyclical *Rerum Novarum* as a response to the rise of the nation state and the emergence of the civil society with the multiplicity of Catholic social movements which it invigorated and provoked.<sup>361</sup> While it remained authoritatively bound to Neo-Scholasticism, Catholic social thought offered an opportunity to express concepts of justice in the language of political and social reform, articulating a theory of personalist philosophy, human dignity and human rights. From that basis, Catholic thinkers had the capacity to participate in the innovation of human rights ideas, particularly with the creation of the Universal Declaration of Human Rights.<sup>362</sup>

Catholic social thought however, had remained a conservative idea until the Second Vatican Council, and remained for a long period suspicious of the state and of democracy. It was also firmly wedded to natural law as a basis for its understanding of social justice and human rights. Only through a later period of reappraisal of the natural law tradition, its scope and practicality, particularly with the advent of various new theologies which gave rise to liberation theology and Catholic feminism, was this monopoly challenged. Those movements had in their genesis a rethinking of moral and fundamental Catholic theology, particularly Christology after World War II and the experience of Third World and Latin American theology.<sup>363</sup> The latter recognised the cry of the oppressed, in poverty and the political abuse of power by emerging states, giving rise to Catholic

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<sup>360</sup> Pope Leo XIII, 'Ass 12 (1879)', (§24

<sup>361</sup> Pope Leo XIII, 'Encyclical Letter *Rerum Novarum*', (§ 2.

<sup>362</sup> Moyn, *The Last Utopia: Human Rights in History*. See further Samuel Moyn, 'From Communist to Muslim: European Human Rights, the Cold War, and Religious Liberty', *South Atlantic Quarterly*, 113/1 (Winter 2014), 63-86.

<sup>363</sup> For an examination of the central thesis of Liberation theology see Gerald S. Twomey, *The "Preferential Option for the Poor" in Catholic Social Thought from John XXIII to John Paul II* (Edwin Mellen Press Limited), Gustavo Gutiérrez, *A Theology of Liberation: History, Politics, and Salvation* (Orbis Books). Michael Kirwan SJ, 'Liberation Theology and Catholic Social Teaching', *New Blackfriars*, 93/1044 (246-58).

participation in civil rights movements, human rights ideas, and the articulation of the “preferential option for the poor”.<sup>364</sup>

This chapter has provided an overview of the scholastic period in Catholic theology that saw a gradual reinterpretation of the objective meaning of rights and duties. Catholicism’s cathartic experience from the French Revolution up to and including the 19<sup>th</sup> century, lead to an appropriation of democratic and human rights language, particularly as it emphasised human dignity from the 1930’s onwards, and is in simple terms a new departure from the older *ancien regime*. What emerges suggests both the existence of continuity in some of the salient ideas which contributed to the rise of human rights as well as rupture and discontinuity as tenets were re-evaluated. If we acknowledge Catholicism’s complex history, and its contribution to the intellectual and cultural history of Europe to it, there was room for this dignified *volte-face*. Catholicism may not have invented human rights and human dignity but it certainly gave these ideas the some of the formative language and concepts.

In examining the introduction of philosophical Personalism in Catholic theology and the philosophical expression of personalist ideas in the writing of Maritain and John Paul II, it is clear that this those tendering these ideas sought not just to present human rights with a foundation but also to express Catholicism in the genre of modern social thought, which the Catholic Church had been developing since the 19<sup>th</sup> century. While Personalism did contribute to the way in which human rights ideas became expressed outside of the Catholic Church and gave credibility to human rights within the broader natural law tradition, it was also seen as grounding for the uniquely Catholic expression of its own social justice movement. Therefore, personalism and Catholic social justice was not dependent of the success of human rights nor is it seen to be so in the future. Both movements dovetailed at a unique time at the end of World War II, and came as a response to the twin challenges (at least from the Catholic perspective) of communism and fascism. The rise of totalitarian ideologies would find the Catholic Church battling for its own survival which, in response, saw the development Catholic social theory as an alternative to both ideologies. By taking up the democratic project, with the

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<sup>364</sup> Johan Verstraeten, 'Towards Interpreting Signs of the Times, Conversation with the World and Inclusion of the Poor: Three Challenges for Catholic Social Teaching', *International Journal of Public Theology*, 5/3 (314-30). For an example of Feminist theology see Tina Beattie, *New Catholic Feminism: Theology and Theory* (London: Routledge). Christine E. Gudorf, 'Encountering the Other: The Modern Papacy on Women', in Charles E. Curran (ed.), *Change in Official Catholic Moral Teaching: No. 13 Readings in Moral Theology* (New Jersey: Paulist Press, 2003a). Rosemary Radford Ruether, 'The Development of Feminist Theology: Becoming Increasingly Global and Interfaith', *Feminist Theology*, 20/3 (May 1, 2012 2012), 185-89.

liberal ideas of civil and human rights, and the demand for social justice, the Catholic Church expressed a “middle ground” between the ideologies of the left and right. This was, undoubtedly, an ideology of a different hue, with many internal contradictions, something the theologians of the later 20<sup>th</sup> century point would point out, but it secured a way to navigate through perilous times. Until the early 19<sup>th</sup> century, liberalism and the individualism, which frame human rights principles and were inspired by Catholic teachings, were also viewed with deep suspicion as they clashed with the communitarian and collectivist values of the Church. Where Catholicism did officially contribute to human rights ideas, it did so in a circumspect way, believing that human rights, when devoid of continuity with natural law ideas are undermined from its very core.

The next chapter will examine the development of a political philosophy that accompanied this development in Catholicism towards appropriating a social philosophy. While Catholic political thought has an ancient history, which provides the backdrop, it is the shift towards democratic and human rights ideas during the 19<sup>th</sup> and 20<sup>th</sup> centuries which will assist in clarifying how these same ideas are situated in Catholicism.

## Chapter 2: From the centre to the periphery: Catholic theory of international order in transition.

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### 2.1. Introduction

The legal historian David Kennedy has observed that once ‘our enlightenment narrative has been jostled, the deep and abiding interaction between international law and religion seems unavoidable’.<sup>1</sup> For Kennedy a retelling of the history of international law ‘would surely need to begin with religion, seeing the roots of law’s arrogance, universality, indeed univocality, in the project of canon law and the development of catholicity’.<sup>2</sup> Catholicity is not a reference to the religion in particular, but is defined as ‘the opinion of the greater, wiser, older, healthy part, in short, the orthodoxy established by councils as arbiters of the public good’.<sup>3</sup> Kennedy presents these origins as ‘a companion for international law’s generalising pretence – even unto its roots in the in the institutional structure of plenary and consent’.<sup>4</sup> From this more ancient history, a time when “two swords” mingled—the interaction of the bureaucratic and territorial claims of the sovereignty of religion and the sovereignty of political rulers engaged in ‘the exclusion and suppression of actual social difference’.<sup>5</sup> By the 16<sup>th</sup> century, the formal creation of international law became bound by particular concerns structured by the ‘logic of state orthodoxy’.<sup>6</sup> Kennedy elaborates an expansive engagement for the history of international law that,

[...] would return us to the development of interrogations, common rituals, taxations, citizenship and exiles, to the recognition and enforcement of papal enunciations and imperial denunciations, rooting the doctrines of international law in the earliest consolidation of authority in the West, and the first turn from enthusiastic to bureaucratic power.<sup>7</sup>

The task of engaging in international law as mapped out by Kennedy includes the bifurcation of law during the Reformation period, a process which gave rise not

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<sup>1</sup> David Kennedy, 'Images of Religion in International Legal Theory', in M.W. Janis and C.M. Evans (eds.), *Religion and International Law* (The Hague: Martinus Nijhoff Publishers, 1999b). 153.

<sup>2</sup> Ibid. 151.

<sup>3</sup> Ibid.151.

<sup>4</sup> Ibid. 151.

<sup>5</sup> Ibid. 151.

<sup>6</sup> Ibid. 151.

<sup>7</sup> Ibid. 151.

alone to the idea of an independent state but also of a need to provide legal accommodation to religious and political minorities. This process included Europe being 'conditioned by the consolidation of dynastic rivalry and the Ottoman "threat" as crucial, perhaps even particularly crucial as a division, to the centrality of Europe to international law'.<sup>8</sup> Kennedy describes the passage into the modern era, with its dependence on rationalism and enlightenment not as a 'the displacement of religion, but as a continuation of religion's will to power'.<sup>9</sup> The idea that law can continue to extend itself to be exclusionary but also transformative and not just a bureaucratic management of the inhabitants of the state suggests a way to consider some possibilities to recognise 'the mutual participations of religious and legal construction of the state, the sovereign and his law'.<sup>10</sup>

Our purpose therefore is to provide a critical narrative of the development and direction of international law as it was characterised by Catholic preoccupations from the medieval and early modern era. The theological and philosophical contribution to the structure of pre-modern international law by Augustine, Thomas Aquinas, Francisco de Vitoria and Robert Bellarmine assisted the Catholic Church at crucial moments in its history and left an enduring legacy. This could broadly be described as a foundation for a Catholic approach to international law. Collectively they provided opportunities for reflection on the meaning and purpose of sovereignty and international order. Their contribution could well be described as "hinge moments" in shaping of a Catholic approach in the development of international law and to provide a basis for the Catholic Church's response to an emerging modern international law. This process is highlighted and then contrasted with early-modern international legal scholarship as Grotius, Vattel and Hobbes constructed it. The structure of international law that emerged during the eventful 16<sup>th</sup> and 17<sup>th</sup> centuries lead to Catholic political and legal thought becoming a minor key in the development of public international law in the 19<sup>th</sup> century. This distinctively different approach to sovereignty and international order provides an opportunity to examine the peripheral place of religion, particularly Catholicism, in the structure of 19<sup>th</sup> century international law. The Catholic Church's participation in the emergence of temporal and religious sovereignty reveals that the development and structure of international law is a

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<sup>8</sup> Ibid. 152.

<sup>9</sup> Ibid. 152.

<sup>10</sup> Ibid. 153.

construct of history, marked by its interaction with religion, and in the European context, with Catholicism.

## 2.2. Catholic Theory of International Order in Transition

From the Medieval to the Early Modern period, scholastic lawyers used the Christian gospels as a unique source for the relationship between the Catholic Church and the state.<sup>11</sup> The initial reference point appears in the Gospels of Matthew (22:21), Mark (12:17) and Luke (20:25) which is the New Testament injunction to render to Caesar the [secular] things which are Caesar's and to God the things that are God's.<sup>12</sup> The Christian admonishment that they should “not conform to this world” gives rise to the desire to acknowledge the distinctiveness of Christian dual-citizenship, belonging both to the world and to the kingdom of God.<sup>13</sup> The development of a theory of “two swords” sufficient to govern the world became a complex arrangement between throne and altar with various alterations of a balance of power between these two poles.<sup>14</sup> Religious and political power was dispersed between the distinctive functions within Christendom as it developed, emphasising at times closer or greater levels of co-operation. The Catholic Church’s ‘precarious association with civil authority began to change in the fourth

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<sup>11</sup> Kennedy, 'Primitive Legal Scholarship', (3).

<sup>12</sup> See Harold J. Berman, 'The Spiritualization of Secular Law: The Impact of the Lutheran Reformation', *Journal of Law and Religion*, 14/2 (313-49. 313. The historian Harold J. Berman writes that early Christianity saw the contest as between the 'spiritually minded inner-directed follower of Christ fights against the materialism of the unredeemed age, into which he was born'.

<sup>13</sup> Romans 12:2. See John Witte, *God's Joust, God's Justice : Law and Religion in the Western Tradition* (Grand Rapids, Mich. ; Cambridge: Eerdmans) xiv, 498 p. 212 – 216. The duality of the Christian's relationship with the world is similarly found in early Church documents, including the *Didache* ( ca. 120 C.E.) and *The Epistle of Barnabas* ( ca. 100-120 C.E.). Early Christian monasticism sought to emphasize the true nature of the Christian vocation in society, highlighting the distinctiveness of Christian life in the world often deeming the world an alienating and threatening influence. See also Berman, 'The Spiritualization of Secular Law: The Impact of the Lutheran Reformation', (313).

<sup>14</sup> Luke 22:38. See however G.E. Caspary, *Politics and Exegesis: Origen and the Two Swords* (London: University of California Press, 1979). 125 [footnote omitted]. Caspary argues that some early church interpretations of the “two swords” lead to a development of Christian pacifism. Notably the theologian Origen in *Contra Celsum* (ca 248 C.E.) who interpreted the idea of two swords wholly spiritually and so writes ‘to those who would ask us where we have come from or who is our author, we reply that we came in accordance with the commands of Jesus to beat the spiritual swords that fight and insult us into ploughshares and to transform the spears that formerly fought against us into pruninghooks. No longer do we take the sword against any nation, nor do we learn war any more, since we have become sons of peace, through Jesus, who is our author, and no longer follow our traditions and customs, by which we had become “strangers to the covenants” [Ephesians 2:12]’. In his writing, Origen offers a sophisticated response to the situation of Christians in the world. The authority of civil rulers are recognised but only so far as they conform to divine law but where that law is broken they are to offer no active resistance other than passive resistance of martyrdom. Civil power is also given by God because the Church and the world are both creations of the same God and each is considered a good for society. Civil authority is pre-Christian and therefore potentially influenced by the presence of the Church. In this view, the existence of evil resists the church's presence and distorts civil power but is redeemable and can be guided to the proper exercise of authority by the providence of God.

century with the conversion of the Emperor Constantine'.<sup>15</sup> Councils of the Catholic Church began to consider not just spiritual and ecclesiastical concerns, but relationships with temporal rulers and sovereign power.<sup>16</sup> In the 5<sup>th</sup> Century, Pope Gelasius I (492–496) wrote to Emperor Anastasius and articulated the classical definition of this relationship:

Two [swords] there are, august emperor, by which this world is chiefly ruled, the sacred authority of the priesthood and the royal power ... If the bishops themselves, recognizing that the imperial office was conferred on you by divine disposition, obey your laws so far as the sphere of public order is concerned ... with what zeal, I ask you, ought you to obey those who have been charged with administering the sacred mysteries [in the matters of religion]?<sup>17</sup>

The basic principle of medieval order, *Imperium* and *Sacerdotium*, was to last for the best part of a thousand years. It was inaugurated with the crowning of Charlemagne as Emperor by the Pope on Christmas Day, AD 800 founding the Holy Roman Empire.<sup>18</sup> The doctrine of “two swords” was used by Alcuin, Charlemagne’s court theologian, ‘to illustrate this conception of the unity of the *corpus christianum* and the co-ordination of [these two ministerial offices], Empire and Papacy, on the basis of their equal rights’.<sup>19</sup> Within this new ordering of secular rule, the office of King and Emperor existed within the Church and became an extension of the kingship of Christ over the world, therefore the ruler must “share his kingship” with Christ but which also means sharing in the office of Christ over the Christian people.<sup>20</sup> To the contemporary theologian Milbank, this religious-political arrangement established ‘the ecclesia was in effect a kind of new

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<sup>15</sup> Robert John Araujo and John A. Lucal, 'Forerunner for International Organizations: The Holy See and the Community of Christendom - with Special Emphasis on the Medieval Papacy', *Journal of Law & Religion*, 20 (312).

<sup>16</sup> *Ibid.* 312. (footnotes omitted). Numerous Papal encyclicals referenced this Gelasian text up to the 19<sup>th</sup> century. See for instance Pope Leo XIII Encyclical, *Arcanum* [On Christian Marriage] (January 8, 1880); Pope Leo XIII, Encyclical, *Nobilissima Gallorum gens* [On The Religious Question In France] (February 8, 1884); Pope Leo XIII, Encyclical, *Immortale Dei* [On The Christian Constitution Of States] (November 1, 1885). For an overview of the significance of these texts on Christian political philosophy see John Courtney Murray, 'Leo XIII: Separation of Church and State', *Theological Studies*, 14 (1953), 145-214.

<sup>17</sup> Berman, *Law and Revolution: The Formation of the Western Legal Tradition*. 92

<sup>18</sup> C. Pierson, *The Modern State* (Taylor & Francis, 1996). 43

<sup>19</sup> Wileelm G. Grewe, *The Epochs of Interational Law*, trans. Michael Byers (Berlin/New York: Walter de Gruyter). 40.

<sup>20</sup> John Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People (Illuminations: Theory & Religion)* (Kindle edn.; Oxford: Wiley). 229. The idea of sharing in kingship originated for Medieval theologians in the works of Saint Augustine, *Concerning the City of God against the Pagans*, ed. Betty Radice, trans. Henry Bettenson with an Introduction by John O'meara (Kindle edn., Penguin Classics; London: Penguin Books, 1984).



synthesis of the city and the empire and therefore in one respect a new revision of the Roman project itself'.<sup>21</sup> Kingship became an instrument of Christian government, which kept intact the eschatological ambitions of the Christian religion to be both redemptive of a fallen world and to exercise a justice, which pointed beyond itself to eternity.<sup>22</sup> The role of Christian governance was therefore to be both a defender of the faith and protection of the Christian mission in civil society.<sup>23</sup>

### 2.2.1. Augustine

Berman suggests that Augustine contrasted the temporal “earthly city” and the pure and eternal “city of God”.<sup>24</sup> In Augustine’s writing, there is a sense of alienation from an unredeemed and materialistic age that shaped both the Roman *res publica* and the *ecclesia* of the Christians. At this point, the *saeculum* was ‘a profoundly sinister thing’ in which Christians viewed as a place of trial and penitential existence.<sup>25</sup>

To Augustine there existed four elements to his political philosophy: the church, the state, the City of Heaven, and the City of the World.<sup>26</sup> Augustine makes use of the Christian gospels and can suggest ‘we have learnt that there is a City of God: and we have longed to become citizens of that City, with a love inspired by its founder’.<sup>27</sup> However, for those who have rejected the worship of God for the city of the world, they are ‘reduced to a poverty-stricken kind of power, and engage in a kind of scramble for their lost dominions and claim divine honours from their deluded subjects’.<sup>28</sup> The tensions that lay in this narrative embed the struggle between state and the church. The fall of Rome in 410 by the army of Alaric the

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<sup>21</sup> Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People (Illuminations: Theory & Religion)*. 231.

<sup>22</sup> Ibid. 233.

<sup>23</sup> Grewe, *The Epochs of Interational Law*. 42.

<sup>24</sup> Berman, 'The Spiritualization of Secular Law: The Impact of the Lutheran Reformation', ( 313.

<sup>25</sup> Ibid. 313.

<sup>26</sup> L. C. Ferrari, 'Background to Augustine's " City of God"', *Classical Journal*, (1972). Ferrari offers a context for Augustine’s political thought and concludes when, ‘from the ashes, the pioneering architects were to begin building anew what was to become the western Christendom of the middle ages, it was from Augustine’s City of God that their guiding principles were derived’.

<sup>27</sup> Augustine, *Concerning the City of God against the Pagans*. Kindle Locations 9213-9214. Book XI, Chp 1. See also Holy Bible, New International Version (NIV), Romans 12:2 ‘Do not conform to the pattern of this world, but be transformed by the renewing of your mind. Then you will be able to test and approve what God’s will is—his good, pleasing and perfect will’.

<sup>28</sup> Ibid. Kindle Locations 9216-9217. O’donovan, 'The Language of Rights and Conceptual History', (193. Oliver O’donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (Cambridge: Cambridge University Press, 1999). 83. Augustine took the experience of Israel in Babylon ‘as the archetype for the duality of this-worldly and divine rule, and gave special emphasis to one text arising from that experience, the letter of Jeremiah written to the exile community in 594 BC (Jeremiah 29: 1-23)’.

Visigoth marked the end of a pagan empire on the cusp of becoming truly Christian. It had not been the case that the republic was wholly corrupted to Augustine but that it had not fully set its sight on the broader goals of a just society as Augustine had envisioned.

The contrast between Augustine's *The City of God* after the fall of Rome and Cicero's *On the Commonwealth* which followed the civil war between Pompey and Caesar (49–45 BC) and ended the republican government in Rome, is related to the Cicero's concern for the 'way in which knowledge of morality and tradition can be passed on and kept alive' but also to offer 'a living example of the values and social behaviour that Cicero most admired'.<sup>29</sup> Augustine takes up many of the themes of Cicero but imbues them with Christian ideals that are focused on the purpose of virtue, peace, justice and the eschatological concerns of the City of God. Cicero had 'attempted to place Aristotelian ideas about the ethical importance of civic life within the Stoic framework of universal law' and Augustine pursued this framework but informed by Christian sources.<sup>30</sup> Those theological considerations allowed Augustine to re-formulate 'the traditional virtue based concept of society' which the Ideal republic aspired to and which Cicero had articulated before him. Augustine could assess the fall of Rome by recognising the very high motives of the *res publica* (the common wealth of public things belonging to the people) while also criticising the governance of a Christian Empire, where it fell short of the ultimate goal of the City of God. In this context, Augustine held the roman *res publica* account of virtue, peace and justice up to examination and scrutiny under the theological proposition of the City of God, which remained, to the forefront of his thought. Society and all the political consequences, which built upon the kind of citizens that inhabited it, became measured according to the yardstick of an eternal city, a position that gives Augustine his realist and pragmatic leaning.

The historian Oliver O'Donovan suggests that in Augustine's *The City of God* it is possible to find some traces of his political thought, particularly on the constitution of political societies and on their government.<sup>31</sup> In Book 19, Augustine sets out a 'broadly moral, rather than narrowly political' Christian response to the disputes that preoccupied moral philosophy of his time, making 'society central to the

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<sup>29</sup> M.T. Cicero and J.E.G. Zetzel, *Cicero: On the Commonwealth and on the Laws* (Cambridge University Press, 1999). xiii.

<sup>30</sup> *Ibid.* xx.

<sup>31</sup> Joan Lockwood O'donovan and Oliver O'donovan, *Bonds of Imperfection. Christian Politics Past and Present* (Cambridge Eerdmans Publishing Company, 2004).48. O'Donovan takes note of the various viewpoints which ask if a political theory could be located in *The City of God* noting that the work also tends towards being non-political or trans-political.

supreme good' of philosophical concern.<sup>32</sup> The concern of Augustine is not government but 'the moral forces which shape a society and its practices'.<sup>33</sup> At the heart of Augustine's political philosophy his 'powerful theological anthropology compels attention to the ways in which human beings, created in God's image, communicate'.<sup>34</sup> In fact, his philosophy begins in his earlier autobiographical *Confessions*, a work in which the individual remains a mystery because there are incommunicable facets of the human identity which are only truly located in the divine.<sup>35</sup> Augustine rejects stoic *apatheia* by which we are removed from the emotions, and therefore the human being is 'a fragile, dependent creature who is by no means a *tabula rasa*, but, rather, a being at once social and "quarrelsome."<sup>36</sup> It is the desire for peace and accord in Augustine's writing which will find its fulfilment in the City of God. Elshtain summarises:

The self is not and cannot be free-standing. Social life is full of ills and yet to be cherished. Thus, civic life, among those social forms, is not simply what sin has brought into the world but what emerges, in part, given our capacity for love and our use of reason, as well (alas) as a pervasive lust for domination attendant upon human affairs.<sup>37</sup>

In this sense, there exists a natural likeness between all human beings which establishes our empathy and social bonds but Elshtain further suggests from Augustine's thought, 'these "bonds of peace" do not suffice to prevent wars, dissensions, cruelty, and misery of all kinds, but we are nonetheless called to membership based on a naturalistic sociality and basic morality available to all

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<sup>32</sup> Ibid. 50-51.

<sup>33</sup> Ibid. 50-51.

<sup>34</sup> Jean Bethke Elshtain *Augustine* in Scott and Cavanaugh, *The Blackwell Companion to Political Theology*. Kindle Locations 599-600.

<sup>35</sup> See Henry Chadwick, *Saint Augustine Confessions* (Kindle edn., Oxford World Classics; St Ives: Oxford Uni Press, 1998). See also Paul Weithman *Augustine's political philosophy* in E. Stump and N. Kretzmann, *The Cambridge Companion to Augustine* (Cambridge: Cambridge University Press, 2001). According to Augustine, human beings are moved by what he calls their "loves". Weithman notes that in Augustine's thought, perfect justice 'would consist in an enduring disposition to love objects, including God, according to their worth'. Augustine therefore 'relies on this account of love to explain the origin of the two cities and their progress through time'. Each particular form of love, self-love or *caritas*, would define the purpose and ends of each society.

<sup>36</sup> Jean Bethke Elshtain *Augustine* in Scott and Cavanaugh, *The Blackwell Companion to Political Theology*. Kindle Locations 618-619.

<sup>37</sup> Jean Bethke Elshtain *Augustine* in *ibid.* Kindle Locations 630-631. See also Grewe, *The Epochs of Interational Law*. 106-116. Grewe outlines the contribution by Augustine to the development of the theory of a "just war"

rational creatures'.<sup>38</sup> The complete realisation of peace is therefore located in the City of God.

For Augustine, human beings are inherently social and we are 'always in society and we always seek the consolation of others'<sup>39</sup> and society 'is a species of friendship, and friendship is a moral union in and through which human beings strive for a shared good'.<sup>40</sup> The love of friendship extends beyond family bonds and towards society and is an imitation of the unique singularity of God in whom plurality is found. This Trinitarian theology is the basis for Augustine's view of the person who lives in society that is manifestly plural and is the basis on which political society is built.<sup>41</sup> Elshtain suggests, 'human civic life is not simply a remedy for sin - with order and coercion needed to constrain our wickedness - but an expression of our sociality; our desire for fellowship; our capacity for a diffuse *caritas*'.<sup>42</sup> This interpretation of society is a challenge to the Roman republican ideal articulated by Cicero on the *res publica* (translated as the public sphere or republic), which had been based on shared interests and common agreement but also stoicism.<sup>43</sup> According to Elshtain, Augustine goes further to suggest the republic is, 'a people gathered together in a civic order [it] is a gathering or multitude of rational beings united in fellowship by sharing a common love of the same things'.<sup>44</sup> As Marcus clarifies, Christians 'could not think of themselves as citizens involved in creating the right order in society, nor of their leaders as entrusted with bringing such order into being'.<sup>45</sup> This activity could only be interpreted on the larger canvas of redemptive history, and the divine economy and providence of God. The proposition from Augustine is that Christianity would 'tame the occasions for the reign of *cupiditas* [the orientation towards evil] and the activation of the *libido donlinandi*, or lust to dominate, and maximize the space

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<sup>38</sup> Jean Bethke Elshtain *Augustine* in Scott and Cavanaugh, *The Blackwell Companion to Political Theology*. Kindle Locations 630-631. See also Grewe, *The Epochs of Interational Law*. 106-116. Grewe outlines the contribution by Augustine to the development of the theory of a "just war"

<sup>39</sup> Jean Bethke Elshtain *Augustine* in Scott and Cavanaugh, *The Blackwell Companion to Political Theology*. Kindle Locations 636-637.

<sup>40</sup> Jean Bethke Elshtain *Augustine* in *ibid.* Kindle Locations 636-637.

<sup>41</sup> Jean Bethke Elshtain *Augustine* in *ibid.* Kindle Locations 652-653.

<sup>42</sup> Jean Bethke Elshtain *Augustine* in *ibid.* Kindle Locations 636-637.

<sup>43</sup> See R.A. Markus, *Saeculum: History and Society in the Theology of St Augustine* (Cambridge University Press, 1988). 73-74, '...whatever they [Greek philosophers] thought about the origins or the metaphysical status of the right social order the theme of the *polis* as the means of directing men toward the achieving of the good life runs towards the whole of the Greek tradition of political thought'.

<sup>44</sup> Jean Bethke Elshtain *Augustine* in Scott and Cavanaugh, *The Blackwell Companion to Political Theology*. Kindle Locations 654-655.

<sup>45</sup> Markus, *Saeculum: History and Society in the Theology of St Augustine*. 74

within which *caritas* operates'.<sup>46</sup> By placing the City of God as the telos for the social and political community, Augustine addresses the limitations inherent in the quest for temporal peace, which is invariably circumvented by the pursuit of conquest and domination. Elshtain writes that because 'earthly *potestas* is tied to the temptations inherent in that form of power we call *dominion*, there can be no such thing as an earthly sacral society or state'.<sup>47</sup> Political and social institutions are placed in a broader theological narrative and therefore can refrain from assuming the role of religion, and a temptation of collapsing both religion and the state into one another.

In Augustine's philosophy, all are part of the city of man but some are also part of the city of God and yet both societies exist within the same temporal sphere and same period of history. Each society has its own goals shaped by how ultimately that transcendent view of the city of God is considered. After the Reformation, the tension in understanding the relationship between these two societies led some reformers to establish two spheres with institutional and social division in the political ordering of the state.<sup>48</sup> Augustine therefore had pre-emptively repudiated a theological underwriting of the notion of an *imperium Christianum*, this 'lies in part in his worry that any identification of the city of God with an earthly order invites sacralisation of human arrangements and a dangerous idolatry'.<sup>49</sup> However, the temptation remained in Christian political theory to fold the power of religion and the state into one political order.

In Augustine's writing that the period between the fall of man, as outlined in the Book of Genesis and then end of time (the eschaton) is called the *saeculum*. It is the temporal foreground in which humanity exists and where the two overlapping cities of man and of God interweave. While it denotes ordinary time which is historical and progressing linearly towards a future it also embraces the concept of eternity, with the intersection of the sacred with the profane in the world.<sup>50</sup> Markus writes that in the later writings of Augustine 'the affairs of the *saeculum*

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<sup>46</sup> Jean Bethke Elshtain *Augustine* in Scott and Cavanaugh, *The Blackwell Companion to Political Theology*. Kindle Locations 676-677. Elshtain explains: For a lust to dominate taints and perverts all human relations, from family to city. Similarly, a decent love, a concern for the well-being of all in the household or in the city, strengthens the delicate filaments of peace. See also Michael Banner, 'Christianity and Civil Society', in John A. Coleman (ed.), *Christian Political Ethics* (New Jersey: Princeton University Press), 3-21. 5-8.

<sup>47</sup> Jean Bethke Elshtain *Augustine* in Scott and Cavanaugh, *The Blackwell Companion to Political Theology*. Kindle Locations 695-696.

<sup>48</sup> Banner, 'Christianity and Civil Society'. 6-7.

<sup>49</sup> Jean Bethke Elshtain *Augustine* in Scott and Cavanaugh, *The Blackwell Companion to Political Theology*. Kindle Locations 692-693.

<sup>50</sup> See Taylor, *A Secular Age*. 4-61. Taylor describes the process in which this understanding held by Augustine of the *saeculum* is transformed through a gradual process of disenchantment leading progressively to the modern sense of exclusive humanism, which leaves religious belief as optional and contested.

assumed significance [...] because he now saw the *saeculum* as the historical, empirical, perplexed and interwoven life of the two eschatological cities'.<sup>51</sup> Markus continues '[t]he very terms of Augustine's critique of the sacralisation of the Roman Empire implied a protest against the readiness to see within any society the ultimate eschatological conflict prematurely revealed in visible, identifiable form'.<sup>52</sup> While there is an emphasis on two cities, their locus remains mysterious but is evident in the ultimate concerns of those who belong to each city, the city of God being concerned with the theological virtues of faith and divine love. Therefore, through Augustine it was possible to see how Christian engagement with the social and political affairs of the republic was resolved. Christians could be 'bound to a temporal society devoted to the service of objectives which lay well on this side of the final goals of life'.<sup>53</sup> Banner points out that in the Augustinian sense 'this overlap does not license the granting of autonomy, if one may put it so, to the earthly city'.<sup>54</sup> Distinctions made between the state and the church could not unravel the intimate relationship between the two cities, which are found in each of these social, religious and political spheres. Our interpretation of the meaning of the concept of the secular must include this broader Christian understanding in modern political theory.

### 2.2.2. Aquinas

The writings of Augustine presented a radical critique of political and religious power and form the basis for much of the Catholic theory of state that followed. Although there were alternative propositions that influenced the various stages of the evolution of the State and the shape of the "law of nations" the work of Augustine retains a central position in Catholic thought. While the Augustinian tradition 'was suspicious of the exercise of power because of the fundamental corruption of the human will', the theologian Thomas Aquinas undertook a re-evaluation of the order of society in light of Aristotle's *Politics* to formulate it as a more organically harmonious unity.<sup>55</sup>

This emphasis on the ordering of society by Aquinas was to create the proper conditions for the practice of religion, and providing the right order of politics for religion's social and political manifestation. The focus was on virtue in the public

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<sup>51</sup> Markus, *Saeculum: History and Society in the Theology of St Augustine*. 101.

<sup>52</sup> *Ibid.* 101.

<sup>53</sup> *Ibid.* 102.

<sup>54</sup> Banner, 'Christianity and Civil Society'. 7.

<sup>55</sup> *Ibid.* 13. Aristotle, *Aristotle: The Politics and the Constitution of Athens* (Cambridge Texts in the History of Political Thought; Cambridge: Cambridge University Press, 1996).

arena, and following the classical Ciceronian and Aristotelean ideal of the state as subordinate to the practice of religion.<sup>56</sup> This is quite a different emphasis from the modern understanding, which separates expressions of religion from its social or political manifestation placing law prior to the manifestation of morality or particular religious theories of the common good. The historian Annabel Brett suggests that what was important for early medieval political philosophy 'is that the question of what *is* politics cannot be separated from the question of how to *value* it'.<sup>57</sup> The proximity between 'politics and the human good was a keystone of the political discourse of Antiquity within which and upon which medieval philosophers worked'.<sup>58</sup> Christian theologians, relying on scriptural revelation, strived to further develop an understanding of a shared common good, which they identified in previously held political thought, ,

Every city is a community of some kind, and every community is established with a view to some good...But, if all communities aim at some good, the city or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good.<sup>59</sup>

The human community had become in the thought of Aristotle, the locus for the best conditions in which a virtuous life might be lived. In Aristotle's philosophy a 'natural being's nature, essence, function (*ergon*), and end (*telos*), or that for the sake of which it exists (*hou heneka*), are intimately related'.<sup>60</sup> Therefore, this teleological approach to human nature becomes the reference point in explaining human behaviour in the human community leading to propositions about the good life and virtue and the kind of conditions, which are required in the political community. Given that humans are in Aristotle's definition, political animals, and the city-state is a natural expression of human nature, Aristotle believed that it could be realised through distinguishing the organisation of city-state.<sup>61</sup> This legacy was taken up by the later Christian theologians and adjusted to their own ends by

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<sup>56</sup> Annabel Brett, 'Political Philosophy', in A.S. McGrade (ed.), *The Cambridge Companion to Medieval Philosophy* (Cambridge: Cambridge University Press, 2003b). 276.

<sup>57</sup> *Ibid.* 277.

<sup>58</sup> *Ibid.* 277

<sup>59</sup> As cited in *ibid.* 277. See Aristotle, *Politics. Translated, with Introduction and Notes, by C.D.C. Reeve* trans. C.D.C. Reeve (Cambridge: Hackett Publishing Company, 1998).

<sup>60</sup> Aristotle, *Politics. Translated, with Introduction and Notes, by C.D.C. Reeve* xxvii.

<sup>61</sup> See for instance, *ibid.* xxviii. (Pol. 1252<sup>b</sup>30, 1253<sup>a</sup>1)

It is evident from these considerations, then, that a city-state is among the things that exist by nature, that a human being is by nature a political animal, and that anyone who is without a city-state, not by luck but by nature, is either a poor specimen or else superhuman. Like the one Homer condemns, he too is "clanless, lawless, and homeless."

defining the nature of the Christian city-state on the foundation of the theory that went before them.<sup>62</sup>

If Augustine had been particularly critical both of the more ancient understanding of civility and the city, believing that the only state of true justice is the city of God, which surpasses the best of the classical city-state, and also that religious constructs were also prone to fall short, then later theologians found some median ground. Whereas Augustine believed that ultimately a shared (and perfected) political community lay outside the human city, in the City of God, Aquinas restored the natural human community to its place within the structure of theological thought about the political.<sup>63</sup> Aquinas emphasised that human reason could obtain its natural teleological ends to direct the political community, including the pursuit of virtue and peace, and find its justification as directed towards more ultimate ends.<sup>64</sup> Aquinas achievement was to find a unified whole between the natural and supernatural ends of the political community. This organic theory of the political implied also that the moral and spiritual autonomy of the political domain was not unqualified but was also governed by the laws of nature which Aquinas elaborated and which had its foundation in divine law. While the city-state might not become a law unto itself, sovereignty in accordance with right reason, did not frustrate the purpose of the city-state but directed it towards the highest good.<sup>65</sup> As Brett notes, the contribution of Aquinas was to accord political legitimacy to political power when exercised by the authority of reason directed towards the higher goods or common goods of the community.<sup>66</sup>

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<sup>62</sup> See further Brett, 'Political Philosophy'. 281 -2. The recovery of the Aristotle's moral and political thought gave rise to new innovations in political philosophy and reinterpretation of Augustine.

<sup>63</sup> Gordon Leff, 'The Apostolic Ideal in Later Medieval Ecclesiology', *The Journal of Theological Studies*, XVIII/1 (April 1, 1967), 58-82. Leff argues that with the introduction of the thought of Aristotle medieval theologians could moderate the radical ideas of Augustine and to provide a theological basis from the balance of nature and supernatural for the relationship between *regnum* and *sacerdotium*. However, the seed of disintegration was also present because this foundation in nature did not need to appeal to the teleological ends found in divine order.

<sup>64</sup> See Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People (Illuminations: Theory & Religion)*. 6. It is important to note as Milbank suggests that 'antiquity by and large knew of no 'pure nature', but already referred the natural to the supernatural, albeit this was too confined to intra-cosmic terms'. However, the collapsing of this understanding into the autonomy of the individual was one of the Early Modern humanist consequences.

<sup>65</sup> Brett, 'Political Philosophy'. 284.

<sup>66</sup> On the relationship between the human person, who was both natural but also rational, social and cultural, and the political ends of the human society, see Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People (Illuminations: Theory & Religion)*. 220-224. Milbank argues that a synthesis between human nature and the human qualities found in classical authors, as a rational animal, as a social animal, as a fabricating animal (*homo faber*), and as destined to the beatific vision (a unity which Milbank calls "trans-organic") and directed by the classical virtues (prudence, fortitude, temperance and justice) is unified by the "clasp of charity". The contribution of new theological virtues by Christians (faith, hope and charity) offered a 'supernaturally infused *habitus*' and represented a third level beyond human nature,



Aquinas is credited with many ideas that have filtered into political theory including recognition that man is a social and political animal. Blythe suggests that Aquinas produced a system comprising 'of the citizen as one who participates in government, of the classification of government by the number and quality of its rulers, [and] of a mixed constitution [...]'.<sup>67</sup> Although Aquinas writing did not advocate any particular form of rule, alternating monarchy and a theory of mixed constitution, thereby proposing various principles which might govern each proposition, it may also be possible to determine, following Blythe, that Aquinas supported a theory of mixed constitution. This suggested a hybrid system that would distinguish between regal and political rule, a problematic proposal during Aquinas' time.

Aquinas theory of mixed constitution as the best government stems from a belief in the common good and therefore 'it denies sovereignty to any one element and in this way avoids the tyranny of either the one, the few, or the many'.<sup>68</sup> To Aquinas the best form of government promoted the common good and therefore this included restraints on the rule of the sovereign. If Aquinas held a traditional monarchist position, as was the norm for his time and 'always favours a king', he had agreed with Aristotle that this was best 'only if there exists one of transcendent virtue'. In the absence of such virtue, Aquinas favoured a mixed constitution, and stressed the importance of law.<sup>69</sup> Aquinas placed an emphasis on checks and balances between regal and political power, so as to be 'able to preserve the participation characteristic of Greek society and the unity of rule found, at least in principle, in the medieval kingdom'.<sup>70</sup> Blythe suggests, therefore, 'the idea of a mixed government had re-entered the Western world after an absence of some thousand years'.<sup>71</sup> In particular, the idea of mixed constitutions became influential in the later Conciliarist debates of the 15<sup>th</sup> century and thereby became persuasive in the secular theories of constitutionalism in the 17<sup>th</sup> century,

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integrating the former two. In the medieval period, this possibility directed 'reason beyond reason' to a host of new creative activities both practical and spiritual. This 'rarely seemed to yield to the temptations of a purely private *gnosis*, but rather inspired an unprecedentedly practical religious activity which extended the reach of medicine, knowledge, welfare and protection of the weak beyond anything known in antiquity'.

<sup>67</sup> J. M. Blythe, 'The Mixed Constitution and the Distinction between Regal and Political Power in the Work of Thomas Aquinas', *Journal of the History of Ideas*, (1986). 547. See also Newman, *Foundations of Justice: A Historico-Critical Study in Thomism*. 25. In summarising his reflections on the relationship between church and state, Newman pointed out that man is both a social and political animal.

<sup>68</sup> Blythe, 'The Mixed Constitution and the Distinction between Regal and Political Power in the Work of Thomas Aquinas', (563).

<sup>69</sup> *Ibid.* 564.

<sup>70</sup> *Ibid.* 564.

<sup>71</sup> *Ibid.* 564.

even if they might have discounted the medieval origins and heritage in their thought.<sup>72</sup>

Zuckerman suggest that there may exist a relationship between metaphysical theory of universals with theories of church government, which provided a basis and justification for either absolute papal sovereignty or the other radical option of ecclesiastical governance resting in the individual members of the Church.<sup>73</sup> A final moderate and intermediate position in the work of Aquinas, 'combined elements of universality and singularity, [which] led to widespread acceptance after 1250 of the view that sovereignty within the church which was to be divided or shared between the pope and its individual members'.<sup>74</sup> Although Zuckerman disputes the evidence, there is some agreement that the sovereignty of ecclesiastical authority was supported by a metaphysics found in the work of Aquinas and alternative forms of sovereignty branched in various directions, leading to the nominalism of Ockham and the more moderate response of Suarez. Rengger explains that,

[...] the world from the seventeenth century onwards and which we deem to be thoroughly secular and which is predicated on a rejection of the theological basis of earlier European society, especially in the medieval period – is in fact erected on a major medieval theological debate and that to fail to see this is to fail to understand just how central theological assumptions still are to this modern 'secular' world.<sup>75</sup>

Central to this, which Rengger suggests can remain invisible to the modern mind, is the so-called Realist-Nominalist debate which impacts upon our understanding of the international relations of modern nation states in the present time. Rengger proposes that in the process of challenging the Platonist assumptions of medieval thought the "nominalist" philosophers (meaning those who denied the prevalence of objective universal ideas as a source of order) began,

[...] the process of separating out created order from constructed order, and in the process opened a space for an increasingly voluntaristic, instrumental conception of human agency, which paves the way for modern Natural

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<sup>72</sup> Brian Tierney, *Religion, Law, and the Growth of Constitutional Thought, 1150-1650* (Cambridge [Cambridgeshire]; New York: Cambridge Cambridgeshire; New York: Cambridge University Press). 87-91.

<sup>73</sup> C. Zuckerman, 'The Relationship of Theories of Universals to Theories of Church Government in the Middle Ages: A Critique of Previous Views', *Journal of the History of Ideas*, (1975). 580.

<sup>74</sup> Ibid. 580 [footnote omitted].

<sup>75</sup> N. Rengger, 'On Theology and International Relations: World Politics Beyond the Empty Sky', *International Relations*, 27/2 (2013), 141-57. 142-143.

Science and which also introduced distinctions between the 'natural' and the 'supernatural' that had not been present in previous thought'.<sup>76</sup>

Rather than recognising political order as given from nature or right reason, it is derived from the act of will of the sovereign power, which governs.<sup>77</sup> Retaining an organic unity of natural and supernatural as the given natural order with the order instigated by human will and reason becomes a dominant concern of the political philosophy of medieval theologians to secure a basis for political order. Interestingly, Morrissey submits that 'the scholastic philosopher Thomas Aquinas made two pivotal moves that would free political authority from ecclesiastical control and lay the groundwork for religious liberty'.<sup>78</sup> Morrissey firstly recognises that 'Aquinas seized on Europe's rediscovery of Aristotelian thought to present political authority and law as grounded solely in the natural order of human activities'.<sup>79</sup> He continues, Aquinas in 'his Aristotelian ontology gave temporal power a mandate that was independent of the Church's authority'.<sup>80</sup> Therefore Aquinas indirectly enabled an idea of sovereign governance to develop moral principles by reason alone for the creation of law that would serve the common good. Secondly, Morrissey identifies Aquinas's innovation of the place of conscience, which ought to be followed even if erroneous.<sup>81</sup>

The question of governance beyond the domain of the church goes back as early as the fourth century Council of Antioch (341). During this time, the Church was primarily concerned with *exterae potestates* (external powers), which were defined as powers that were, neither hostile nor benevolent and with whom the church might co-operate on matters related to the governance and discipline of the Church because the Church is part of society.<sup>82</sup> The historian James Muldoon

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<sup>76</sup> Ibid. 142-143.

<sup>77</sup> Ibid. 143. Rengger notes that political order therefore is seen 'as "immanent" and therefore the creation of human reason – rather than the discovery *by* human reason of a pre-given pattern of order – which becomes central to the emerging political ideas of the renaissance and early modern periods and which reaches a culmination of sorts in Hobbes'.

<sup>78</sup> Daniel J. Morrissey, 'The Separation of Church and State: An American-Catholic Perspective', *Catholic University Law Review*, 47/1 (36)

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Caspary, *Politics and Exegesis: Origen and the Two Swords*. 140 - 141. The earlier work of the theologian Origen (185-232), in this instance seen the 'pre-Christian "secular" power appointed primarily for the utility of those who do not yet belong – or at least do not yet fully belong – to the People of God'. Origen recommends obedience to authority while it remains in accord with divine law. Whereas when they fail in this duty they are not to resist and "to attempt nothing that is hostile against the princes and powers of this world" because as Caspary explains "even when state authorities subvert the powers which they have received, the Church (which belongs to the Spirit) will not share in that subversion by indulging in material resistance' (p. 146). Origen

proposes, '[t]he issue of whether or not legitimate secular power exists *extra ecclesiam* is one more aspect of that most fundamental question in medieval political thought, [specifically] the problem of *dominium...*'.<sup>83</sup> Muldoon argues that the work of various medieval lawyers who are often surveyed, including Vitoria and Grotius, 'represent various abortive attempts to create from the canonistic elements a rudimentary international law'.<sup>84</sup> Their concerns dwelt on the contacts made in their time by Europeans with 'infidel societies' and as a consequence how law might be universally applied outside of the ecclesial jurisdiction of the Church.<sup>85</sup> On such occasions jurists belonging to the Church engaged in extensive legal activity to respond to the 'problem of the legitimacy of secular powers in infidel hands' but it did not amount to a complete theory of international law.<sup>86</sup>

### 2.2.3. 11th To 14th Centuries

The balance of power between *Imperium* and *Sacerdotium* altered during the eleventh century culminating in the investiture crisis of 1060-1130. The path to this division began with a strengthened position for the Holy See through a series of reforms, including the monastic renewal at Cluny in France. This consolidation of power within the structure of the church led to the assertion of the sphere of authority over the election of the pope and papal offices. For bodies of law to be truly transnational or at least to govern the church as a unique institution separate from lay control other reforms has to occur.<sup>87</sup> Prior to the eleventh century Papal governance was very much at the service and under the authority of various feudal lords, kings or emperors. These lay proprietors appointed clergy, possessed most

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therefore not only distinguishes between the Church and the power of civil rulers but also the use and misuse of power and the Christian response.

<sup>83</sup> James Muldoon, 'The Contribution of the Medieval Canon Lawyers to the Formation of International Law', *Traditio*, 28 (483-97. 497 [emphasis included].

<sup>84</sup> *Ibid.* 497. See also Markus, *Saeculum: History and Society in the Theology of St Augustine*. 72-73. Typical of Augustine's era it could not be said that he possessed a political theory as it is understood today.

<sup>85</sup> Muldoon, 'The Contribution of the Medieval Canon Lawyers to the Formation of International Law', (497.

<sup>86</sup> *Ibid.* 497.

<sup>87</sup> Berman, *Law and Revolution: The Formation of the Western Legal Tradition*. 91. Berman notes the importance of the Benedictine monastic reforms centred at the Abbey of Cluny, in southern France and founded in 910 ad which gradually began to co-ordinated over one thousand monasteries scattered across Europe to become the first "translocal corporation" leading to innovations in canon law to support governance of this structure. It offered a model for the reform of the Papacy and lead to further reforms reflected in canon law, including the twelfth century Cistercian reforms under Bernard of Clairvaux (1098) 'on the basis of a written rationalized legislation'. See Peter Brown, 'Society and the Supernatural: A Medieval Change', *Daedalus*, 104/2 (1975), 133-51. 134. Brown suggests, 'the disengagement of the sacred from the profane opened up a whole middle distance of conflicting opportunities for the deployment of human talent compared with which the society of the early Middle Ages appears as singularly monochromatic' (135).

of the Church's land, promulgated church law and called church councils.<sup>88</sup> Clergy were completely enmeshed in the regional and local dynasties from which the church sought independence.<sup>89</sup> The doctrine of "two swords" or *potestates* had been the overarching theory governing relations between the Church and the emperor since the fourth century.<sup>90</sup>

The legal historian Harold J Berman details that prior to the eleventh century, 'law did not exist as a distinct system of regulation or as a distinct system of thought'.<sup>91</sup> There was no systematic study of law that might provide a general corpus of rules and ideas that might separate it from, 'other processes of social control and from other types of intellectual concern'.<sup>92</sup> What existed was primarily customary, regional or local more often associated with various tribal or feudal authorities drawing from the inheritance of previous existing Roman law or traditional sources. Canon law of the Catholic Church did not evolve in isolation it was part of the trend towards systemisation of law that included systems of feudal law, manorial law, mercantile law, and urban law that accompanied the social, economic and political changes of the middle ages.<sup>93</sup> The new system of canon law was divided into two historical periods for clarity, the "old law" (*jus antiquum*) and the "new law" (*jus novum*), that included 'contemporary legislation and decisions as well as contemporary interpretations of the earlier texts and canons'.<sup>94</sup>

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<sup>88</sup> Berman, *Law and Revolution: The Formation of the Western Legal Tradition*. 88. An example of this was the role of Charlemagne calling a "universal" church council in 794. It is also believed he appointing Pope Leo III to the papacy. In this vein, German emperors would require the pope to swear an oath of loyalty.

<sup>89</sup> Once concern was Niolaism (clerical marriage) which meant that clergy were brought through marriage within the feudal and clan structures. Another concern was simony (the sale of ecclesiastical titles or benefices).

<sup>90</sup> Berman quotes St. Ambrose, Bishop of Milan: "Palaces belong to the emperor, churches to the priesthood". Berman, *Law and Revolution: The Formation of the Western Legal Tradition*. 92. This understanding of the scripture quote "render unto Caesar what is Caesar's and to God what is God" would lead to various interpretations in the formation of the relationship between State and Church. See Marin Terpstra, 'The Political Theology of a Potestas Indirecta', *Religion, State and Society*, 41/2 (2013/06/01 2013), 133-51. Terpstra suggest that a 'political theology of an indirect power claims to represent a higher legal order, God's law, to which political order with its positive laws is subjected' and made accountable'.

<sup>91</sup> Berman, *Law and Revolution: The Formation of the Western Legal Tradition*. 85.

<sup>92</sup> Ibid. 85

<sup>93</sup> Ibid. 86

<sup>94</sup> Ibid. 86 See also Charles P. Sherman, 'A Brief History of Imperial Roman Canon Law', *California Law Review*, 7/2 (1919), 93. Sherman notes that the term "canon" had a 'comprehensive and narrow meaning' in Early Christianity. Rules for the governance of the Church developed early on and were known by the Greek term *Κάνωες*, or canons. Their Latin synonyms were *conones*, *forma*, *disciplina*. Therefore the Christian Scriptures were also "canons" as they were the supreme rule of Christian life. In that sense medieval scholars could draw on various sources of law, including scripture and canonical texts as a basis for law view these sources as organic, unified and animating each other. Sherman notes that from each of the first eight ecumenical councils of the Church, disciplinary decisions were notated "canons" while decisions regarding faith were designated

Berman suggests it was the upheaval of 1075-1122 that, 'laid the foundation for the rediscovery of the Roman texts of Justinian; for the creation of the first European university, at Bologna, to train jurists and to create a science of law [...]'.<sup>95</sup> As the "first modern state", the Church 'needed a modern legal system to regulate its internal relations as well as its relations with the newly secularized polities'.<sup>96</sup> Those polities, in turn, needed modern legal systems for similar reasons. Over a period of twenty-five years, the papal court had promoted the idea of greater autonomy over church governance culminating in Pope Gregory VII declaration of papal supremacy over the Christian Church and the independence of clergy from secular power.<sup>97</sup> Berman suggests that to use the word "reform" 'is a serious understatement' and undervalues the enormity of the shift from previous Church relations with the secular powers. This shift contributed to the construction of the modern age beginning with an unravelling of the *Imperium* and *Sacerdotium*.<sup>98</sup> In 1075, Pope Gregory VII produced *Dictatus Papae* (Dictates of the Pope) that listed twenty-seven points claiming papal authority over the church. This move would lead to disputes over papal authority. It also led to the infamous meeting in January 1077 between the penitent Emperor Henry IV and Pope Gregory at Canossa, at the foot of the Alps, to seek release for Henry IV from excommunication.<sup>99</sup> Under the Concordat of Worms in 1122, new powers were ceded to the Pope who could declare, for the first time, his papal court to be 'the court over the whole of Christendom'.<sup>100</sup> The Pope formally had the right to act as universal legislator over Christians and freely interpret church law, and provide the authoritative statements on all matters related to faith and morals, much of which was unavailable to the pope prior to 1075.<sup>101</sup> The unity of the two powers was

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"dogmas". Further maturation of law in Christianity included the term *jus canonicum* (Canon law) and *Decreta*, or *Decretum*, used with the 12<sup>th</sup> century systematic study of law.

<sup>95</sup> Harold J. Berman, 'Introductory Remarks: Why the History of Western Law Is Not Written', *University of Illinois law review* 1984/3 (1984).

<sup>96</sup> *Ibid.*

<sup>97</sup> Berman, *Law and Revolution: The Formation of the Western Legal Tradition*. 87. This transformation has been given a number of titles, the Hildebrand Reform, the Gregorian Reform or the Investiture Struggle. See Grewe, *The Epochs of Interational Law*. 43.

<sup>98</sup> Berman, *Law and Revolution: The Formation of the Western Legal Tradition*. 87

<sup>99</sup> *Ibid.* 95. See Grewe, *The Epochs of Interational Law*. 43. Grewe suggests this papal pronouncement "shook the foundations of the traditional conception of unity with its co-ordinated ordering of the two supreme powers on the basis of equality'. Grewe remarks that these struggles for *libertas ecclesiae* 'did not seek to establish the freedom of the church, but its superiority' [footnotes omitted].

<sup>100</sup> Berman, *Law and Revolution: The Formation of the Western Legal Tradition*. 99.

<sup>101</sup> *Ibid.* 98-99 Among the powers the Pope could exercise from this new reform period included: the approval of clergy ordination; the functions and powers of bishops and other clerical officials; Create, divide or supress bishoprics; institute and supervise new monastic orders; act as 'principle dispenser' of church property; regulate worship and religious belief; summon general councils of the church and preside over them and implement their rulings; he was also final arbitrar and judge of cases submitted to him and shared an

preserved at the Diet of Worms in 1122 that 'settled the investiture contest through a carefully balanced compromise'.<sup>102</sup> However, the trend towards greater autonomy both for the Church, establishing its own legal system and governance, and the civil authority to become 'a secular *dominium mundi* [universal dominion or supreme authority] of civilisation' began to take shape.<sup>103</sup> Contestations between *Imperium* and *Sacerdotium* who vied for direct power over both spiritual and secular spheres continued between the twelfth and thirteenth centuries. Grewe comments that it was due to the prominence of Roman law that had contained a sense of universal law, rather than theological concerns of a universal mission, that 'laid the foundation for the legal theory, that was soon to arise, of the sovereign territorial State of early modern times'.<sup>104</sup> Both the Church and secular rulers with a gradual systemisation of their political claims gradually applied Roman law. While the claims of both Emperor and Papacy during the medieval era to possess *dominium mundi* [universal jurisdiction] remained, Grewe observes this claim to possess *de iure* dominium over the world was tempered with the gradual recognition of *de facto* institutions that had also made claims to autonomous sovereignty.<sup>105</sup> This process gradually brought to an end the theocratic claims to political and temporal rule of the Church but also the absolute claims of secular sovereigns to govern their subjects as this too was becoming limited by legal circumvention.<sup>106</sup> Arangio-Ruiz writes about how this process also became the germination for international law:

Contrary to the belief of the constitutionalists, international law came into being not by a process of decentralization of the medieval *Respublica Christiana*. It came into being — first among *seigneurs* and kings and later among cities, principalities, kingdoms and republics — as a distinct formation of inter-sovereign rules in the course of the centuries which

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overlapping authority on questions concerned normally with secular civil matters including the regulation of marriage and inheritance.

<sup>102</sup> Grewe, *The Epochs of Interational Law*. 43.

<sup>103</sup> Ibid. 44. See also James Muldoon, *Empire and Order: The Concept of Empire, 800-1800* (Palgrave Macmillan, 1999). 87-100.

<sup>104</sup> Grewe, *The Epochs of Interational Law*. 45-47.

<sup>105</sup> Ibid. 47. The emergence of various Religious orders within Catholicism, Franciscan and Dominicans, which sought canonical recognition as autonomous legal corporations and entities also contributed to challenging claims to jurisdiction within the Church. This process mirrored the claims to autonomous secular sovereignty in the early medieval period.

<sup>106</sup> Ibid. 47 – 48. See J. Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP Oxford, 2010). 5. In response to the Gregorian Reform, the English King Henry II attempted to reassert customary law and feudal prerogatives over church property and governance through the Constitutions of Clarendon (1164), leading to further conflict and the martyrdom of Thomas Becket. Magna Carta (1215) asserted religious liberty for the Church over its own internal affairs in its opening article and also established the limitations of the rule of monarchs over their subjects.

marked the crisis, and finally the demise, of the “universal” hierarchical order under Emperors and Popes. In other words, it originated not within the universal law but within the “gaps”, and because of the “gaps” — temporal and spatial — of the increasingly ineffective universal law of Empire and Church.<sup>107</sup>

Earlier attempts at the formation of a universal law governed by the sovereign will of the collective power of “two swords,” and the alternate claim to absolute sovereignty by *Imperium* or *Sacerdotium*, shaped the initial rise of self-governing states and latterly the construct of a new international order and legal system. The outlines of a *jus gentium* had already become identifiable by the bonds of Christian solidarity existing ‘distinct from that of *ecclesia* or *Imperium*’.<sup>108</sup> Christendom had become ‘a pluralistic concept of nations and empires, and was more or less synonymous with the terms *populus christianus* and *res publica christiana*’.<sup>109</sup> This common religious, political and legal order retained its potency and relevance up to the eighteenth century when these confessional and religious ideas were ‘no longer decisive’.<sup>110</sup> European states would continue to identify as Christian, but at the same time, they embraced a new political and legal international order.<sup>111</sup>

This transformation of the Catholic Church’s relationship with the civil powers demanded an equally innovative response. The evolving juridical culture developed by Decretists, and building upon Gratian’s compendium of canon law (ca. 1140), stimulated the development of ‘two broad arenas in which the Church’s canon law was operative: the external forum of ecclesiastical courts (sometimes known as the “contentious forum”) and the internal forum of conscience and

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<sup>107</sup> Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See', *Revue Belge De Droit International* /2 ( 358).

<sup>108</sup> Grewe, *The Epochs of Interational Law*. 53 - 54. The natural law had been the legal basis that united medieval legal thought and extended beyond the Christian community and found in the law of nature common to all humanity. See James Muldoon, 'The Medieval Church and the Origins of Globalization', *Historically Speaking*, 2/2 ( 3. Muldoon suggests that in the canon lawyers' conception of the world,

[...] there was a tripartite legal order that encompassed all humankind within a universal moral order. In the first place, there was the canon law that governed Christian life. There was also the Mosaic Law that governed Jewish society. Everyone else was subject to the natural law, a law accessible to all rational creatures. Seen in this light, the medieval canonists were probably the first to conceive of humankind in truly global terms.

<sup>109</sup> Grewe, *The Epochs of Interational Law*. 54 - 55 [footnotes omitted]. Grewe provides a history of the terminology as it developed from the ninth century to the Late Medieval period when *res publica christiana* became ‘orientated towards the image of a community of equal Christian rulers and nations, opposed to the concept of imperial universalism’.

<sup>110</sup> See *ibid.* 54 – 55.

<sup>111</sup> *Ibid.* 287-294. See also Muldoon, *Empire and Order: The Concept of Empire, 800-1800*. 144. Muldoon notes that even before the Reformation, ‘the papal claim to universal jurisdiction over the Christian kingdoms of Europe was increasingly ignored, and the weakness of the Empire made any claims to universal jurisdiction on its part ludicrous’.



penance'.<sup>112</sup> The metaphor of two forums or two courts 'refers to no precise jurisdictional boundaries but rather to two interrelated spheres of the Church's authority'.<sup>113</sup> The historian Goering discerns that while the external forum was both mandatory and contentious providing a legal system of jurisprudence and supervised by ecclesial judges and lawyers, the second element of canon law, the structuring of an internal forum, while voluntary, provided another legacy to the formation of Western culture. In effect it contributed to 'the creation and spread of a common juridical culture and a *ius commune* in Europe'.<sup>114</sup> This common juridical culture continued throughout the medieval era and Early Modern period but its significance did not have an impact on the formation of nation states until the rise of modern international law. It is possible that human rights law's emphasis on the autonomous sphere of the individual before the power of the state re-established the space in law for the internal forum.<sup>115</sup> Hittinger writes that, from this point, there is a 'shift from the state as [inner medieval] sanctum to the legitimisation of a properly constituted authority' this process therefore 'began the secular and ecclesiastical policy of legitimism. The tangled and tattered relationship between Catholicism and the states was to be solved by *obedience to properly constituted authority*'.<sup>116</sup>

A further consequence of Roman law becoming part of the Western lexicon in the twelfth century is it stimulated the growth in centralised government and 'a growth

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<sup>112</sup> Joseph Goering, 'The Internal Forum and the Literature of Penance and Confession', *Traditio*, (2004), 175-227. 175. Goering notes that the internal forum was not a medieval usage. The post-Tridentine Church referred to "*forum internum*" as a term building on the medieval *forum poenitentiae* or *forum conscientiae*.

<sup>113</sup> Ibid. 176.

<sup>114</sup> Ibid. 227 [footnote omitted]. Goering provides a detailed overview of penitential practices across Europe, the education of clergy and the tradition of creating common text books for confessors. The priorities of restorative justice and the development of conscience including in the economic area established a common ethos across Europe regardless of status, class or gender.

<sup>115</sup> Lindkvist, 'The Politics of Article 18: Religious Liberty in the Universal Declaration of Human Rights', ( See also Samuel Moyn, "Personalism, Community, and the Origins of Human Rights," in *Human Rights in the Twentieth Century*, ed. Stefan-Ludwig Hoffmann (Cambridge: Cambridge University Press, 2010), 85–106. During the drafting of the Universal declaration of Human Rights, Maritain and Malik played a role in emphasising the *forum internum* and *forum externum* as the structure for religious freedom based on Thomistic and scholastic natural law ideas.

<sup>116</sup> Witte and Alexander, *The Teachings of Modern Roman Catholicism on Law, Politics, and Human Nature*. 6 emphases added. The issue came back to the surface within Catholicism in the language of religious freedom and the state, particularly by the American theologian John Courtney Murray. See "*The Problem of Religious Freedom*." *Theological Studies* 25 (December 1964): 503–75, published later as '*The Problem of Religious Freedom*' Woodstock Papers, 7. Westminster, MD: Newman Press. See also *Leo XIII on Church and State - The general Structure of the Controversy* *Theology Studies* (1953), *Leo XIII Separation of Church and State* *Theology Studies*; John Courtney Murray and J. Leon Hooper, *Religious Liberty: Catholic Struggles with Pluralism* (1st edn., Library of Theological Ethics; Louisville, Ky.: Westminster/John Knox Press) 278 p. John Courtney Murray, 'Contemporary Orientations of Catholic Thought on Church and State in the Light of History', *Theological Studies*, 10/2 (177-234, Joseph A. Komonchak, 'the Crisis in Church-State Relationships in the U.S.A.' A Recently Discovered Text by John Courtney Murray', *Review of Politics*, 61/4 (Fall1999, 675, Courtney Murray, 'Leo XIII: Separation of Church and State', (

in constructional theories and practices'.<sup>117</sup> Tierney suggests that it 'is only when we turn to the ecclesiastical aspects of medieval culture that we encounter situations that are indeed extremely abnormal by the standards of most other civilizations'.<sup>118</sup> What stands out from the later medieval period is not the power struggles that existed between the papacy and the various civil authorities but rather that no single authority completely succeeded in its ambition for dominance.<sup>119</sup> Instead, what emerged was two separate authorities that both complimented and diverged from each other, but essentially limited each other's potential to completely and authoritatively rule Europe.<sup>120</sup>

Medieval institutions had by 1400's 'engaged in trying to replace papal monarchy with conciliar government[...]'<sup>121</sup> The medieval canonists offered reflections on the constitutional law of the Church which could and did influence subsequent speculations on the right ordering of the state'.<sup>122</sup> Even as the formation of new ideas found its way to provide the evolving theory of an autonomous state the Church's ecclesiology sought to evolve to keep pace with these newly emerging trends drawing upon its own earlier tradition. The Conciliar movement developed in reaction to the Great Western Schism (1378–1417) seeking to redefine the balance of power between the papacy and the universal Church and restore unity in the Church.<sup>123</sup> Its significance lay not only in the secular sphere and the

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<sup>117</sup> Tierney, 'Medieval Canon Law and Western Constitutionalism', (5. Tierney writes, '[A]dministrative structures were emerging that we can reasonably call states but for the first time they were constitutional states. It was a major turning point in the history of human government'. By the 17<sup>th</sup> century emphasis on toleration because of religious division and the preference for providing legal protections for religious minorities in the post-Westphalian era, excluded a prominent place for conscientious objection on religious grounds.

<sup>118</sup> Ibid. 7.

<sup>119</sup> Ibid. 8

<sup>120</sup> Ibid. 8 Tierney alliterates the various interactions between ecclesiastical and secular government:

Kings were anointed like bishops and bishops became feudal lords like kings. Secular laws relating to the ancient Senate were used to define the status of cardinals in the Roman church, and canonical rules regarding the choice of bishops were used to regulate the elections of emperors. The pope assumed the imperial tiara, and the emperor the Episcopal mitre.

<sup>121</sup> Ibid. 6. According to Tierney, this preoccupation of medieval institutions with conciliar government provides a link between Athenian democracy and the Roman republic with the early modern thought of Hobbes and Locke.

<sup>122</sup> Ibid. 12. They also 'formulated a series of doctrines in the sphere of private law which eventually proved of the utmost importance in the growth of representative government [...]'. The collegial structure of the medieval church particularly for ecclesiastical communities within the church, their governance and right to property and titles and to become corporate groups and the rights of individuals within these communities became a central preoccupation for canon law and began to latterly become a source of secular political theory.

<sup>123</sup> Stackhouse, 'Some Intellectual and Social Roots of Modern Human Rights Ideas', (304-305). The theologian Max Stackhouse makes the important point about the relevance of the conciliar movement to the growth of human rights ideas. In the desire to re-establish papal authority during the council of Constance (1415) the Conciliarists asserted the principle of law which transcends the particularities of the divisions upon which

development of constitutionalism in the 15<sup>th</sup> century, but also later in the 20<sup>th</sup> century during the Second Vatican Council. During this period, the Catholic Church sought to reinterpret the collegial relationship between the Pope and the hierarchy of the Church and to define the use of papal authority in matters of governance of the Church.<sup>124</sup> This 15<sup>th</sup> century form of ecclesiastical constitutionalism challenged the absolute monarchy of the papal office believing as ‘a constitutional ruler that he possessed a merely ministerial authority conferred upon him for the good of the church’.<sup>125</sup> Later Councils of Pisa (1409) and Constance (1414-18) sought to end this schism, while the Council of Basel (1431-49) ‘defied unsuccessfully the authority of a pope the validity of whose title was not in question ...’.<sup>126</sup> However, the medieval universalist claims of the papacy had been limited from the earlier invocation of an absolutist dominium to an office under the stewardship of the collegial offices of the bishops. Oakley notes that the scandal of the Great Schism had the effect of turning attention from the ‘old familiar dispute between the two powers, temporal and spiritual, and focusing it upon the nature of the church itself’.<sup>127</sup> The church became, in the minds of the conciliar theorists, ‘one of a class of political societies’.<sup>128</sup> Figgis suggests this was ‘because they were not concerned with the conflicts between ecclesiastical and spiritual authority, but

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various claims were made to the papacy. Following the re-establishment of the papacy, the Church had also affirmed a principle of law, even if it was overwhelmed by authoritative papal claims subsequently. Stackhouse asserted that “human rights” ‘were not to differ according to national interests or ethnic traditions, nor according to religious “preference”, political position or even ecclesiastical office’. To Stackhouse this principle asserted the position of responding to diverse ‘moral authorities which, because they are all governed by an ultimate law, can find a sufficient harmony in their motion so that pluralism is possible’.

<sup>124</sup> Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* (Brill). xxii - xiii. The papal decree *Haec Sancta* (1415) defined the jurisdictional superiority of the Council of Church over the Pope where the conditions required the Pope’s disposition from power and commanded that the pope ‘was bound to obey the statutes of the Council of Constance, and also those of any other General Council, in matters touching the faith, the schism, and the general reform of the church in head and members’. These reforms existed because of the crisis which the Schism of the Church had exacerbated because there existed three would-be schismatic Pontiffs, all of doubtful legitimacy [footnote omitted]. The Councils of Constance and Basle were the high points in the debates on Conciliarism which shaped the governing of the Church up to the 19<sup>th</sup> century. The Second Vatican Council (1963-1964) sought to readdress the First Vatican Council’s (1870) definition of papal primacy and infallibility in balance with collegiality of the universal church. It has been suggested that some ‘parliamentary constitutionalists in England, France, and Scotland used conciliarism as a precedent and source of arguments about how power should be distributed in the state’. See A. Black, ‘Francis Oakley. The Conciliarist Tradition: Constitutionalism in the Catholic Church 1300–1870. New York: Oxford University Press. 2003. Pp. ix, 298’, *The American Historical Review*, (2004). 1629.

<sup>125</sup> Francis Oakley, “Anxieties of Influence”: Skinner, Figgis, Conciliarism and Early Modern Constitutionalism’, *Past and Present*, (1996). 71-72.

<sup>126</sup> *Ibid.* 72.

<sup>127</sup> *Ibid.* 72.

<sup>128</sup> *Ibid.* 72. See J.N. Figgis, *Political Thought from Gerson to Grotius: 1414-1625: Seven Studies* (Kitchener: Batoche Books, 1999). 36.

with the depositary, the functions, and the limits, of sovereign power, in a perfect society'.<sup>129</sup> Figgis observes that,

[...] before the modern world of politics could arise, it was needful not merely to deprive the Emperor of any shadowy claim to supremacy, but the Pope must be driven from his international position. The rise of Protestantism was the condition for the founding of International Law, as a body of doctrine governing the relations of States supposed to be free, equal, and in a state of nature.<sup>130</sup>

While the Church asserted its own ecclesiastical constitutional order in the 15<sup>th</sup> century, asserting again the absolute authority of the papal monarchy over the church, the ambit of papal dominium was circumvented by the conciliar controversy. Those very principles, of an ascending theory of government, which shaped the controversy in the 15<sup>th</sup> century, filtered into other classes of political society. It is worth noting that Tierney has proposed that in each case where ecclesiastical disputes arose there existed a preference for the independence of the Church governance to provide from its own resources to respond to contemporaneous disputes. This very useful theme runs through Tierney's contribution, suggests that Church polity retained a distinct ecclesiastical life allowing it to stand somewhat detached and with a high level of self-sufficiency within its historical milieu. Tierney writes, therefore,

[...] when the conciliar writers surveyed their problems, they would naturally turn for guidance, not to the customs of France, or the laws of England or the constitutional practices of Spain, but rather to the great mass of ecclesiastical jurisprudence, to the common law of the Universal Church and the works of its great interpreters.<sup>131</sup>

Even if this was the source of the Conciliar thought, by the early seventeenth century particular reference was made to their ideas by secular political theorists. Oakley notes that the British Commons debates of 1628 'parliamentary proceedings came [for the first time in that era] to be dominated by a contest between King and Commons about the nature and limits of supreme

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<sup>129</sup> Figgis, *Political Thought from Gerson to Grotius: 1414-1625: Seven Studies*. 41

<sup>130</sup> *Ibid.* 18.

<sup>131</sup> Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism*. 10 [footnote omitted]. Tierney notes that these Conciliarist and canonists 'have usually been associated with the doctrines of extreme Papalism that were put forward in the conflict between *regnum* and *Sacerdotium*'. See also Oakley, "'Anxieties of Influence": Skinner, Figgis, Conciliarism and Early Modern Constitutionalism', (76-77).

authority' and similarly by analogy to the Council of Basel (1431-49) one member of Parliament debated with the words: 'whether the Pope be above the church or the church above the Pope, so now is there a doubt whether the law be above the King or the King above the law'.<sup>132</sup> The very shift towards the belief that an absolute monarch, either secular or ecclesial, could be deposed or subject to judgement by the rank and file of a political or ecclesiastical institution gave rise to new formations of the use of the idea of sovereignty and temporal dominion. Even when representative assemblies in Europe had begun to enter into a period of decline in preference for absolute or quasi-absolute monarchy it remained possible to return to the conciliarists (particularly the "School of Sorbonne" including John of Paris, via d'Ailly and Gerson) who 'had given a notably universal expression to the principles underlying the medieval constitutional tradition, and that that notably universal expression was destined to take on a heightened significance in a later era [...]'<sup>133</sup>

Tierney points out that there were occasions where medieval canonists further contributed to the formation of constitutional thought. For example, the maxim of Roman private law, *Quod omnes tangit* ("What touches all is to be approved by all") 'was applied to the authority of General Councils by canonists from the twelfth century onward and so was transformed into a basic principle of representative government'.<sup>134</sup> This phrase, he suggests, contributed to the transformation of new democratic ideas in the 1640's by contributing to the formation of new democratic government. Interestingly Tierney also observes that the canon lawyers 'did not teach that ruling power in the church was derived from personal holiness – a saint did not have jurisdiction over his bishop'.<sup>135</sup> This indicated that charisma, while important in Catholicism, did not trump law as the basis for a reasonable ordering of the Church. It was by election, another variation of the *Quod omnes tangit* phrase they held that 'he who is to rule over all should be chosen by all', rather than charisma.<sup>136</sup>

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<sup>132</sup> As cited in Oakley, "Anxieties of Influence": Skinner, Figgis, Conciliarism and Early Modern Constitutionalism', (91 - 93 [footnotes omitted]). Oakley further affirms Figgis' theory that with the onset of the Reformation, the 'conciliar theory exerted a demonstrable influence upon the constitutional and resistance theorists of the sixteenth and seventeenth centuries'. Oakley citing the historian Skinner suggests the Reformed Churches and particularly the Calvinists had developed 'a fully secularised and populist theory of political resistance ...' drawn from Catholic theorists from the preceding centuries.

<sup>133</sup> *ibid.* 108.

<sup>134</sup> Brian Tierney, 'Hierarchy, Consent, and the "Western Tradition"', *Political Theory*, 15/4 (646-52). 648.

<sup>135</sup> *Ibid.* 648.

<sup>136</sup> *Ibid.* 648.

## 2.2.4. Early Secular Political Theory

A number of developments in secular political theory stems from the works of two prominent theorists who bridge the period between the medieval canonists and the Early Modern period. Marsilius of Padua and William of Ockham both in turn challenged the papal claims to temporal jurisdiction. Tierney points out that their significance is not as the origin of Conciliarist thought but protagonists for future directions away from orthodox interpretations of church ecclesiology toward secular government.<sup>137</sup> Tierney observes that the orthodox theologians of the period, as they argued for papal authority over secular dominium, did not rely on the thought of Marsilius or Ockham but rather upon the precedent set by the earlier canonical writing of Gratian and the glosses which had developed out of that body of work. However, to understand the how western legal culture operated between the two poles of secular and ecclesiastical found within Christendom, they present points of departure for the construction of an international law, that looked back to the universalist claims of the “two swords” but build upon new interpretations of those universalist foundations.

### 2.2.4.1 Marsilius of Padua (ca. 1275-1342)

Marsilius of Padua is a central figure in political thought of the medieval era.<sup>138</sup> A noted controversy that influenced the deliberations of John of Paris and, later, Marsilius of Padua was the so-called “poverty controversy”. Among the many prominent political writings of the time was a defence for the position of King Philip writing by the Dominican friar John of Paris ‘*On Royal and Papal Power*’, a work that ‘sought to vindicate the autonomy of royal power from the power of the pope in all but the most exceptional circumstances’.<sup>139</sup> The controversy centred not just on the right of particular religious Orders to practice various degrees of poverty as part of their religious rule, but also the extent of papal jurisdiction over the regulation of local bishops and Ordinaries. This dispute, regarding the authority of the universal stewardship of the papacy over the affairs of the Church and the

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<sup>137</sup> Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism*. xiii. Tierney’s point is to show that the Conciliarists who challenged the balance of power between the papacy and the universal church via the function of Ecumenical Councils did so within their orthodox ecclesial environment, a position distinctly different from William of Ockham and Marsilius of Padua.

<sup>138</sup> He attended the University of Paris during the latter half of the conflict concerning the royal powers of the French King Philip IV and Pope Boniface VIII.

<sup>139</sup> Annabel Brett, *Marsilius of Padua: The Defender of the Peace. With an Interpretive Introduction by Leo Strauss*, trans. Annabel Brett (Cambridge Texts in the History of Political Thought; Cambridge University Press, 2005). Introduction xvi. Note: two versions of Marsilius of Padua’s *Defensor Pacis* (*Defender of the Peace*) are used, an earlier version with an introduction by Leo Strauss and a later version with an introduction by Annabel Brett. The main text of *Defensor Pacis* remains that of Annabel Brett in both versions.

particular dignity of bishops and the regional hierarchy, brought into focus the question of the '*dominium*' of papal authority in Church matters but also reflected by analogy the struggles which emerged between the papacy and secular sovereigns. Together these events influenced one another as their sources of authority intertwined.<sup>140</sup> Marsilius, a Christian Aristotelian, wrote his *Defensor Pacis* (*Defender of the Peace*) in Paris in 1324, based on the work of Aristotle's political teaching on democratic governance, and removed the essential difference between the clergy and the laity.<sup>141</sup> Marsilius reflects the manner in which both religious and civil authorities were used as sources to engage both kinds of controversies and from these differing sources could arrive at the same central argument. In this case, Marsilius presents the civil authority, the emperor, as the catalyst of peace in disputes by presenting the case for religion within the city. In deliberating on the nature of a civilised life, which Marsilius calls a 'sufficient' life, and which follows the Aristotelian ideal of "living well", he states that, '[...] those who live a civil life do not just live – which beasts or slaves do – but live well, sc. having leisure for the liberal activities that result from the virtues both of the practical and of the theoretical soul.'<sup>142</sup> However, in tracing the history of the *dominium* or coercive jurisdiction of the Christian religion over the civil rulers, Marsilius believed the Church had,

[...] later on assumed this universal coercive jurisdiction over the entire world under another title which includes them all, viz. 'plenitude of power' [*plenitudo potestates*], which they assert was granted by Christ to Saint Peter and his successors in the episcopal see of Rome as the vicars of Christ.<sup>143</sup>

Marsilius argued the canonists of the thirteenth century had used 'the concept of *plenitudo potestates* to characterize the power of the pope within the church, or,

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<sup>140</sup> Ibid. Introduction (Brett) xvi.

<sup>141</sup> Ibid. Introduction i.

<sup>142</sup> Ibid. Introduction (Brett) xx. See Book I. 4, 1.

<sup>143</sup> Ibid. Book I. 19. 9. See also Kenneth Pennington, 'The Canonists and Pluralism in the Thirteenth Century', *Speculum*, 51/1 (35-48.35. Pennington writes,

'Although the canonists did develop terms such as *Plenitudo potestates* to describe Papal jurisdictional power independently of Roman law, most of their statements of papal prerogatives were not taken from earlier ecclesiastical traditions, but from the writings of Roman imperial jurisconsults. Consequently, the pope was *legibus solutus*; he had *omnes leges in scrinio pectoris*; he was *lex animata* and he held the office of the living God on earth' [footnotes omitted].

more rarely, the pope's prerogative in the secular sphere'.<sup>144</sup> Marsilius believed this idea was justified by the Church for the following reasons:

[...] that just as Christ had plenitude of power and jurisdiction over all kings, princes, communities, collective bodies and individual persons, so they too, who call themselves the vicars of Christ, should have this plenitude of coercive power, *defined by no human law*.<sup>145</sup>

Through a series of divine interventions in human history the relationship between the human and divine was bridged by the Christian religion to bring tranquillity and accord but the over exercised jurisdiction of the papal claim had, in Marsilius view, threatened this peace. Following Aristotle's *Politics* Marsilius viewed the role of the clergy as something a step removed from politics and belonging to domestic or private roles, with a view of presenting the Church as a non-political structure.<sup>146</sup> Brett deduces two concerns from Marsilius, 'the development of the papacy has been one long and exploitative process of illicit encroachment upon the civic sphere, both in the form of owning property and in the form of exercising coercive jurisdiction [dominium]'.<sup>147</sup> Marsilius had examined the question of the election of rulers by consent rather than their intrinsic qualities to rule, and had concluded that 'because all good government was rule over voluntary subjects, it followed that such government had to be established by consent'.<sup>148</sup> This idea implied a potential for civil obedience to a sovereign to be consensual and 'was directed primarily to the laws and government as such, only secondarily to the person of the rule'.<sup>149</sup> Secondly, he aspired to remove clerical privilege on matters of faith or

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<sup>144</sup> Pennington, 'The Canonists and Pluralism in the Thirteenth Century', ( 35. See at 48, Pennington explains that the thirteenth century canonists 'were neither slavishly imitating Roman imperial models, nor looking forward to divine right monarchy, although there are elements of both systems of thought in their work'. As a consequence they had also been balancing *plenitudo potestates* with the rule of law in favour of limited monarchy. The jurisdiction of the papacy over local bishoprics in foreign territories became a regular source of contention particularly where papal power was used to override basic rights to benefices which had been governed by canon law. This sense of interference from Rome, particularly where rights were granted by law but denied on grounds of papal *plenitudo potestates* and perceived to operate outside the law, continued to vex these relationships.

<sup>145</sup> Brett, *Marsilius of Padua: The Defender of the Peace. With an Interpretive Introduction by Leo Strauss*. Book I, 19, 9. Emphasis added.

<sup>146</sup> Ibid. Book I, 19, 12. Cf footnote 20: Aristotle, *Politics* IV 1299 a 16– 20, a23.

<sup>147</sup> Ibid. Introduction (Brett) xxviii.

<sup>148</sup> Tierney, 'Hierarchy, Consent, and the "Western Tradition"', (648).

<sup>149</sup> Ibid. 649 See footnotes: A. Gewirth, *Marsilius of Padua: The Defender of the Peace*, 2 vols. (New York: Columbia University Press, 1951-1956), 2: 61 and 74. Tierney notes other commentators including Duns Scotus defining the necessity of the consent of those ruled to uphold a binding rule of authorities over the community either by the community itself or from an individual ruler. William of Ockham suggested that in the absence of a suitably qualified ruler, consent of the community and simple election could provide justification without the necessary qualifications. See also Skinner, *The Foundations of Modern Political Thought*. 18-22. 20. Skinner notes Marsilius provided an argument for the temporal independence of Italian city republics from both Church



morality.<sup>150</sup> Papal office was derived from the congregation of the faithful and canonical legislative acts belonged to them, with executive power only given to the Pope. His radical Conciliarist view influenced further positions on church authority particularly when the church faced a schism over papal succession and its authority. However, his Aristotelianism was deemed heterodox and radical for the time and was condemned as a heresy by Pope John XXII in the Papal Bull, *Licet iuxta doctrinam* in 1327. The medieval historian Bernardo Bayona Aznar notes the medical training of Marsilius and his reliance on the thought of Aristotle gave his writing a rationalistic orientation, an approach the political philosopher Hobbes later shared and used to discover the nature of political events as phenomena, which could be rigorously analysed.<sup>151</sup> After the papal condemnation *Licet iuxta*, no one dared to follow Marsilius, at least explicitly. Marsilius did provide a template for the protests for the protestant reformers in the 16<sup>th</sup> century and influenced Hobbesian political theory.

In an interesting parallel, Theodor Meron writes that treaty making power 'is often considered a modern concept'.<sup>152</sup> He does, however acknowledge that 'state practice, customary law, Roman law and canon law all contributed to the continuing evolution of the principles governing treaty-making power (this term

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and Empire, using scripture to show for example that clergy have not received a mandated from Christ to exercise 'coercive authority or worldly rule'. See also Mary Elizabeth Sullivan, 'Democracy and the Defensor Pacis Revisited: Marsiglio of Padua's Democratic Arguments', *Viator*, 41/2 (257-69. 257-258, 267. Mary Elizabeth Sullivan argues that 'while Aristotle offers these [democratic] arguments as straw men, which he promptly knocks down, Marsiglio presents them (citing the *Politics*) as favouring popular participation and does not offer any counter-arguments. Thus, Marsiglio advocates positions that are explicitly described as *democratic* in the text of the *Politics*' [italics in text].

<sup>150</sup> Franzen, 'The Council of Constance: Present State of the Problem', ( 26

<sup>151</sup> Bernardo Bayona Aznar, 'Religión Y Poder En Hobbes Y Marsilio De Padua: Similitudes Y Diferencias ', *Pensamiento*, 65/244 (2009), 221-59.

Y Hobbes, que había estudiado óptica, física y geometría, pretende aplicar a las disciplinas morales el método riguroso de la "admirable geometría", que tan "provechosos resultados" daba en el conocimiento de la naturaleza. Está convencido de que el desorden en la vida social es consecuencia de las teorías erróneas y de que sólo se logrará abolir la guerra civil si se gana la batalla a las "opiniones erróneas" con el método de la ciencia racionalista, que no deja lugar para disputas acerca de lo verdadero o lo falso, porque sus conclusiones se vuelven indiscutibles.

See also *Leviatan* I,5, 46-47.

<sup>152</sup> Theodor Meron, 'The Authority to Make Treaties in the Late Middle Ages', *The American Journal of International Law*, 89/1 (1-20. 1. On the ratification of treaties by oath and '*pacta sunt servanda*' in the medieval and early modern period see also R. Lesaffer, 'The Medieval Canon Law of Contract and Early Modern Treaty Law', *Journal of the History of International Law*, 2/2 (178-98. Lesaffer suggests the 'general acceptance of the maxim '*pacta sunt servanda*' was a necessary cornerstone for the survival of a legal system after the collapse of the old European order'. He remarks 'It is clear that the princes and rulers of the sixteenth, seventeenth and eighteenth centuries when they signed their treaties implicitly held on to this principle' (196). Lesaffer further argues the 'neoscholastics tried not unsuccessfully to give the international legal order a new universal and unchangeable basis after the collapse of the *respublica christiana* with the re-introduction of natural law' (198).

was not used at the time)'.<sup>153</sup> Meron proposes that the 'concept of inalienability of sovereignty was a central tenet of the medieval theory of the kingdom'.<sup>154</sup> The king was not the *dominus*, but a guardian, curator or usufructuary of his office. As such, he could not "alienate the essential functions of his office to the prejudice of the state".<sup>155</sup> This idea became a principle of state for countries such as France and England and, therefore, the public power or political community was increasingly distinguished from the notion of the king's private estate, or "*domaine royal*". The crown became 'associated with the kingdom rather than with royalty',<sup>156</sup> and,

[...] distinctions between the private estate of the king, which he could dispose of freely, and the domain of the crown, which belonged to the king as sovereign and could not be alienated without at least some form of consent of the people, were recognized as early as the Saxon era.<sup>157</sup>

Meron's point is to propose that sovereign treaty making power had become identified with the realm of the king or the sovereign state, rather than its representative, thus contributing to the evolution of international law.

These examples begin to show how the distinction between powers of monarchy from the forms of absolute sovereignty of monarchs, which existed in the preceding centuries, evolved. The question of sovereignty by virtue of the intrinsic quality of the ruler or in contrast, licit rulership by active consent rather than deference, extends our understanding of the landscape of medieval and early modern thought on the state. It is unsurprising then to turn to the thought of Marsilius among others to examine the full import of the relationship between Catholicism and the state as it evolved historically. Annabel Brett suggests that, 'the giants of seventeenth-century Protestant political theory rest on the shoulders of firm defenders of the papacy'.<sup>158</sup> That early Catholic political order shaped the manner in which political theory responded to new religious, social and political movements, both by the Protestant reformers (and their forbearers) and the Catholic authorities who sought to react to those new environments and defend their own claims.

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<sup>153</sup> Meron, 'The Authority to Make Treaties in the Late Middle Ages', (2 [footnote omitted]).

<sup>154</sup> *Ibid.* 3.

<sup>155</sup> *Ibid.* 4 [footnote omitted].

<sup>156</sup> *Ibid.* 4 Meron notes that in the coronation oaths of the French Kings of France they were forbidden to alienate their kingdom without the consent of the subjects of the crown.

<sup>157</sup> *Ibid.* 4.

<sup>158</sup> Annabel Brett, James Tully, and Holly Hamilton-Bleakley, *Rethinking the Foundations of Modern Political Thought* (Cambridge University Press, 2006). 138

#### 2.2.4.2 William of Ockham

William of Ockham incorporated some of the ideas of Marsilius of Padua in his work, *Dialogus*. Ockham's nominalism established a new methodology of deriving truth, and understanding the balance of powers in Church governance. However, other more conservative voices such as Gerson (1363-1429) and d'Ailly (1350-1420) similarly thought principles of justice suitable to remedy crisis in the church without tipping the institution towards abandoning Papal authority and governance.<sup>159</sup> Ockham addressed the question of how the pope might face canonical justice given his exalted position as head of the Church.<sup>160</sup> This form of argument gave rise to the idea of how the head of the church might exert power outside of the common

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<sup>159</sup> It is worth quoting in full Gerson's famous speech to the Council of Constance (1414), as quoted in Franzen, 'The Council of Constance: Present State of the Problem', (28:

The final norm, set by the Holy Spirit and transmitted by Christ, is the church or the general council which represents the church; *every man, the Pope included must obey*. The general council is the assembly summoned by the legitimate authority from all ranks of the hierarchy. Every faithful has the right to be heard by it. It is the task of the council to regulate, by means of salutary discussion and decisions, whatever is necessary for the right government of the Church in faith and morals. When the Church or the general council has laid down something for the government of the Church, the Pope is not above the law, so that he is not at liberty to undo such decisions. Although, on the other hand the general council can in no way suspend the plenitude of power of the Pope, which rests on a supernatural foundation by Christ, it can nevertheless limit this power according to given rules and laws for the edification of the Church, for the sake of which the authority of the Pope as of any other man has been instituted.

The church or the general council has been and is able to meet in many cases also without the explicit consent or order of the Pope even when he has been lawfully elected and lives decently. One of these cases exist when a Pope has been accused and summoned to listen to the church according to the word of the Gospel to which he, too, is subject, and then obstinately refuses to convoke the church. Another case exists when a general council has to take important decisions concerning the government of the Church, but the Pope obstinately refuses to convoke it. Other cases are present when a general council has already decided to meet again within a certain time, or when in circumstances of genuine doubt there are several claimants to the papacy [emphasis added].

Gerson stresses the hierarchical nature of the church while emphasising principles associated with a balance of power required for the proper order of the Church governance. A document from the Council titled *Haec Sancta* emphasised that in emergency session exceptions of governance could be attributed by a general assembly of the Church to remedy situations where papal authority was in error or at risk of discontinuity but offered no lasting or enduring control of the papacy to that of the Church body.

<sup>160</sup> This debate arose in the late thirteenth century during the dispute between Pope Boniface VIII and Philip the Fair during which there was an attempt to indict the pope before a General Council of the Church. See Brian Tierney, 'Ockham, the Conciliar Theory, and the Canonists', *Journal of the History of Ideas*, 15/1 (40-70). See also Giorgio Agamben, Lorenzo Chiesa, and Matteo Mandarini, *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government (Homo Sacer II, 2)* (Meridian, Crossing Aesthetics; Stanford: Stanford University Press) xiii, 303. 108-109. Agamben views Ockham as a more modern thinker, who separated absolute power, which is irreducible to law from the ordered power of government, exercised under law. This distinction is thoroughly modern and to Agamben the notion of sovereignty carries both historical meanings. The older irreducible power of the sovereign stemming from divine authority (in the case of the pope – or medieval king) is never exhausted completely during the execution of sovereignty. As Agamben notes, in the thought of Ockham, 'the Kingdom (absolute power) exceeds and always in some way precedes the Government (the ordered power)...' Whereas today modern sovereignty is exercised by limited democratic mandate, this contingent legal structure contains the potential for the sovereign state to act "beyond the law and against it" by use of exceptional legal powers.

law of the Church and how the pope could be held to account by the convening of General Council. This balance of power within the ecclesial life of Christendom had repercussions on future thought for the structure of the emerging nation state. The absolute power of the Pope was placed in sharp relief to the concerns of wider church politic, particularly on the question of who remained within the ambit of the law. Ockham suggested that, 'a heretical Pope was *ipso facto* deposed and so subject to the judgement of any catholic'. This was a position that went far beyond his contemporaries who accepted the possibility that in the case of a fallible Pope a General Council of the Church might correct him. In contrast, Ockham believed a fallible Pope was inferior to the *congregatio fidelium*.<sup>161</sup>

The position of those who were perceived to remain "under the law" be that canonical or customary, vexed later medieval thought and stands in contrast to the modern idea of limited sovereignty. Tierney discusses the unusual phrase *Princeps Legibus solutus est* [the prince is not bound by laws] as defined in Accursius's gloss of the Roman law maxim.<sup>162</sup> In Tierney's view this was not interpreted as to set limits on the liberty of the ruler by natural law, though he remained bound by the law of morality, but that as ruler the *lex regia* [royal law] gives supreme power to the prince.<sup>163</sup> This definition required a 'pure theory of sovereignty' that required working out 'all the implications of attributing an unlimited legislative capacity to the Prince for a legal system that was conceived of as a structure of interdependent rules'.<sup>164</sup> According to Accursius, Tierney writes,

[...] the command of the Prince could not be the ultimate basis of law in the Roman legal system since his authority to command rested on a preceding law and the validity of that in turn on the principle to which we have been led, "Law is what all men ought to obey". The essence of the argument was that law logically preceded sovereignty since sovereignty was a product of law.<sup>165</sup>

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<sup>161</sup> Tierney, 'Ockham, the Conciliar Theory, and the Canonists', ( 61-70. Ockham went so far as to suggest that 'a group of bishops, or the individual bishop in whose diocese the Pope was resident, or any other Catholic (especially the Emperor) might exercise such jurisdiction' [footnote omitted]. Ockham's views on the fallibility of Church governance give further credibility to future protestant reformers who valued private judgement of scripture and freedom of conscience in matters of faith. There is an obvious parallel here of the concept of universal jurisdiction found in contemporary international law.

<sup>162</sup> Brian Tierney, "'The Prince Is Not Bound by the Laws.'" Accursius and the Origins of the Modern State', *Comparative Studies in Society and History*, 5/4 (378-400. 387-8.

<sup>163</sup> Ibid. 389. Tierney writes that the *lex regia* 'simply declared without reservation that the people had conferred on the emperor all their own authority and power' [footnote omitted].

<sup>164</sup> Ibid. 390.

<sup>165</sup> Ibid. 394.

This process of reasoning contradicted the idea of absolute sovereignty which might become arbitrary or, tyrannical or totalitarian and instead affirmed the idea that when 'the Prince legislated he was not acting as one *legibus solutus*; rather he was acting in accordance with the law that defined his office'.<sup>166</sup> The liberty of the sovereign to form or suppress law had at its foundation a more basic or fundamental law to which the sovereign was obliged to respect and in which the sovereign bound his rulership.

Ockham sought to emphasize the proper role of the papacy as that of service to the secular order rather than to hold *dominion* over it, and regarded the liberty of faith, accepted or rejected, as the basis for the governance of state.<sup>167</sup> In debating the temporal jurisdiction of the Pope, Ockham had appealed to human nature, similar to Aquinas and Marcellus but Brett suggests that 'instead of interpreting the requirements of nature in terms of natural law or of biological regularity, Ockham built on a foundation of natural *rights*'.<sup>168</sup> Ockham's innovation was to distinguish his theory from the natural law framework of Aquinas because the individual right was 'subjective in the sense that the individual acting by or with natural rights had his actions justified in terms of himself and not (at least immediately) in terms of a higher order'.<sup>169</sup> The extension of this subjective right became viable by the establishment of property and personal jurisdiction, therefore Individuals are 'naturally possessed with the right to acquire property and the right to create jurisdictions'.<sup>170</sup> It followed that based on the existence of Roman law, which predated Christianity, 'that legitimate civic structures, especially that of the empire, predate Christianity and that their secular nature survives intact to the present'.<sup>171</sup>

Tierney adds that the 'pattern of government that was emerging by the end of the thirteenth century in Europe was different from that of any kind of civilisation'.<sup>172</sup> The complex legal system which developed as a product of reason and will, and was willing to place constitutional limitations on monarchy, be that ecclesiastical or secular and provide the 'techniques of representation and consent [...] as to make

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<sup>166</sup> Ibid. 395.

<sup>167</sup> Tierney, 'Ockham, the Conciliar Theory, and the Canonists', (46-47. Tierney notes that while the canonists influenced the thought of Ockham, for instance the pope's spiritual and temporal authority over the church could not contradict the faith or put the Christian community in jeopardy, but also 'Roman law played a major part in moulding his thought [...]'

<sup>168</sup> Brett, 'Political Philosophy'. 293 [italics in text].

<sup>169</sup> Ibid. 293.

<sup>170</sup> Ibid. 293.

<sup>171</sup> Ibid. 293.

<sup>172</sup> Tierney, "'The Prince Is Not Bound by the Laws.' Accursius and the Origins of the Modern State', (379).

possible the practice of constitutional government throughout whole nations, over areas embracing many cities'.<sup>173</sup>

### 2.2.5. Francisco De Vitoria

According to the historian James Muldoon, 'Columbus's first voyage presented Europeans not only with a New World but with a new set of problems as well. [However,] it took a good deal of time before the "newness" of the New World was appreciated and the unsuitability of older methods of comprehending non-Christian peoples was recognised'.<sup>174</sup> The fundamental question of the times 'facing European legal thinkers in the sixteenth century was the question of the legal basis upon which Europeans could lay claim to the Americas'.<sup>175</sup> In the early 15<sup>th</sup> century, the conquest and occupation of the newly discovered lands on the coast of Africa and South America had always explained contact and conquest in terms of the Church's 'universal mission'.<sup>176</sup> Pope Eugenius IV (1431-1447) 'saw a sharp increase of interest in the status of the infidel. In the first place, the Portuguese were anxious to maintain the impetus of their overseas expansion'.<sup>177</sup> Muldoon writes that it was 'a conception of papal responsibility for mankind rooted in the tradition of canon law that formed the intellectual framework within which the pope's curia operated'.<sup>178</sup> Muldoon emphasises that what has been lost in understanding the papacy in relation to conquest is the not only the concerns about giving Christian dominion over other peoples but also that it lay within the legal tradition of canon law, which in itself was a creative tradition which allowed for an number of approaches.<sup>179</sup> Rather than seeing the Alexander VI's Papal Bull "*Inter Caetera*" (4 May 1493) as a text which divided up the known world among Christian rulers, it is a 'statement on the nature of Christian-infidel relations and of the responsibility of the pope to protect the infidels and to convert them to Christianity'.<sup>180</sup> This focus on ecclesiological jurisdiction provides a sense in how

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<sup>173</sup> Ibid. 379.

<sup>174</sup> James Muldoon, 'Francisco De Vitoria and Humanitarian Intervention', *Journal of Military Ethics*, 5/2 (2006), 128-43. 132. De Vitoria has peeked the interest of many international law scholars. See J.B. Scott, *The Catholic Conception of International Law: Francisco De Vitoria, Founder of the Modern Law of Nations, Francisco Suárez, Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations : A Critical Examination and a Justified Appreciation* (Lawbook Exchange, 1934). For a critique of the imperialistic undertones of the work, and contesting American interventionism see Fernando Gómez, 'Francisco De Vitoria in 1934, before and After', *MLN*, 117/2 (365-405).

<sup>175</sup> Muldoon, 'Francisco De Vitoria and Humanitarian Intervention', (133.

<sup>176</sup> Muldoon, 'The Medieval Church and the Origins of Globalization', (3.

<sup>177</sup> James Muldoon, 'Papal Responsibility for the Infidel: Another Look at Alexander VI's "*Inter Caetera*", *The Catholic Historical Review*, 64/2 (168-84. 177. This papal Bull followed on the return of Christopher Columbus. His first voyage began on August 3, 1492 and returned March 15, 1493.

<sup>178</sup> Ibid. 169.

<sup>179</sup> Ibid. 169.

<sup>180</sup> Ibid. 169.

dominium had been considered in that era. Following the discovery by Columbus of the New World, the context in which the legal justification for territorial dominium had to be interpreted came from a long tradition of canon law, which preceded the question. Since Gratian's *Decretum* (1140) the non-Christian world had been interpreted as adversarial and a threat to Christendom. Relations between Christian's and the Mongol empire and with Muslims had provides a precursor for the interpretation of the New World discoveries. Muldoon points out that during the crusades, in a commentary on the decretal *Quod super his*, a letter by Pope Innocent III on crusading vows, , Innocent IV, argued while it was a just war to regain Christian lands in the East, 'he denied that Christian's have the right to invade infidel lands simple because they are held by infidels'.<sup>181</sup>

The 16<sup>th</sup> century scholastic theologians and lawyers proposed solutions to the new questions arising from Conquest and the New World from the natural law tradition and from their understanding of church governance.<sup>182</sup> Katherine Elliot van Liere notes the relevance of 'the structure and power of ecclesiastical government' as influential factors in shaping the response of Christendom to the New World.<sup>183</sup>

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<sup>181</sup> *Ibid.* 170

<sup>182</sup> On the debates at Valladolid in 1550–51 between Juan Gines de Sepulveda and Bartolome de las Casas See Brunstetter, 'Sepúlveda, Las Casas, and the Other: Exploring the Tension between Moral Universalism and Alterity', ( 412. Brunstetter writes, this was 'an historical moment at the origins of Modernity when the notion of the human was debated and alternative interpretations presented as the most viable, the Valladolid debates provide the context to explore ways to attend to Otherness at the heart of civilizational discourse'. Brunstetter notes the difficulty of non-assimilation to a particular moral viewpoint found in Christianity and also in modern human rights discourse as it offers,

[...] an argument for including the Other under the umbrella of moral egalitarianism despite its deviant behaviour, but postpones the question of what might happen if the Other does not assimilate'. He writes '[W]hat emerges from these debates is a conception of the human which challenges claims that the Other is inferior and devoid of rights, but at the same time, in setting assimilation to Christianity as the barometer of exclusion can vary from limiting the Other's right to choose conceptions of the good deemed outside the realm of the tolerable to waging permanent just wars to viewing the Other as inherently inferior (411-12).

This tension is incompletely recognised in Las Casa's yet his 'defence of the Indians, based on a view of the unity of humanity and a nascent understanding of natural rights, reveals an important fault line characterizing the modern concept of the human'. Brunstetter identifies 'a Las Casasian-style faith in the Other is never unlimited and pointing to alarming arguments about the plight of the Other that emerged when it was lost' (414).

See also Ruston, *Human Rights and the Image of God*. 285. Ruston notes the rules of natural justice were already known by these scholastic teachers but were applying them in a time of crisis. Vitoria and Las Casas 'served the role of moral dissenters'. See also Casanova, 'The Influence of Christianity on the Spanish Conquest of America and the Organization of the Spanish-American Empire', ( Casanova asserts that it was primarily due to the hagiographies established during the Enlightenment which undermined the contribution of Christianity to a more civil Spanish colonialism. Las Casas offered 'a moral ethos that stands in sharp contrast to the pragmatic standards that the Enlightenment'.

<sup>183</sup> Katherine Elliot Van Liere, 'Vitoria, Cajetan, and the Conciliarists', *Journal of the History of Ideas*, 58/4 (597-616. 598.

One key figure to assist in understanding the complex relationship between the evolving state and an evolving international law is found in Francesco de Vitoria's perspective on the power of the Pope and Church over temporal and spiritual affairs, because his thought helps shed light on secular political power as expressed in the natural law.<sup>184</sup> Vitoria's writing struggled 'with the plight of the American Indians under Spanish colonial rule', as well as 'his protracted struggle with the theological implications of natural law theory, a struggle which can be observed in his lectures of the early 1530's on ecclesiastical power'.<sup>185</sup> As Van Liere identifies, Vitoria was writing from within a lengthy tradition of political thought stretching back to the Neo-Scholasticism of the middle ages.<sup>186</sup>

Van Liere explains there is a useful point of reference in an, 'analogy between secular and spiritual "bodies" widespread in Western political thought from the thirteenth century onward'.<sup>187</sup> The medieval theologian Aquinas continued to emphasize the distinction between the civil and ecclesiastical commonwealth.<sup>188</sup> As van Liere notes 'the civil commonwealth was a *corpus politicum* subject to natural law, while the Church as a *corpus mysticum*, the mystical body of Christ, was subject to divine law'.<sup>189</sup> The theologians of the Salamanca school of which Vitoria was a prominent member knew this particular theology, even as it was transformed by previous controversies in the Church (particularly the Conciliarist debate).<sup>190</sup> Van Liere proposes that scholarship has highlighted the 'importance of conciliar thought to develop the idea of consent and popular sovereignty in secular political thinking. Although conciliarism lost its political force in the later fifteenth century, the

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<sup>184</sup> Ibid. 598. Vitoria's three *relectiones* of 1532 and 1533 *De potestate ecclesiae* [the power of the church] and *De potestate papae et concilii* [the power of the pope and the council] precede the famous *Relectiones de indiis* [On the American Indians] which he delivered in 1538 and 1539. See Francisco De Vitoria, *De Indis Et De Ivre Belli*, ed. James Brown Scott (Reprinted edn., The Classics of International Law; London: Oceana Publications Inc./Wildy & Sons Ltd., 1964). See also Francisco De Vitoria, *Francisco De Vitoria: Political Writings*, eds Anthony Pagden and Jeremy Lawrance (Political Writings; Cambridge: Cambridge University Press, 1991).

<sup>185</sup> Liere, 'Vitoria, Cajetan, and the Conciliarists', (599).

<sup>186</sup> Zapatero, 'Legal Imagination in Vitoria. The Power of Ideas', (229). 'Vitoria reengineered several legal traditions to produce something new: *ius gentium* as *ius inter gentes* (law of peoples)'.

<sup>187</sup> Liere, 'Vitoria, Cajetan, and the Conciliarists', (599). See further Cavanaugh, *Torture and Eucharist: Theology, Politics, and the Body of Christ*.

<sup>188</sup> Liere, 'Vitoria, Cajetan, and the Conciliarists', (600).

<sup>189</sup> Ibid. 600. See E.H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1997). Kantorowicz classical study detailed the relationship between the civil and ecclesiastical sphere as each organ used the language of Christendom as a mystical body and corporate entities with political and legal title. See Luis Valenzuela-Vermeiren, 'The Origin and Nature of the State in Francisco De Vitoria's Moral Philosophy', *Ideas y Valores*, LXII/ 151 (2013), 81 - 103. 95. Valenzuela-Vermeiren this view 'persisted in Spain through Alfonso X's *Siete Partidas* as glossed by Gregorio López (*Las siete Partidas del Rey don Alfonso el Sabio, glosado por el licenciado Gregorio López, Salamanca, 1555*)'.

<sup>190</sup> Liere, 'Vitoria, Cajetan, and the Conciliarists', ( 600). See Valenzuela-Vermeiren, 'The Origin and Nature of the State in Francisco De Vitoria's Moral Philosophy', (81).



conciliar theory was still well known to Francisco de Vitoria in the 1530s'.<sup>191</sup> Commentators like Quinten Skinner have suggested that medieval Conciliarist and neo-Thomist are the intellectual movement's 'joint contributors to the modern notion of popular sovereignty'.<sup>192</sup>

It is important to also see de Vitoria's lectures in the context of the Protestant Reformation, balancing the urgency of papal accountability, in the spirit of the Conciliarist who preceded him, and the orthodoxy found in the scholastic tradition that emphasised the self-sufficiency of the Church to resolve theological and philosophical problems from within the wider catholic tradition. Reform came first from within the polity of the Church rather than from secular polity or from movements which threatened disunity in the Church. de Vitoria writings were shaped by the School of Paris Thomism and particularly Cardinal Cajetan (Thomas de Vio, 1468-1534) who 'is probably the most celebrated Thomistic commentator in history'.<sup>193</sup> For example, Cajetan would become the primary theologian to examine Martin Luther at Augsburg.<sup>194</sup> Vitoria drew heavily on Dominican anti-Conciliarist writers and from the writings of Cajetan to assess the sovereignty claims of the papacy but in doing so retained the orthodox line balancing critique and challenge with preserving the unity of the Church.

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<sup>191</sup> Liere, 'Vitoria, Cajetan, and the Conciliarists', (601. Scott, *The Catholic Conception of International Law: Francisco De Vitoria, Founder of the Modern Law of Nations, Francisco Suárez, Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations : A Critical Examination and a Justified Appreciation*. See also Zapatero, 'Legal Imagination in Vitoria. The Power of Ideas', (221–271.

<sup>192</sup> Liere, 'Vitoria, Cajetan, and the Conciliarists', (601.

<sup>193</sup> Cortest, *The Disfigured Face: Traditional Natural Law and Its Encounter with Modernity*. As we saw in Chapter One, it was this thomistic tradition which Vitoria brought to Spain from other European centres of scholastic scholarship, particularly the Dominican schools of Paris where he attended from 1507 to 1522 and Toulouse, which prepared the ground for the "Second Scholasticism" associated with the School of Salamanca.

<sup>194</sup> Liere, 'Vitoria, Cajetan, and the Conciliarists', (603. Vitoria relied upon the two anti-Conciliarist tracts written by Cajetan in 1511 and 1512. Cajetan had argued that the papal office had the "power of the keys" representing two distinct kinds of power (*potestas*) in the church, one of jurisdictional power (*potestas iurisdictionis*) to govern the Church, and sacramental power (*potestas sacramentalis* or *potestas ordinis*) which was power to perform the sacraments. Cajetan strove to provide a *via media* between two extreme opinions regarding these powers, firstly that they are given to all bishops of the church or secondly that they are given alone to the Petrine office of the papacy. Cajetan argued that the Petrine office had received both forms of *potestas* from Christ, while the bishops and clergy received the sacramental power immediately by virtue of ordination, but jurisdictional power in a mediated way from papal authority. This moderate Conciliarist approach sustained the hierarchical unity of the Church but the more radical approach, that of jurisdictional power given to all Christians collectively (*congregatio fidelium*) a position argued at an earlier time by Marsilius of Padua, tended towards a theology which supported a civil reading of church polity. Their position that political sovereignty resting in the civil commonwealth and granted back to the sovereign, and already evident in scholastic thought, showed up against papal claims to sovereignty from above or divinely ordained from Christ. This particular position obviously provided further theological support to the Reformation even as it was devised for secular government. The anti-Conciliarists retained their argument that sovereignty over the church was distinctive from the secular based on a hierarchical understanding of law as natural law, positive law and divine law, used appropriately to ecclesiastical government (divinely ordained) and secular government (from natural sociability) which they believed supported the papal claim for normative jurisdictional power over the church.

Francisco de Vitoria's (1485–1546) response to the discovery of the Americas was in the form of a synthesis 'of Christian thought on the issues of world order and the relationship of Christian society to the non-Christian, non-European societies that Europeans were encountering overseas'.<sup>195</sup> This chapter in history can be read in terms of Christian responsibility of those who find themselves in the effective control of a foreign sovereign territory and the standards to which they may be held to account.<sup>196</sup> Vitoria's *De Indis Et De Ivre Belli* was a lecture (*relectio*) to address the discovery of the Americas given in a traditional scholastic format beginning with scriptural authority and responding to various scholastic issue that arose in the context.<sup>197</sup> Vitoria states in their defence,

The Spaniards have a right to travel to the lands of the Indians and to sojourn there so long as they do no harm, and they can not be prevented by the Indians.<sup>198</sup>

This approach was based on Vitoria's understanding of the universality of human nature and natural society founded in a common humanity and as a basis for *jus gentium*, a commonality found, not just from within Christendom, but external to it among the peoples of the New World. Vitoria emphasises the classical Aristotelian idea and which theologians following Augustine accentuated that human beings are communicative by nature as social beings, and are, therefore, bound to each other by nature.<sup>199</sup> This was the basis of the principle that these new peoples were

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<sup>195</sup> Muldoon, 'Francisco De Vitoria and Humanitarian Intervention', (133).

<sup>196</sup> Ibid.133.

<sup>197</sup> De Vitoria, *De Indis Et De Ivre Belli*.

<sup>198</sup> See for example the emphasis Vitoria placed on *jus gentium* which placed both rights and duties on the nations. Ibid. The First Relectio:

I will now speak of the lawful and adequate titles whereby the Indians might have come under the sway of the Spaniards. (1) The first title to be named is that of natural society and fellowship. And hereon let my first conclusion be: (2) The Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them. Proof of this may in the first place be derived from the law of nations (*jus gentium*), which either is natural law or is derived from natural law (Inst., 1, 2, 1): "What natural reason has established among all nations is called the *jus gentium*". For, congruently herewith, it is reckoned among all nations inhumane to treat visitors and foreigners badly without some special cause, while, on the other hand, it is humane and correct to treat visitors well; but the case would be different, if the foreigners were to misbehave when visiting other nations.

Secondly, it was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel wheresoever he would. Now this was not taken away by the division of property, for it was never the intention of peoples to destroy by that division the reciprocity and common user which prevailed among men, and indeed in the days of Noah it would have been inhumane to do so.

Thirdly, everything is lawful which is not prohibited or which is not injurious or hurtful to others in some other way. But (so we suppose) the travel of the Spaniards does no injury or harm to the natives. Therefore it is lawful.

<sup>199</sup> Jean Bethke Elshtain *Augustine* in Scott and Cavanaugh, *The Blackwell Companion to Political Theology*. Kindle Locations 599-600. Augustine had particularly emphasised the quality of friendship as we recall society

capable of conversion and also holding title to their property, land and titles, not on the basis of their conversion to the Christian faith but on Vitoria's understanding of a universal human nature. However, the emphasis for the Dominican scholar was to go further to see them as included in the *jus gentium* of Christendom with a right to be protected.<sup>200</sup> The basis of this use of the law of nations was not found primarily in religion but in the natural law and commanded the Spaniards to act in their defence.<sup>201</sup>

Vitoria follows the classical Thomistic-Aristotelian theory of the state as a natural and describes organic political authority Vitoria, in *De potestate civili*,

[T]he final and necessary cause of public power is the same. If assemblies and associations of men are necessary to the safety of mankind, it is equally true that such partnerships cannot exist without some overseeing power or governing force. Hence the purpose and utility of public power are identical to those of human society itself.<sup>202</sup>

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'is a species of friendship, and friendship is a moral union in and through which human beings strive for a shared good'. The love of friendship extends beyond family bonds and extends towards society is in the thought of Augustine. In fact Vitoria had argued from the premise of friendship stating "The Indians might have come under the sway of the Spaniards by a title of alliance and friendship". And in another section he quotes scripture: "Every animal loveth its kind" (Ecclesiasticus, ch. 15). Therefore, it appears that friendship among men exists by natural law and it is against nature to shun the society of harmless folk".

See further De Vitoria, *De Indis Et De Ivre Belli*. The First Relectio:

"[...] the Indians can not prevent the Spaniards from a communication and participation in those things which they treat as common alike to natives and to strangers".

However Vitoria goes further in exploiting this communication by suggesting the right to the natural resources if these rights are given to other foreigners.

"If, for example, other foreigners are allowed to dig for gold in the land of the community or in rivers, or to fish for pearls in the sea or in a river, the natives can not prevent the Spaniards from doing this, but they have the same right to do it as others have, so long as the citizens and indigenous population are not hurt thereby. This is proved by my first and second propositions. For if the Spaniards may travel and trade among them, they may consequently make use of the laws and advantages enjoyed by all foreigners".

<sup>200</sup> See De Vitoria, *De Indis Et De Ivre Belli*. The First Relectio. Vitoria argues that a just intervention is feasible where new converts are at risk from their rulers the Spaniards may therefore consider

'[...] making war and in compelling the barbarians by force to stop such misconduct, and in employing the rights of war against such as continue obstinate, and consequently at times in deposing rulers as in other just wars'. The basis of this action grounded in natural friendship rather than religion.

Vitoria states they natives have,

[...] a title based not only on religion, but on human friendship and alliance, inasmuch as the native converts to Christianity have become friends and allies of Christians and we are under an obligation to do "good unto all men, especially unto such as are of the household of faith" (Galatians, ch. 6).

<sup>201</sup> Muldoon, 'Francisco De Vitoria and Humanitarian Intervention', (136 – 137. Muldoon comments, 'Vitoria pointed out, among the illegitimate claims advanced to justify Spanish possession of the Americas was precisely the argument that refusal of the barbarians, that is the inhabitants of the Americas, to accept Christianity once it was preach to them was in itself a justification for conquering them'.

<sup>202</sup> As cited in Valenzuela-Vermehren, 'The Origin and Nature of the State in Francisco De Vitoria's Moral Philosophy', ( 92. See De Vitoria, *Francisco De Vitoria: Political Writings*. 9. Describing the origin of political authority: [N]ot merely in the physical sciences but in all human sciences as well: [...] necessary causes, the first

Vitoria asserted that it was the city (*ciuitas*) which is, 'the most natural community, the one which is most conformable to nature'.<sup>203</sup> Such a conception of the state is pre-modern in its emphasis on the naturalness of the human community, rather than one established by the will and power of the sovereign. This view 'is antithetical to the positivistic view that political power is *only* the expression of human consent or human will, *voluntas*, or law'.<sup>204</sup> Valenzuela-Vermehren also notes that Vitoria had agreed with the scholastic idea of law binding the sovereign even though sovereign power is unequalled, 'laws passed by a prince also bind the prince himself, even if he is the king [...] the king is free to make laws as he chooses, but cannot choose whether to be bound by the law or not'.<sup>205</sup> This observation compliments Tierney's observation of a theory of limited monarchy which had been emerging since the thirteenth century.<sup>206</sup> This particular viewpoint of the sovereign as limited by the very conception of the civil order or *corpus politicum* implied that there were limited rights to the exercise of temporal power as, according to the classical Thomistic-Aristotelian doctrine, such power must be used towards the common good. As power was derived from the people who invested the right to rule in the sovereign, so there existed a bond between both and which grounded and established the laws of civil order. As Vitoria argued, a king 'does not cease to be a member and part of the commonwealth just by becoming king'.<sup>207</sup>

Vitoria extending this logic to the following corollary: 'that the law of nations (*ius gentium*) does not have the force merely of pacts or agreements between men, but has the validity of a positive enactment (*lex*)'.<sup>208</sup> Vitoria continues,

*The whole world, which is in a sense a commonwealth, has the power to enact laws which are just and convenient to all men; and these make up the law of nations. From this it follows that those who break the law of nations, whether in peace or in war, are committing moral crimes ... No kingdom*

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and most potent of all causes, must be considered as functions of purpose. Whether this principle was established by Aristotle himself, or whether he got it from Plato, it has proved a mighty tool in philosophy, shedding light on all subjects. Again Vitoria asserted: The clear conclusion is that primitive origin of human cities and commonwealths was not a human invention or contrivance to be numbered among the artefacts of craft, but as device implanted by Nature in many for his own survival'.

<sup>203</sup> De Vitoria, *Francisco De Vitoria: Political Writings*. 9.

<sup>204</sup> Valenzuela-Vermehren, 'The Origin and Nature of the State in Francisco De Vitoria's Moral Philosophy', (81. 93 [emphasis included]).

<sup>205</sup> As cited in *ibid.* 97. Valenzuela-Vermehren also quotes the text of Domingo de Soto's *De Iustitia et iure* (1580) in support of Vitoria's view of the limits placed on the sovereign stemming from the observations in scholastic tradition to that point.

See De Vitoria, *Francisco De Vitoria: Political Writings*. 40 § 21.

<sup>206</sup> See Tierney, "'The Prince Is Not Bound by the Laws.'" Accursius and the Origins of the Modern State', ( 379.

<sup>207</sup> De Vitoria, *Francisco De Vitoria: Political Writings*. 40 § 21.

<sup>208</sup> *Ibid.* 40 § 21. We can determine here Vitoria's strong natural law thinking which we explored in the first Chapter.

may choose to ignore this law of nations, because it has the sanction of the whole world.<sup>209</sup>

This notion of “the whole world, which is in a sense a commonwealth” (“*Totus orbis, qui aliquo modo est una res publica*”) provides a point where it is possible to integrate the idea of *res publica* ‘within a wider community of independent entities that together make up the entire globe...’.<sup>210</sup> Therefore, the world community stands recognised as a horizontal, rather than a hierarchical political community governed by the law of nations (*jus gentium*), and extending beyond the borders of the known world.

Zapatero argues that for Vitoria there was no legitimacy that could be derived from divine, natural or even positive law ‘that would allow the Emperor Charles V to extend his sovereignty to other peoples’.<sup>211</sup> Ironically, Vitoria had argued that if the universal claims of sovereignty extended to Spanish claims over the territory of the Indians, then Indian monarchs could make similar claims over the territory of the Spaniards. In limiting the sovereign claims of secular rulers Vitoria ‘went further and outlined an alternative: *a community of peoples encompassing the whole world*’.<sup>212</sup>

That it would embrace peoples beyond the *res publica christiana* that previously established as an order among equal Christian rulers was an innovative turn by Vitoria, making his *jus gentium* into a truly universal law.<sup>213</sup> This particular emphasis in Vitoria returns the Ciceronian – Augustinian synthesis of a community orientated towards a universal Christian telos, which Augustine developed, and a moderating organic natural society developed by Aquinas that finds support in a rational universal natural law.<sup>214</sup> Grewe suggests that scholastically trained theologians from Salamanca provided international law with a theoretical

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<sup>209</sup> Ibid.40 § 21. [italics added]. “Habet enim totus orbis, qui aliquo modo est una res publica, potestate(m) ferendi leges aequas et convenientes omnibus, quales sunt in jure gentium”.

<sup>210</sup> Zapatero, 'Legal Imagination in Vitoria. The Power of Ideas', (226).

<sup>211</sup> Ibid.226.

<sup>212</sup> Ibid.227 [emphasis added]. See also Hernandez, 'The Internationalization of Francisco De Vitoria and Domingo De Soto', ( 1035. Ramón Hernández reveals the various influences which shaped the thought of de Vitoria, which provided ‘the foundation of his internationalism and pointed concern with American themes, including humanism, nominalism, and Thomism’.

<sup>213</sup> Grewe, *The Epochs of Interational Law*. 54 – 55.

<sup>214</sup> Martti Koskenniemi, 'Colonization of the 'Indies' – the Origin of International Law? ', *Talk at the University of Zaragoza*, (University of Helsinki December 2009). Koskenniemi notes that ‘by reading the Roman law notion of *dominium* thorough a theory of virtue they had learned from Aquinas. That reading suggested to them that the relations of power among humans could be separated into public law jurisdiction (*dominium iurisdictionis*) and private ownership (*dominium proprietatis*) in a way that we will immediately recognise as familiar’.

foundation for the future formation of its discipline.<sup>215</sup> What is distinct however is when international law turned to Grotius rather than Vitoria, the philosophical and theological points of departure were different. While the Salamanca school retained the traditional Thomistic-Aristotelian approach to the nature of the state and the law of nations, a different tradition emerged following the nominalism of William of Ockham and Marsilius of Padua and their successors.<sup>216</sup> Grewe identifies that while the Spanish theologians had retained the theological premise of Church as detached and self-sufficient as *corpus mysticum* the alternative nominalist theology had tended to merge with *corpus politicum*. Grewe states the 'common Thomistic basis was preserved in so far as the pure voluntarism of Ockham did not find adherents in the international legal sphere until the French Age, in the work of Thomas Hobbes'.<sup>217</sup>

Grewe suggests that an outcome of the debates about the relationship between the state and the monarch gave rise to two 'different views of the structure and the sources of the law of nations developed on the basis of [...] two conceptions of the natural law'.<sup>218</sup> While Vitoria believed in a preordained natural order aimed at the common good (the *bonum commune totis orbis*), which provided a source for the law of nations and which could be identified by customary law or by treaty derived from the consent of the majority, the alternative had been constructed by Suarez (1548-1617) who followed the tradition of Vitoria but in a 'logical application of his basic, voluntaristic conception, Suarez grounded the law of nations on a consensus of state wills'.<sup>219</sup> The outcome was of course to strengthen the move from created order given by divine and natural law to a constructed order shaped by sovereign power.<sup>220</sup>

#### 2.2.5.1 On Papal Dominion

Vitoria had also forcefully argued that 'the pope had no right to award the Americas to the Spanish, because he has no power in temporal matters', and unbelievers could only be deprived of their goods lawfully. Vitoria stated further, 'there is no doctor [of laws], even among our adversaries, who concedes the

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<sup>215</sup> Grewe, *The Epochs of International Law*. 187-189.

<sup>216</sup> *Ibid.* 187-189.

<sup>217</sup> *Ibid.* 189. In Grewe's view 'this split in the natural law schools of thought ran parallel to the theological debates between Jesuits and Dominicans'.

<sup>218</sup> *Ibid.* 189.

<sup>219</sup> *Ibid.* 190.

<sup>220</sup> See further Rengger, 'On Theology and International Relations: World Politics Beyond the Empty Sky', (142-143).

argument that they may be despoiled solely on the grounds of unbelief'.<sup>221</sup> Vitoria then states declaratively,

The clear conclusion is that this title against the barbarians is also invalid, whether it is alleged because the pope gave dominion over these countries to the emperor, or because the barbarians fail to recognised the dominion of the pope'.<sup>222</sup>

Vitoria denied a right to occupy the New World, but supported a natural right to discovery and exploration, based on a natural right to share in the produce of the earth, including its wealth and to encounter new peoples. In circumstances of unwarranted hostility from the native communities or where the Spaniards encountered violations of the natural law, Vitoria 'broke with the mainstream of canonistic and papal thought on the nature and extent of papal jurisdiction'.<sup>223</sup> He did not see it possible for the Pope to grant a right to intervention on grounds of following the *jus gentium*.<sup>224</sup> Muldoon writes the 'justification for the conquest of the Americas rested upon a theory of universal papal jurisdiction that the canon lawyer Sinibaldo Fieschi, better known as Pope Innocent IV (1243-1254) had developed'.<sup>225</sup> This papal jurisdiction had extended from the spiritual to the temporal sphere to include governance over violations of the natural law. In conquest, the popes of the period had granted permission to civilised conquered peoples on grounds that they might be Christianised. Vitoria argued against this line of reasoning, challenging the universal jurisdiction of the papacy over non-Christian territories. If there were no grounds to intervene to Christianise the native population, those grounds based on natural law did concede opportunity to the Spaniards to further conquest.

## 2.2.6. Bellarmine

Vitoria had argued against papal intervention in political affairs where the papacy had given unjust legitimacy to the conquering of the Americas and provided a complex reading of *jus gentium*, which he extended by natural right to the natives

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<sup>221</sup> De Vitoria, *Francisco De Vitoria: Political Writings*. 262-264. §30 '...the pope has no temporal power over these barbarians, or any other unbelievers ...If the pope has no temporal powers except in relations to spiritual matters and if I Cor. 5:12 shows that he has no spiritual power over the barbarians, it follows that he can have no temporal power over them either'.

§31 '...that even if the barbarians refuse to recognise any dominion (dominium) of the pope's, war cannot on that account be declared on them, nor their goods seized. This is obvious, because the pope has no such dominion'.

<sup>222</sup> *Ibid.* 264. §31

<sup>223</sup> Muldoon, 'Francisco De Vitoria and Humanitarian Intervention', (138).

<sup>224</sup> *Ibid.* 138.

<sup>225</sup> *Ibid.* 138.

of those discovered lands. Yet Vitoria had not sided with the more radical voices raised against papal intervention in secular affairs. Vitoria had remained orthodox and faithful to the papal view, even if he had moved with the period to recognise the limitations of sovereignty over the rights of peoples and over whom they governed. Similarly, Bellarmine had followed this particular trend, seeing limited direct sovereignty of the papacy as a means to extend the influence of Church indirectly over the more significant universal concerns of Christianity.

Bellarmino's discussion of the papal political power of the Pope is located in the first volume of the third *Controversiae*, entitled *De Summo Pontifice* [The Supreme Pontiff].<sup>226</sup> His concern in this text was to assert the exact nature of the Pope's political power with respect to the secular authority of princes'.<sup>227</sup> Tutino explains there were 'two key theoretical assumptions underpin Bellarmine's defence of the indirect papal authority'.<sup>228</sup> The first is granting of a distinctive and autonomous space to the temporal government with respect to the Christian Church.<sup>229</sup> Bellarmine writes 'dominium is not founded in grace or faith, but in free will and reason, and it does not spring from the *ius divinum*, but from the *ius gentium*', which provides the second theoretical assumption, the grounds for secular government remain legitimate 'even if ruled by non-Christian governors'.<sup>230</sup> Papal authority in the view of Bellarmine remains limited to Christians in the world and

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<sup>226</sup> Bellarmine (4 October 1542 – 17 September 1621) was a Jesuit priest in the post-Reformation Catholic Church and key to providing the church with a response to the emerging state and legal order of the time. See also John Courtney Murray, 'St. Robert Bellarmine on the Indirect Power', *Theological Studies*, 9/4 (December 1, 1948-1949), 491-535. 494. Bellarmine had been engaged with a number of contemporaneous issues, including a dispute over clerical exemptions with the Kingdom of Venice (1606), with the royal absolutism of James I of England (1607) particularly to argue for a divine right of kings, and against the absolutist and Gallican claims of William Barclay and Rodger Widdrington (1610) taken up by the French monarchy and clergy. See Jonathan Havercroft, 'Was Westphalia 'All That'? Hobbes, Bellarmine, and the Norm of Non-Intervention', *Global Constitutionalism*, 1/1 (120-40). and also John A. Simmons, 'Theories of the State', in Donald Rutherford (ed.), *The Cambridge Companion to Early Modern Philosophy* (Cambridge Companions; Cambridge: Cambridge University Press, 2006), 250-73. 252.

Among the philosophical and theological ideas Bellarmine directs his thought is toward that of Marcellus of Padua and the ongoing protestant Reformation. The Jesuit scholars of the time were also concerned with the "reason of state" (*raison d'état*) a concept attributed to Francesco Guicciardini (1483-1540) developed from the earlier Machiavelli. See Stéphane Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', *Journal of the History of International Law*, 2 (148–77. 276 and Stefania Tutino, *Empire of Souls: Robert Bellarmine and the Christian Commonwealth* ed. David C. Steinmetz (Kindle edn., Oxford Studies in Historical Theology; Oxford: Oxford University Press). Kindle Location 212.

<sup>227</sup> Havercroft, 'Was Westphalia 'All That'? Hobbes, Bellarmine, and the Norm of Non-Intervention', (125. This essay views 'the first decade of the 21st century the development of the norm of the Responsibility to Protect raises several similar issues to the 17th-century debate between Bellarmine and Hobbes'.

<sup>228</sup> Tutino, *Empire of Souls: Robert Bellarmine and the Christian Commonwealth* Kindle Location 609. Tutino also explores the way Bellarmine develops his argument in support of the papal the 'affirmation that the laws made by the pope in theological matters are binding in conscience for the entire Christian commonwealth' (Kindle Locations 549-550).

<sup>229</sup> Ibid. Kindle Location 609-610.

<sup>230</sup> Ibid. Kindle Location 609-610.



only directly over their spiritual affairs.<sup>231</sup> Bellarmine had applied the historical recognition of temporal authority by the Pope of temporal rulers in a new way, with a new meaning.<sup>232</sup> Drawing upon scholastic tradition Bellarmine argued that natural law provided temporal and civil order, in particular he relied on de Vitoria's *relectio* to support the basis of his position in contrast to the Reformation argument that it was divine grace, which gave legitimacy to governments.<sup>233</sup> This distinction was essential to the Catholic response to the Reformation as they kept the hierarchical idea of the nature of law, originating in scholastic theology to be natural, positive and divine law. Whereas the Reformation scholars had begun to transform and diminish the role of natural law as a substantive basis for law and rely on positive and divine law collapsing in some instances of spiritual and temporal power into the singular sovereignty, firstly by absolute monarchy and then by the creation of an absolute nation state.

The early modern period was an occasion when Catholic political theory could adapt to the challenge of Constitutional thought. Bellarmine followed Francisco de Vitoria on his reading of Thomas Aquinas, where Vitoria had thought Aquinas was "inconsistent" where Aquinas suggested both monarchy and mixed government as the better solution. Tutino observes 'for Vitoria monarchy is, in principle, the best form of government, but, for instance, where the lack of a suitable monarch or other contingencies of this sort prevent monarchy from being implemented successfully, a mixed form of government should be implemented instead'.<sup>234</sup> Bellarmine developed his own distinction suggesting that mixed constitutional government contained elements of monarchy, aristocracy and democracy given that a sovereign ruler receives sovereignty "*ex universo populo*" and not from divine law.<sup>235</sup> Bellarmine had addressed 'the problem of the two powers of the thomistic doctrine of the natural origin and end of the temporal power; and he stated certain empowerments of the political power within the *respublica christiana*'.<sup>236</sup> This "theo-political organism" reiterated the traditional view of a

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<sup>231</sup> Ibid. Kindle Location 609-610.

<sup>232</sup> Ibid. Kindle Location. 615.

<sup>233</sup> Ibid. Kindle Location 618. Tutino emphasised for Bellarmine and the Jesuits had become committed to the "Second Scholasticism" of the Salamanca school of Francisco de Vitoria. Tutino notes that Bellarmine studied under Francisco de Toledo, a graduate of the University of Salamanca and teacher in the Roman College in 1559 (Kindle Location 202). The reinterpretation of the works of Thomas Aquinas by the Spanish Scholastics became central to the way in which Bellarmine developed his ideas about the Church and civil authority.

<sup>234</sup> Ibid. Kindle Location 379-380.

<sup>235</sup> Ibid. Kindle Location 388. "from all the people"

<sup>236</sup> Courtney Murray, 'St. Robert Bellarmine on the Indirect Power', (496. On the early 20<sup>th</sup> century influence of Bellarmine's political theology on papal politics see Giuliana Chamedes, 'The Vatican and the Making of the Atlantic Order, 1920-1960', (Columbia University. 37 -38. See also Courtney Murray, 'Leo XIII: Separation of Church and State', (on Pope Leo XIII's encyclical *Immortale Dei* (1885). Tutino, *Empire of Souls: Robert*

universal Christendom even though the Reformation had gradually fragmented the political organic system of government, which had dominated the European Continent since the medieval era.<sup>237</sup> Bellarmine transformed the claims of papal *plenitudo potestatis* in temporal affairs, a position that risked placing him on the papal index of banned books, in preference of a theory of indirect power. Bellarmine stated '[w]e understand by jurisdiction of an indirect kind the jurisdiction which the pope has over the temporal in relation to the spiritual; properly and of itself his jurisdiction regards the spiritual'.<sup>238</sup>

The historical use of direct power of the Pope in the temporal affairs of the state, for instance to depose a monarch, was reserved for exceptional circumstances, particularly where the state had become despotic or had collapsed.<sup>239</sup> Nevertheless, this possibility was not remotely conceivable when Bellarmine wrote in the early 17<sup>th</sup> century because of the failing influence of Catholicism in Western Europe. Yet this theory of direct intervention in the political life of the state grew in relevance in the early 20<sup>th</sup> with the rise of absolute and totalitarian states when direct opposition to political ideologies became a central question for the Church. The emphasis on the influence of religion over the conscience of citizens in society, and their further political participation, could be a source of influence in the modern state again. The newly formed national state sought to encompass all forms of power within its doctrine of state sovereignty, including the whole allegiance of the newly formed citizen but Catholic political theory asserted a political distinction and tension.<sup>240</sup> The political theory of Bellarmine and his successors, who had ceded direct power over the temporal sphere to the state, also asserted the state did not remain autonomous or unlimited in its power. The jurisdiction of the state remained part of the *forum externum* whereas the *forum internum* of the citizen was bound to the *res publica christiana*. This doctrine of the *res sacra in temporalibus* (the sacred in the temporal) came further to the fore in the writing of Pope Leo XIII in the 19<sup>th</sup> century. It emphasises the sacred nature of

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*Bellarmino and the Christian Commonwealth* Kindle Locations 681-683, notes a difference regarding the "perfect commonwealth" or "*Societas Perfecta*" of his precursors Suarez, Vitoria, Molina, and in Bellarmine 'is in the nuances of this spiritual intervention, which for Bellarmine must remain spiritual, while for the others such intervention assumes a quasi-temporal character'.

<sup>237</sup> Tutino, *Empire of Souls: Robert Bellarmine and the Christian Commonwealth* Kindle Location 189.

<sup>238</sup> As cited in Courtney Murray, 'St. Robert Bellarmine on the Indirect Power', (496. Bellarmine *Recognitio Operum Opera Omnia* IV (Pars 2), 235.

<sup>239</sup> Courtney Murray, 'Leo XIII: Separation of Church and State', (201.

<sup>240</sup> See for instance Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', (247. Emer de Vattel (b. 1714), 'came up with his theory of government and his system of international law by transforming the reality that "sovereignty", the word, represents through the cognitive process of the mind within the social consciousness of humanity. Indeed, with this word, *Droit des Gens* attempted the *externalisation* of power, which was transposed from the internal plane to the international plane. Accordingly, his utilisation of sovereignty creates a new reality, that of the *exclusivity of authority* without' [emphasis in text].

the human in the political sphere where the state had begun to emphasise 'that in the political order everything is political and subject to political power which would reject the idea of the *res sacra in temporalibus*'.<sup>241</sup> It became possible for the Catholic Church at the turn of the 20<sup>th</sup> century to begin to use the language of human dignity and human rights. Human dignity and human rights became overarching principles that asserted realistic limits on the power of the state and presented a common language between the Church and civil society and between the traditional "two swords" of church and state. In this context, freedom of religion not only became a priority in this evolution of thought but also the freedom of the *forum internum*, the freedom of conscience (or *synderesis*).

### 2.3. International Law during the Reformation and Westphalia

Kennedy suggests that the three stages in the development of international law, which he characterizes as primitive, traditional and modern, we see periods of continuity as well as discontinuity.<sup>242</sup> Kennedy argues that modern scholars of international law, 'who offer a numbing variety of humble responses to the collapse of traditional legal scholarship, might rightly be jealous of the elegance and coherence with which primitive scholarship expressed its diversity'.<sup>243</sup> The unity of morality and law was quite natural in primitive scholarship that connected 'legal authority and doctrinal results in a direct unproblematic fashion'.<sup>244</sup> As Kennedy notes, amongst scholastic canon lawyers, the doctrines are valid because the authoritative propositions are valid.<sup>245</sup> Where there existed disputes among theologians or canon lawyers, it related to the doctrinal position of their opponents. A distinguishing element to primitive international law is a 'uniform faith in universal principles'<sup>246</sup> as 'primitive scholars do not distinguish between legal and moral authorities, national and international law, or the public and

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<sup>241</sup> Courtney Murray, 'Leo XIII: Separation of Church and State', (208).

<sup>242</sup> Kennedy, 'Primitive Legal Scholarship', (3. See also Berman, *Law and Revolution: The Formation of the Western Legal Tradition*. 562. Berman suggests that Weber had classified all legal systems into three broad types: Rational, traditional and charismatic. He remarks, 'this may be true from a philosophical standpoint but is misleading from a historical and sociological standpoint, since Western legal systems, and the Western legal tradition as a whole combine all three types'. See also Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*. 95-96.

<sup>243</sup> Kennedy, 'Primitive Legal Scholarship', (3).

<sup>244</sup> *Ibid.* 5.

<sup>245</sup> *Ibid.* 6.

<sup>246</sup> *Ibid.* 6. Kennedy elaborates in this section about the contrast between how authority is interpreted in primitive international legal scholarship when there is an assumption of a clear authoritative group of sources. Whereas traditional legal scholarship could assert a more coherent hierarchy of established norms and customs external to the cultural context, a factor due as a consequence to the fragmentation of the medieval architecture as a consequence of the Reformation.

private capacities of scholars'.<sup>247</sup> In one sense, this failure to distinguish between morality and law or faith and reason came from that earlier carefully woven relationship between Classical thought and Christian ideas. Morality and faith preceded law as they were deemed the source of juridical thought particularly in the construction of a hierarchy of law. In the religious turmoil of the 16<sup>th</sup> century and the wars that followed, there was a concerted effort to depoliticise the juridical disunity of European society, which required an inverse solution to the relationship between morality and law. Public law preceded morality, which in turn privatised and internalised religion, and relegated religion to the subjective conscience or to the civil sphere. In turn, in the seventeenth century the protections and toleration given to religious minorities governed the civil sphere.<sup>248</sup>

One of the issues that Kennedy pursues is how the comprehensive worldview of scholars in the primitive era often failed to address conflicts of laws because of a pre-ordained sense of a duty towards metaphysical ideas rather than the concrete affairs of nations.<sup>249</sup> This split of course recognises the distinguishing marks of a classical Catholic approach to international law and state affairs and the positivistic approach, which produced theoretical foundations based on the various new sources of the law of nations. Concordance between both approaches depends on the integration of secular sources of law and the morality of law, or the philosophy of law, as derived from Catholicism to that of the emerging dominance of the secularisation of law.<sup>250</sup> With the emergence of independent nation state, that sense of 'a single normative order' governing the affairs of states on a worldwide basis became less reliant of a coherent framework, until the 19<sup>th</sup> century when attempts were made to professionalise and develop the international legal system.<sup>251</sup> Early-modern legal scholars such as Grotius and Gentili are distinguished from Vitoria and Suarez but they are also bound within the same cultural and customary understanding of the functioning of law, even as they represented the split within Christendom following the Reformation and the shift toward new sources of international law. For instance Kennedy suggests that, '[r]ather than referring to Scripture and Canon law, Gentili prefers to describe historical precedents and to cite classical jurists, Roman civil law, ancient philosophers, or on

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<sup>247</sup> Ibid. 7.

<sup>248</sup> Grewe, *The Epochs of Interational Law*. 290.

<sup>249</sup> Kennedy, 'Primitive Legal Scholarship', (58).

<sup>250</sup> We note later that this division between two courses for the law of nations were initial established along confessional lines but the one consequence of the Reformation was to separate "faith" from law, treating it as a wholly distinct sphere in the belief that religious faith had become compromised and dissolved through incorporation in the affairs of the state and society. It was in a sense a radical reading of Augustinian philosophy, which focused on "two kingdoms".

<sup>251</sup> Kennedy, 'Primitive Legal Scholarship', (59 – 60)

occasion, such contemporary analysts of statecraft as Bodin or Machiavelli'.<sup>252</sup> Kennedy makes the important point that 'modernists have been unable to return to the primitive world of clear distinctions in a single fabric of morality and law'.<sup>253</sup> The sources of law may have deviated from an earlier period of self-assurance but no clear legal hierarchy became identifiable until the 19<sup>th</sup> century. In providing an account of the response of Catholicism, broadly construed, one purpose is to emphasise how Catholic thinkers employed, developed and transformed the scholastic tradition from the medieval to early modern and to the later 19<sup>th</sup> century, as far as the present day, in developing an international law for Christendom and beyond, rooted in canon law and natural law. Reliance on the self-sufficiency of the Church in the world, by working from within its own tradition seems to concur with the goal of setting out its own position apart from the social and political conditions of each generation but also seeking to influence, moderate and control the shape of each manifestation of temporal sovereignty. Catholicism sought to keep intact the approach of the primitive legal scholarship by retaining recognition of earlier interpretations of the natural law and Christian morality.

The Catholic Church was marked by its desire for legal and political independence originating in the 11<sup>th</sup> century Gregorian reforms, but following the protestant Reformation and proceeding from there, the Church was to see its gradual decline in influence, not alone politically but also as a source of the formation of *jus gentium*. Yet what is significant is not alone this eclipse of that natural law argument made by Catholicism or that we find this evident 'faith in a universal moral order hopelessly dated' but that it remained the position of Catholicism into the 20<sup>th</sup> century and throughout its contribution as a source of human rights ideas.<sup>254</sup> In the 20<sup>th</sup> century, the Catholic Church was unwilling to play this minor role in the future formation of the European nation state, and the future legal international order upon which international law was premised. Even from a diminished position, the Catholic Church could contribute in different ways, particularly by carving out its own position in the civil, diplomatic and international legal sphere.<sup>255</sup> Whether it is the medieval *Respublica Christiana* or the Commonwealth of Christendom, the route of creating universal order under a universal law for all nations remained the utopian vision of Catholicism. Despite the "miserable comforters" who sought to reconstruct international law's edifice, the architects of the 18<sup>th</sup> century could not provide the same source material from

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<sup>252</sup> Ibid. 60.

<sup>253</sup> Ibid. 60.

<sup>254</sup> Ibid. 96. This is a point developed in Chapter 3.

<sup>255</sup> This point will be developed in Chapter 3.

scholasticism because it had begun from a new and quite distinct tradition.<sup>256</sup> This said modern international law developed from its demise built by those very same 18<sup>th</sup> and 19<sup>th</sup> century idealists of a community of civilised nations.<sup>257</sup>

### 2.3.1. Vattel

Emer de Vattel's writing on sovereignty has been formative from the 18<sup>th</sup> century and is considered to be the 'father of modern international law'.<sup>258</sup> Vattel's intention was to 'externalise the internal governing authority' in his work *Droit des Gens*.<sup>259</sup> Beaulac proposes that two particular quotations define Vattel's understanding of the State and sovereignty. Firstly on the state,

Nations or States are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantages by the joint efforts of their combined strength.<sup>260</sup>

Secondly, Beaulac shows that sovereignty is derived from this body politic thereby Vattel explains '[t]his political authority is the Sovereignty and he or they who are invested with it are the Sovereign'.<sup>261</sup> Further Beaulac quotes Vattel:

It is evident that, by the very act of the civil or political association, each citizen subjects himself to the authority of the entire body, in everything that relates to the common welfare. The authority of all over each member, therefore essentially belongs to the body politic, or State; but the exercise of that authority may be placed in different hands, according as the society has ordained.<sup>262</sup>

The competence of governance was externalised by establishing what constituted sovereignty, developing the concept of equality among nations each retaining their

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<sup>256</sup> Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law', (396. Koskenniemi proposes,

[...]on the one side, an anachronistic scholasticism, and an old elite clinging to its privileges; on the other side, complex technical words seeking to penetrate the tired surface of political life to give expression to the dynamic forces underneath. Modern international law was born from a defence of secular absolutism against theology and feudalism.

<sup>257</sup> See Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See', (358).

<sup>258</sup> Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', (241 [footnotes omitted]). Vattel (1714-67) Emer De Vattel, *The Law of Nations (Edited and with an Introduction by Bela Kapossy and Richard Whatmore)*, ed. Knud Haakonssen (Natural Law and Enlightenment Classics; Indianapolis: liberty fund, 2008).

<sup>259</sup> Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', (247).

<sup>260</sup> Vattel, *The Law of Nations (Edited and with an Introduction by Bela Kapossy and Richard Whatmore)*. 60.

<sup>261</sup> *ibid.* 81

<sup>262</sup> Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', (248-249 [footnotes omitted]). See Grewe, *The Epochs of International Law*. 287-288. See Vattel, *The Law of Nations (Edited and with an Introduction by Bela Kapossy and Richard Whatmore)*. 81.

independence and autonomy from the other. Therefore, for Vattel “sovereignty” ‘relates to a power which is incorporated and independent’.<sup>263</sup> The state also takes on the function of being a “moral person” ‘who live together in a natural society, subject to the laws of nations’.<sup>264</sup> In this process exclusive sovereignty governed by the law of nations reveals ‘authority is vested into a political body which is the sole representative of the people externally and that is not submitted to any foreign State or to any higher law externally’.<sup>265</sup>

The particularity of the state, (being a moral person) is according to Beaulac taken up by Thomas Hobbes ‘artificial person’, which provided the essence of the commonwealth. The sovereign ‘artificial person’ is sovereign to whom all others are subjects with the purpose of establishing order.<sup>266</sup> Beaulac continues, ‘the legal normative scheme governing the relations ... [are] only concerned with the members of the society of nations, namely the nations (or states)’.<sup>267</sup> Beaulac therefore remarks that the main subject of the law of nations is the sovereign state’.<sup>268</sup> This presented a “new reality” in which sovereign states would not be subject to any other higher legal regime.<sup>269</sup> Beaulac further states, ‘the legal system put forwards by Vattel to regulate the relationship between independent states constitutes the last element in order to accomplish the externalisation of authority through the use of sovereignty in *Droit des Gens*’.<sup>270</sup> This authority to govern extends not only to domestic affairs but also through its relations with foreign nations. Grewe proposes that Vattel’s *Droit des Gens* was ‘the first to adopt the term “la société de nations”’.<sup>271</sup> Religion in Vattel’s thought was ‘only relevant as an object of national policy’ thereby excluding it from the international plane.<sup>272</sup> Instead, Vattel had proposed toleration towards “all religious creeds which do not harbour danger for public morals or the state” for “[t]he ‘*Société universelle du Genre-humain*’ is an institution of nature itself, that is to say, a necessary consequence of human nature’.<sup>273</sup>

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<sup>263</sup> Beaulac, ‘The Westphalian Legal Orthodoxy – Myth or Reality?’, (250.

<sup>264</sup> Ibid. 250 [as cited by Vattel].

<sup>265</sup> Ibid. 250.

<sup>266</sup> See also G. Newey, *Routledge Philosophy Guidebook to Hobbes and Leviathan*, eds Tim Crane and Jonathan Wolff (Routledge Philosophy Guidebooks; Oxon: Taylor & Francis, 2008). 107 – 113. Beaulac notes that Samuel von Pufendorf developed this notion of juristic person with ‘the novelty being the dissociation of the moral person of the state from the physical person of the ruler’.

<sup>267</sup> Beaulac, ‘The Westphalian Legal Orthodoxy – Myth or Reality?’, ( 266. [footnotes omitted].

<sup>268</sup> Ibid. 266.

<sup>269</sup> Ibid. 267.

<sup>270</sup> Ibid. 273.

<sup>271</sup> Grewe, *The Epochs of Interational Law*. 288.

<sup>272</sup> Ibid. 288.

<sup>273</sup> Vattel as cited in ibid. 288.

### 2.3.2. Hobbes

A motivation for the establishment of the State was 'for reasons of self-defence from nature and from violent men and to experience mutual support'.<sup>274</sup> The natural world was no longer viewed as source of social order but this order had to be made new or at least it would in Thomas Hobbes thought (1588 –1679) depend on the continuity of the sovereign least it would descend into chaos. For Hobbes 'the state of nature was, in essence, the absence of effective government, and it not only characterized human prehistory, but was a condition that could re-emerge at any time'.<sup>275</sup> Pagden contends that following the Reformation and the inter-state wars that occurred, Hobbesian and Grotian accounts of the natural law were reducible to simple principles of security.<sup>276</sup> Pagden identifies that whereas the medieval theologians preferenced the sociability of members of society as its basis, it is the need for survival which preoccupied the thoughts of Hobbes and the early-modern thinkers.<sup>277</sup> In the medieval mind Aristotelian –Thomistic,

[...] account of the origins of human society was thus descriptions of an historical process leading inexorably towards the higher good, the *eudaimonia* which existed within the polis, beyond whose boundaries, as Aristotle had famously said, only beasts and heroes – the animals and the divine but not the human – could exist.<sup>278</sup>

In contrast, the "state of nature" as proposed by Hobbes, Grotius and Locke begin the process of diffusing the theory of the good, not in accord with that which resides in the common good as arbitrated by the sovereign but by the individual who chooses the nature of the good, to become a sovereign individual. Pagden suggests that this latter theory, was based 'upon a supposition about the rational calculating abilities of early mankind, it also involved a highly reductionist view of

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<sup>274</sup> Annabel Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton University Press). 207. Brett also suggests, '[t]he political works of Hugo Grotius are usually considered today as belonging to the tradition of seventeenth-century natural law theory, making Grotius what might be called a Naturrechtslehrer or a theorist of natural law'. See Brett, 'Natural Right and Civil Community: The Civil Philosophy of Hugo Grotius', (31).

<sup>275</sup> Simmons, 'Theories of the State'. 255. This was his view of the Civil War in England, to a return to a violent nature.

<sup>276</sup> Pagden, 'Human Rights, Natural Rights, and Europe's Imperial Legacy', (179).

<sup>277</sup> *Ibid.* 180.

<sup>278</sup> *Ibid.* 181.



human psychology and thus of human agency'.<sup>279</sup> The reason it caught on, was in part because of its extreme realism, in part at least because it did what the (Protestant) imperial powers wanted of it. Pagden concludes, '[m]an had gained his identity as an autonomous rights-bearing individual, and lost his identity as a political animal'.<sup>280</sup> The political had been somewhat surrendered or consumed by the developing theory of autonomous sovereignty that was all encompassing and concerned with security.<sup>281</sup> Some of the many "natural rights" sovereigns began to formulate included, the right to pre-emptive strike, the right to the use of "vacant" lands, and the right to punish those who transgress the law of nature. Francisco Suárez (1548-1617) contributed with an attempt 'to introduce what would count as a third category: the idea of an offendable "humanity" which could be "threatened" and therefore could be defended against such acts of aggression as human sacrifice or cannibalism'.<sup>282</sup> The limits and scope placed sovereignty of the state reveals the many 'diverging tendencies of thinking about sovereignty' during the 17<sup>th</sup> century that developed out of 'a severe crisis of the basic concept of the law of nations and the belief in a binding international legal order'.<sup>283</sup> Havercroft argues that the development of the concept of sovereignty was 'not a fixed moment or idea, but as the result of an ideological struggle'.<sup>284</sup> In particular Havercroft proposes,

[...] that while Westphalia was not *the moment* that sovereignty emerged, the various ideological and political struggles in the 17th century between the Pope and European monarchs did produce our modern theory of state sovereignty, a theory that includes the principle of non-intervention as one of its constitutive features.<sup>285</sup>

This period saw the transformation of the natural law, which had been formative to political philosophy and shaped by scholastic philosophy. The nominalist

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<sup>279</sup> Ibid. 181. See also Jürgen Habermas, *Theorie und Praxis. Sozialphilosophische Studien* (Frankfurt am Main: Suhrkamp, 1978), 78-79.

<sup>280</sup> Ibid. 181.

<sup>281</sup> See Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*. 11- 36. Outsiders, beggars, travellers and mendicants were considered part of *jus gentium*, they had a right to travel from city to city in the free and unoccupied parts of the country, particularly given the belief of the permeability of borders. This is particularly relevant as "vacant" or "unoccupied" land was considered common to all peoples, as part of the *jus gentium* (developed from natural law), to be traversed and occupied if there was no resistance from the local inhabitants. Such a view contributed to the idea of Francisco de Vitoria regarding the New World. The theory of sovereignty was equally elastic and mutable until the rise of the territorial nation state.

<sup>282</sup> Pagden, 'Human Rights, Natural Rights, and Europe's Imperial Legacy', ( 182.

<sup>283</sup> Grewe, *The Epochs of International Law*. 349.

<sup>284</sup> Havercroft, 'Was Westphalia 'All That'? Hobbes, Bellarmine, and the Norm of Non-Intervention', ( 122.

<sup>285</sup> Ibid. 123.

philosophy of Ockham provided ‘the point of departure towards legal positivism that [was] inherent in Ockham’s thought’ and ‘developed by Hobbes in a manner that had radical consequences[...]’<sup>286</sup> According to Grewe, ‘natural law only played a very minor role in Hobbes’ system’.<sup>287</sup> The English political philosopher Thomas Hobbes had ‘refined the absolute power of the state’.<sup>288</sup> The conflict between the papacy and monarchy in the 17<sup>th</sup> century over the right of the pope to depose a monarch produced a varied response to which both Hobbes and Bellarmine responded. A monarchic theory of sovereignty had begun to refuse the exercise of external authority and exert a right to remain the final authority on all aspects of the state, both temporal and religious promoting a theory of non-intervention.<sup>289</sup> Assessing the ideas of Bellarmine, Havercroft distinguishes between divine law, which is the domain of the papacy and positive law which is the domain of the prince, recognising that in some matters both the spiritual and temporal overlap.<sup>290</sup> Therefore, Bellarmine can propose where the prince places his subjects at risk, particularly their eternal salvation ‘the spiritual power can and ought to coerce the temporal with every reason and means which will seem necessary for this purpose’.<sup>291</sup> This challenge to the norm of non-intervention came at the beginning of a long period of development of the state and the general rules of non-interference but went to the core of that project by claiming a power to depose the sovereign prince or ruler and therefore challenged the evolving concept of sovereignty itself.<sup>292</sup> While Bellarmine had emphasized indirect power, the retention of this power (*dominium*), in cases of great seriousness for the Church, returned to the medieval notion of shared sovereignty which was part of the nature of a title of being a Christian prince or ruler. Where the church revoked the title of “Christian” (as a spiritual sovereign) from the prince, in the case of heresy, it implied a revocation of the natural right to temporal sovereignty as well. The office of Christian ruler or prince, which had been separated from the person of the

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<sup>286</sup> Grewe, *The Epochs of International Law*. 349 [footnotes omitted].

<sup>287</sup> Ibid. 349 [footnotes omitted].

<sup>288</sup> Ibid. 349 [footnotes omitted].

<sup>289</sup> Beaulac, ‘The Westphalian Legal Orthodoxy – Myth or Reality?’, (261. Beaulac writes, Vattel had ‘transformed the reality that the word “sovereignty” represents by associating it with this other word, independence, which would refer to a normative prescription according to which, on the inter-national plane, one State ought not to interfere in the domestic government of another’.

<sup>290</sup> Havercroft, ‘Was Westphalia ‘All That’? Hobbes, Bellarmine, and the Norm of Non-Intervention’, (126. Citation from Bellarmine: ‘But although this kingdom properly was spiritual, and through faith we belong to it, yet it cannot be denied that also it extends itself to temporal matters, so far as they are ordered to spiritual matters, as all theologians say’.

<sup>291</sup> As cited in ibid. 126.

<sup>292</sup> Beaulac, ‘The Westphalian Legal Orthodoxy – Myth or Reality?’, (261-264. In the writing of Vattel the limits of state self-preservation they could be carried out in the temporal concerns for other nations, for instance assistance in time of famine, to favour external trade and avoid monopolizing commerce, also to assist opposing a powerful enemy or co-operate in the administration of justice [footnotes omitted].

sovereign (the idea of two bodies), could be in the view of Bellarmine, removed from the sovereign with both spiritual and temporal duties associated with the office taken too. This was according to natural law because part of the office of the prince was a responsibility for religion, which was bound up in spiritual as well as religious governance, shared with the pope and clergy of the territory of the prince or ruler.

This particular struggle manifested itself at the turning point in European history when the Reformation provided monarchs the political but also religious capacity to claim both temporal and particularly spiritual jurisdiction over their territory with the establishment of national or confessional churches. The claim of a “divine right” for kings rooted in (as they saw it) divine law, transformed the relationship irrevocably in many instances within Christendom.<sup>293</sup> Historically a sovereign’s claim was found in the natural law and had developed from the idea of *civitas* and the city as an idea belonging to a naturally ordered society and a part of human nature. The divine law and divine authority was usually the domain and solely the preserve of the pope.

One response to the widely known defence of papal claims of Bellarmine came from Thomas Hobbes in his *Leviathan*, who argued ‘that no authority other than the civil sovereign could exercise power within the state’.<sup>294</sup> Havercroft submits that Hobbes ‘arguments about the sovereign being independent from any ecclesiastical authority are less well known’.<sup>295</sup> In response to the struggles over ecclesiastical power that went to the heart of the English Civil War and the Thirty Year War in Europe, Hobbes believed the appropriate response was ‘not only must civil authority be autonomous from religious authority [...] but religious authority must also be subordinate to the secular authority of the sovereign’.<sup>296</sup>

Noteworthy, is that Aznar writes that Hobbes has also been familiar with the work of Marsilius of Padua.<sup>297</sup> Aznar finds a number of links between the two thinkers

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<sup>293</sup> See Pagden, 'Human Rights, Natural Rights, and Europe's Imperial Legacy', (179. Pagden identifies ‘that whereas for Aristotle and Aquinas and their followers, human sociability was prior to the individual and thus, to a very large degree, independent of human will, in the same way that the sociability of certain animals, ants, and bees is wholly independent of logos, for Grotius and Hobbes civil, and thus truly human, society was solely the creation of an act of will’. Pagden suggests there existed a distinction between the identification of divine sovereignty as recognised and found in the medieval papacy of the pope and the later *divine right of kings to rule* which looked to the Classical era where the *demos*, represented by the legitimate head of state in a democracy, was alternatively recognised.

<sup>294</sup> Havercroft, 'Was Westphalia 'All That'? Hobbes, Bellarmine, and the Norm of Non-Intervention', (130.

<sup>295</sup> *Ibid.* 130.

<sup>296</sup> *Ibid.* 130

<sup>297</sup> Aznar, 'Religión Y Poder En Hobbes Y Marsilio De Padua: Similitudes Y Diferencias ', ( [footnote omitted]. Hobbes had visited the Republic of Venice and on his return to England ‘translated and disseminated to the

particularly where they reduce the role of the of the state to the political, to the exclusion of all other spiritual and moral concerns, thereby concentrating all power both ecclesiastical and civil to the function of the sovereign.<sup>298</sup> Hobbes and Marsilius both believed that papal power or *plenitudo potestatis* was in direct conflict with the civil Christian state (Hobbes called the papacy “the Kingdom of Darkness”) seeing in the papal interference an overstepping the role of the pope in political affairs. Alternatively, the sovereign had full power and was the necessary guarantor of peace. In Hobbes the “artificial person” of the state is embodied in the sovereign while for Marsilius the prince is the first citizen of the civil state.<sup>299</sup> In these political theories, it is obedience to the sovereign that is given primacy over the secular and spiritual realm.<sup>300</sup> As Terpstra observes in Hobbes theory, ‘there is room for only one confession in the public realm. The people have

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Court and the Parliament seventy five letters that were exchanged between 1615 and 1628 with Micanzio, friend and personal assistant to Sarpi, the venetian ruler who was a recognized follower of Marsilius’. See also Gregorio Piaia, *Marsilio Da Padova Nella Riforma E Nella Controriforma. Fortuna Ed Interpretazione*. (24; Padova: Antenore, 1977). I am grateful to Professor Bernardo Bayona Aznar of the Universidad de Zaragoza for this article and on how to understand the relationship between the Church and secular power in the late Middle Ages. Ockham influenced much more of the thought of Hobbes than Marsilius of Padua. On Ockham’s influence, see Grewe, *The Epochs of Interational Law*. 349. I am grateful to Professor Bernardo Bayona Aznar of the Universidad de Zaragoza for this article and on how to understand the relationship between the Church and secular power in the late Middle Ages, and the link between Hobbes and Marsilius of Padua.

<sup>298</sup> Anzar points to the rationalism of both Hobbes and Marsilius preferring to believe that science as held the potential for the future.

<sup>299</sup> SAznar, ‘Religión Y Poder En Hobbes Y Marsilio De Padua: Similitudes Y Diferencias ’, (221-259. See Brett, Marsilius of Padua: The Defender of the Peace. With an Interpretive introduction by Leo Strauss:

So it is necessary for the preservation of peace of men that steps be taken not only for the creation of an artificial man but also for that ‘man’ to have an artificial eternity of life. Without that, men who are governed by an assembly would return into the condition of war in every generation, and those who are governed by one man would return to it as soon as their governor dies. This artificial eternity is what men call ‘the right of succession’. *Leviathan* II, 17, § 2.

For the first citizen or part of a civil regime, sc. the princely – be it one man or several – will understand from the human and divine truths written down in this book that they alone have the authority to command the subject multitude, collectively or individually, and to constrain any individual, if it is expedient to do so, according to the laws that have been laid down.

Brett, *Marsilius of Padua: The Defender of the Peace. With an Interpretive Introduction by Leo Strauss*. DP III, III, 557.

<sup>300</sup> Aznar, ‘Religión Y Poder En Hobbes Y Marsilio De Padua: Similitudes Y Diferencias ’, (221. See Brett, *Marsilius of Padua: The Defender of the Peace. With an Interpretive Introduction by Leo Strauss*. For instance Marsilius writes:

It remains now to show that Christ’s foremost apostles held and taught the same opinion, and first of all Paul in II Timothy 2, warning him (whom he had instituted as priest or bishop) not to involve himself in worldly affairs.

DP II, V, 176.

Since, therefore, priests as much as non-priests can be evildoers in respect of all the kinds of transgression we enumerated in chapter 2 of this discourse, it follows necessarily that they ought to be subject in coercive judgement to kings, dukes or other secular princes, who must be established by the authority of the human legislator [...]

DP II, VIII, 190.

promised to obey their lawful sovereign by way of the social contract, and should therefore accept the “true faith” that the sovereign has decided on’.<sup>301</sup>

It could be suggested that the influence of the nominalism of Ockham and the secular ecclesiology of Marsilius of Padua shaped Hobbes theory of state, which he brought to completion in his theory of sovereignty and thereby reshaped the law of nations on the basis of self-interest. His proposition that the state alone had sovereignty over both temporal and spiritual concerns of the state, seemingly raising the position of the sovereign to that the plenitude of power [*plenitudo potestates*], which Marsilius had rejected in the hands of the papacy and which Hobbes confines to the civil territorial state. This justification for civil authority over the confessional faith of the state might similarly be recognised in the more orthodox Conciliarist Gerson. Gerson argued for the limited governance of the papacy in deference to the Church’s representative assemblies, which Ockham had radically transformed to the *congregatio fidelium*, the reconstruction of the sovereignty of the Church to be governed primarily by the community of laity.<sup>302</sup>

### 2.3.3. Westphalia

Pope Innocent X famously responded to the Westphalia Treaty by stating that it was ‘null, void, invalid, iniquitous, unjust, damnable, reprobate, inane, and devoid of meaning for all time’.<sup>303</sup> Simmon’s writes that Christendom was previously ‘structured by a complicated and decentralized system of power relations, in which the claims to obedience made by localities (towns and cities), feudal lords and kings, church leaders (popes and bishops), and quasi-religious leaders (the Holy Roman emperors) cut across one another and overlapped, often without clear priority’.<sup>304</sup> Stéphane Beaulac suggests, ‘there may not be a greater orthodoxy than that according to which the Peace of Westphalia in 1648, which ended the Thirty Years War in Europe, constitutes a paradigm shift in the development of our state system’.<sup>305</sup> Beaulac proposes that this period of treaty making brought an end to the *ancien régime*, a point suggested by the legal scholar Leo Gross.<sup>306</sup>

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<sup>301</sup> Terpstra, 'The Political Theology of a Potestas Indirecta', (148).

<sup>302</sup> See Brett, *Marsilius of Padua: The Defender of the Peace. With an Interpretive Introduction by Leo Strauss*. Introduction by Brett. xx. See Book I. 4, 1.

<sup>303</sup> Havercroft, 'Was Westphalia 'All That'? Hobbes, Bellarmine, and the Norm of Non-Intervention', (120. See also (Jackson 2007 : 52)

<sup>304</sup> Simmons, 'Theories of the State'.

<sup>305</sup> Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', (148. See Malcolm D. Evans, *Religious Liberty and International Law in Europe* (Cambridge Studies in International and Comparative Law (Cambridge, England : 1996); Cambridge: Cambridge University Press) xxxi, 394 p. 49. See fn. 8. Evans notes that the way

To Gross, the Thirty Years War had its origin in religious intolerance, while Westphalia 'consecrated the principle of toleration between Protestant and Catholic states and by providing some safeguards for religious minorities'.<sup>307</sup> This proposition leads Gross to identify Westphalia as the 'starting point for the development of modern international law'.<sup>308</sup> Gross points to the beginning of international constitutional law but this also carried a consequence that required filling the vacuum created by an absence of a reference to the authority of Emperor or Pope, satisfied with the new Grotian idea of the Law of Nature.<sup>309</sup> This particular manoeuvre implied a possibility of gaining appeal across confessional divides 'irrespective of the character and dignity of their ruler'.<sup>310</sup> In this adaptation, Gross sees the laicisation of international law by 'divorcing it from any particular religious background [...]' <sup>311</sup> Gross observes another by-product of Westphalia was to create equity between republican and Monarchical administration of states bound by these new laws.<sup>312</sup> Gross further develops the idea that from Westphalia and the Treaties of Münster and Osnabrück, they had the effect of challenging the principle of universal monarchy and replace this with a balance of power, by which 'the Peace of Westphalia illustrates its application on a grand scale'.<sup>313</sup> This process to Gross represents 'the majestic portal which leads from the old into *the new world*'.<sup>314</sup> The old world was invariably the world of medieval *respublica christiana* governed by Papal spiritual authority and the temporal authority of the Emperor. This was replaced by territorial states that presented a stricter separation between church and state. The later post-Westphalian era of *jus publicum europaeum* progressed this development reliant on the creation of over-seas colonies and the amassing of land which gave stability to the European Family of Nations.<sup>315</sup> However, following the Wars of Religion and of the treaties of Augsburg and Westphalia, they revoked the sense of a commonwealth of values, which

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was paved for the treaty of Westphalia (1648) by the Peace of Nurnberg (1532) and the Treaty of Passau (1552).

<sup>306</sup> Leo Gross, 'The Peace of Westphalia, 1648-1948', *American Journal of International Law*, 42 (1948), 20-41. 28.

<sup>307</sup> Ibid. 22. Gross notes that this idea of toleration found its way into the Charter of the United Nations, with the proposal 'to practice tolerance and live together in peace with one another as good neighbours'. Ibid. 24.

<sup>308</sup> Ibid. 26.

<sup>309</sup> Grotius, Tuck, and Barbeyrac, *The Rights of War and Peace*. See in particular Brett, 'Natural Right and Civil Community: The Civil Philosophy of Hugo Grotius', (31. To Brett, 'Grotius provides us with the insight into the shift in thinking about the place of the natural law as a foundation for State'.

<sup>310</sup> Gross, 'The Peace of Westphalia, 1648-1948', (26. In particular Hugo Grotius had drawn from stoic philosophy the idea that all creatures had a natural instinct towards self-preservation.

<sup>311</sup> Ibid. 26.

<sup>312</sup> Ibid. 26.

<sup>313</sup> Ibid. 27.

<sup>314</sup> Ibid. 28 [emphasis added].

<sup>315</sup> See Oppenheim, L. (Lassa),. *International law, a treatise* (London, New York [etc.] Longmans, Green, and co.

reinforced the mounting sense of the place of the individual in society.<sup>316</sup> The earlier Peace of Augsburg of 1555 confirmed the rule *cuius regio ejus religio*.<sup>317</sup> This treaty effectively carved up the crumbling idea of a universal Christendom, which had provided an overarching solidarity assured in the prior idea of *jus gentium*.<sup>318</sup>

Modern states emerged as a consequence of international constitutions, therefore 'it is the international constitution which *first defines* this [international] polity as an entity with the authority to determine further its own constitutional authority'.<sup>319</sup> Philpott suggests that an 'international constitution, then, is more than simply a derivative of the collected constitutions of its individual polities. It is the framework that makes them individual polities'.<sup>320</sup> The treaties of Westphalia, agreed at Münster and Osnabrück, were international constitutions, which provided a framework for individual states to emerge and thereby gave for instance Dutch and German rule 'a monopoly of constitutional powers, just as their counterparts elsewhere in Europe already enjoyed'.<sup>321</sup> These constitutions resolved the issue of external interference from other states, including that of the Holy Roman Empire. Therefore the,

[...] rival authority of the Holy Roman Empire and the Catholic Church, who had once legislated, judged, and enforced laws and religious uniformity within these states' territories, had to be replaced.<sup>322</sup>

What is most striking is Grewe's argument is that the Peace Treaty of Osnabrück began a new development in law, and was 'the first major treaty of the modern age to provide for the protection of minorities'. As Grewe states:

The structural development of laws for the protection of religious minorities since 1648 leads to a precise conclusion in respect of the intellectual

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<sup>316</sup> Evans, *Religious Liberty and International Law in Europe*.

<sup>317</sup> Gross, 'The Peace of Westphalia, 1648-1948', (22).

<sup>318</sup> see Peter Danchin, 'The Emergence and Structure of Religious Freedom in International Law Reconsidered', *Journal of Law and Religion*, 23 (455-534. 502-5004. Danchin details this process noting 'the Peace in fact signalled the collapse of the notion of empire based on a common religion' (503).

<sup>319</sup> Daniel Philpott, 'Westphalia, Authority, and International Society', *Political Studies*, 47 (566-89. 567. Philpott offers a provoking comment that 'the rise of state sovereignty at Westphalia, the robustness of state sovereignty since Westphalia, and the fall of state sovereignty today are all overrated'. A difficulty Philpott identifies is the absence of a concept to express how international relations have changed and 'how it compares in quality and scale with previous changes in international authority' (566). Philpott notes that the international system unlike conventional constitutions, are 'strewn among separate treaties, conventions and customary law' (567).

<sup>320</sup> *Ibid.* 567. [my emphasis]

<sup>321</sup> *Ibid.* 567.

<sup>322</sup> *Ibid.* 567.

foundations of the international legal community. The fact that conventions of this sort were at all possible demonstrates that religious and confessional questions were *no longer decisive*, that they were deprived of the sharpness and weight which they had possessed in the preceding age.<sup>323</sup>

With the confessional divisions becoming settled, the provisions by treaties for the protection of religious minorities categorised these concerns to the periphery of international law. The post-Westphalian era was no longer explicitly governed by concerns for the religious ends of society as it had been in the preceding centuries. Peter Danchin observes, 'this conception of external sovereignty removed religious allegiance as a justification for war, and thus achieved the objective of peace and stability between warring Christian communities-it simultaneously established a new "secular" European political order premised on a new autonomous (and belligerent) subject: the sovereign state'.<sup>324</sup> With the inter-confessional struggles settled, or at least contained, the 17<sup>th</sup> and 18<sup>th</sup> century's preoccupations could turn to other more secular concerns, namely the construction of a distinctly European civilisation with colonial intentions.<sup>325</sup>

Another element of this transformation was during the seventeenth century is it was spoken of as the "Roman Century" having admired Roman statecraft, military discipline and stoic philosophy.<sup>326</sup> Just as the Protestant inheritors of the Reformation looked to the early Christian church for inspiration, the golden age of the Roman republic became a source for political and social reform for the political and legal community. The ideal of reform drew upon 'an extraordinary confidence in the capacity to remodel human beings'.<sup>327</sup> That very belief in the malleability of human nature meant 'the belief that nothing in principle stood in the way of this

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<sup>323</sup> Grewe, *The Epochs of International Law*. 290 [My emphasis]. Grewe notes several treaties as an example of this process, including Osnabruck and Munster (1648), Oliva (1660), Nijmegen (1678), Ryswijk (1697), Utrecht (1713), Paris (1763), Hubertusburg (1763) and Warsaw (1773). For a detailed account of this development which is the genesis of modern religious freedom, see Evans, *Religious Liberty and International Law in Europe*. 42-82. See also generally on minority protection and religious freedom, Danchin, 'The Emergence and Structure of Religious Freedom in International Law Reconsidered', (504. Danchin describes Westphalia as an eventual *modus vivendi* following the European religious wars, and writes:

While to the papacy the division of Christendom had been a disaster, the notion of empire unified by the universal faith was now officially dead.

<sup>324</sup> See Danchin, 'The Emergence and Structure of Religious Freedom in International Law Reconsidered', ( 508. An understanding of Sovereignty had changed following the Religious Wars, and the Westphalia treaties:

This sovereignty protected an "internal" domain *reservé* premised on the right to self-governance according to religious confession (*cuius regio, eius religio*). "External" sovereignty, however, rested on an unstable and evolving conception of formally equal natural rights in a putative state of nature in conjunction with specific treaty obligations assumed at peace conferences.

<sup>325</sup> Grewe, *The Epochs of International Law*. 291.

<sup>326</sup> Taylor, *A Secular Age*. 120.

<sup>327</sup> *Ibid.* 121.



social engineering'.<sup>328</sup> Charles Taylor proposes that the obstacle to be overcome 'was the traditional understanding of things, which set limits to the possibilities of total reform', most fully spelt out since the European Middle Ages and 'articulated in the formulations of Augustine'.<sup>329</sup> The Augustinian view of human nature, as nature compounded by concupiscence and represented by the pull of two cities each with its own kind of love, viewed the human city at a centre (secularum) where these cities crossed purposes, intermingled and communicated. The very aloof vision of the City of God meant that the state would only keep order on a fallen world. Nevertheless, Augustine recognised the dangers of a Christian state becoming an antidote to the fallen state of nature. Taylor writes an earlier theory of the Christian state did make an important distinction, it 'could help the church, repress heretics and false cults, but it couldn't improve its citizens; only the city of God could do that, represented by the Church, could aspire to that'.<sup>330</sup> Yet the thought of Augustine did remain influential at that point in history but the reformers 'saw a dispensation in which the elect would rule, and discipline the whole of society'.<sup>331</sup> Taylor describes the reconstructive view of nature, its very malleability, particularly though an attempt at the rational ordering of society as also reconstructing natural law.<sup>332</sup> Milbank proposes that far from there being a juncture in the turn from the medieval to early modern period, 'the Christian Renaissance consummated medieval thinking [...], while the main line of modernity is derived from late medieval nominalist-voluntarist theology and from the quasi-Augustinian 'Counter-Renaissance' of the seventeenth century'.<sup>333</sup>

In Grotius there is a new conception of human nature under law which to Taylor implies, 'a rational being means one who proceeds by rules, laws, principles; a rational being who is also sociable would have to have laws which made living together possible'.<sup>334</sup> This voluntaristic definition depends on the establishment of law as the basis of society but moves away from an earlier Augustinian tradition. Augustinianism relied on the natural sociability of people where reason was

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<sup>328</sup> Ibid. 121.

<sup>329</sup> Ibid. 121.

<sup>330</sup> Ibid. 122.

<sup>331</sup> Ibid. 122.

<sup>332</sup> The political philosopher Alister Macintyre could write in 1983 that a 'general blindness to the importance of the continuing influence of Augustinianism in the seventeenth and eighteenth centuries' had meant, 'books of the highest importance about Rousseau tend with few exceptions to ignore the importance of any reference to Augustine[...]'.  
Jean Bethke Elshtain, 'Religion, the Enlightenment and the New Global Order', in John M. Owen and J. Judd Owen (eds.), (Chichester: Columbia University Press, 2010). 61 The Gelasius I "two swords" metaphor was considered by Rousseau as presenting Catholic Christianity as "schizophrenic".

<sup>333</sup> Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People (Illuminations: Theory & Religion)*. 6.  
<sup>334</sup> Taylor, *A Secular Age*. 126.

complemented by reference to the inscribed order found in nature, in creation and ultimately discoverable in the city of God but retains the exceptional nature of the Christian City of God as a sphere distinct from a volatile and hostile natural world.<sup>335</sup> This particular context is the backdrop to the future reconstruction of the state and provided a basis for public order, particularly where inter-confessional disputes attempted to return Europe to the older regime. The natural law of the reformers intended to offer ‘a basis for rational agreement on the foundations of political life, beyond and in spite of confessional differences’.<sup>336</sup> This process gave rise the construction of the absolute state ‘grounded in its own conception of order’ and ‘started from the modern notion of agency as constructing orders, rather than conforming to those already in “nature”’.<sup>337</sup> The idea that an absolute state, rationally organised and appealing to the will of the sovereign for the governance of society became the basis for the further development of a social contract upon which there would be social order, and the possibility of improving society overall.<sup>338</sup> Taylor identifies that the 18<sup>th</sup> century the terminology of “civilisation” had become crystallised a number of political reforms: political (e.g. representative government), economics (e.g. laissez-faire) and social (e.g. an end to castes and privileged).<sup>339</sup>

It is striking to consider how tightly bound a number of inter-lapping ideas began to shape the reforms of the 18<sup>th</sup> and 19<sup>th</sup> century as a part of the process of civilising European society and further beyond. Various social and individual civil liberties began to come to the foreground but it was only in the post-World War II era that modern human rights had to be placed at the centre of that triad of the political, economics and the social reforms in the enlightenment project of civilisation. The success of human rights is most evident in the social or civil sphere (e.g. an end to

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<sup>335</sup> The Calvinist doctrine of “two kingdoms” follows this line of thought, with a strong political role for religion in the shaping and reforming of the state. The philosopher Immanuel Kant was deeply loyal to the Reformation and shaped by his the writings of Augustine. Kant had rejected the Epicureanism and Stoicism of the Enlightenment because of their worldly conceptions of the highest good. Following the thought of Augustine, Kant maintained that only Christianity has an adequate account of the highest good, found in the City [kingdom] of God. In Kant’s philosophy the highest good is found in an ethical community modelled on the Augustinian vision. See also Noah Feldman, ‘Religion and the Earthly City’, *Social Research*, 76/4 (//Winter2009 Winter2009 2009), 989-1000. 991 Feldman suggests, ‘In this archetypical Reformation version of things, which Locke inherits from Calvin and develops, and which grows in Locke through the Letter Concerning Toleration and Two Treatises of Government, there exists a well-developed idea of two different spheres: a sphere of temporal government, where the state is free to operate, and a sphere of religion, where the state is not free to operate.’ A similar process occurs in the writing of Kant who follows the protestant Reformers lead to preserve religious faith as the higher good, and to secularise ethics for the sphere of temporal life, and civil and political society.

<sup>336</sup> Taylor, *A Secular Age*. 127.

<sup>337</sup> *Ibid.* 127.

<sup>338</sup> *Ibid.* 128-9.

<sup>339</sup> *Ibid.* 128-9.

castes and privileged), whereas the political and economic inequalities remain very often illusive to the human rights project. Yet it may be possible to recognise that while modern human rights ideas draw its inspiration from this particular 18<sup>th</sup> century foundation, it is also a prisoner to its fortunes. Modern human rights ideas struggle to stand outside of this particular context of a European civilizational project, to express a critique that is truly trans-political and depoliticised. Kantian cosmopolitanism, Christian Augustinian radicalism or Marxist scepticism towards rights, all seek to critique the nature of the modern political and economic structure of the state. Similarly, various critical theories also apply methodologies to correct or reinterpret the basis of the reforming, malleable and civilizational vision of the 18<sup>th</sup> century enlightenment architects of the modern state. While they have sought to modify or replace parts of that project with alternative social, political or economic structures, it would appear the original foundation remains by-in-large unmoved.

#### **2.4. The Problem with the Structure of International Law**

David Kennedy suggests that in contrast to the twentieth century, 'the nineteenth century offers an image of the pre-modern, a baseline against which to measure the discipline's progress and this century's exceptionalism'.<sup>340</sup> It was also a period of relative calm that sits reflectively prior to two world wars in the 20<sup>th</sup> century but it also contains many histories.<sup>341</sup> Kennedy proposes in,

[...] international law terms, some events stand out in the nineteenth century which might include the dominance of positivism over naturalism as the philosophical basis for international law, the consolidation of theory of the sovereignty of the state and the notion of civilisation, particularly western civilisation.<sup>342</sup>

If international jurists responded to the jurisprudence of naturalism with positivism, then in a peculiar and enigmatic way, the Catholic Church responded with a greater emphasis on natural law thinking, which remained in continuity with the historical experience of Catholicism.<sup>343</sup> While legal positivist theories associated

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<sup>340</sup> Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', (386.

<sup>341</sup> Arnulf Becker Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation', *Harvard International Law Journal*, 51/2 (//Summer2010 Summer2010, 475-552.

<sup>342</sup> Ibid.

<sup>343</sup> Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism', *European Journal of International Law*, 12/2 (April 1, 2001 2001), 269-307. On the divergent views which exist

with prominent jurists such as Hart excluded the possibility of appealing to transcendent norms and claims to remain “metaphysically austere” and neutral, Catholicism continued to insist on the relevance of natural law, which appeals to the first principles of practical reason as a basis of legal order.<sup>344</sup> What this suggests is that international law did not just develop as a uniquely European project or to promote colonial rule or informal imperialism but it was also informed by a particular religious ethic founded in the Reformation.

While there are obvious contradictions to this view, such as the notion that Spanish, Belgian and French colonialism brought with it Catholic expansionism, these were by far in the minority in the manner in which it influenced the development of international law. This, in turn, contributed to a shift in the “unequal treatment” of non-Western sovereigns divided not only on geographical but on terms of civilizational appropriateness.<sup>345</sup> Increasingly, the development of international law reflects more diverse narratives that extend beyond the European experience.<sup>346</sup> Andrew Fitzmaurice remarks that the ‘law of nations and international law have in recent years been shown to have made a key contribution to the liberal apology for empire’.<sup>347</sup> Similarly Anthony Anghie has sought ‘to challenge conventional histories of the discipline which present colonialism as peripheral, an unfortunate episode that has long since been overcome by the heroic initiatives of decolonization that resulted in the emergence of colonial societies as independent, sovereign states.’<sup>348</sup> Lorca remarks that in the nineteenth century it was left to non-Western international lawyers to master classical international law, and to accept the place of legal positivism and a post-

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regarding the relationship and continuity of natural law and natural rights see Tierney, 'Natural Law and Natural Rights Old Problems and Recent Approaches', (389-406).

<sup>344</sup> Brian Leiter, 'Why Legal Positivism?', *Public Law and Legal Theory Working Papers No. 298* (University of Chicago: University of Chicago Law School, 2009). 21 Pufendorf, who understood the natural law to be the foundation of international law, extended its neutrality to all confessions, regardless of their creed.

See International Theological Commission, 'In Search of a Universal Ethic: A New Look at the Natural Law'.

<sup>345</sup> Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation', ( 546 See also Dan Danielsen, 'Anghie, Antony, Imperialism, Sovereignty and the Making of International Law (Book Review)', *American Journal of International Law*, 100 (2006), 757. 'Anghie sheds light on both the persistent partiality and biases of the European conception of a state-centered international legal order ... international lawyers sought simultaneously to promote a universal international legal order and to engage, manage, subjugate, control, and exploit the "uncivilized, violent, irrational, backward, dangerous, oppressed" (p. 317) non-European peoples, tribes, groups, colonies, mandates, dependencies, and postcolonial states'. See Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge Studies in International and Comparative Law; Cambridge: Cambridge University Press) xix, 356 p. 317.

<sup>346</sup> Onuma Yasuaki, 'When Was the Law of International Society Born? - an Inquiry of the History of International Law from an Intercivilizational Perspective', *Journal of the History of International Law*, 2/3 (2000), 66.

<sup>347</sup> Andrew Fitzmaurice, 'Liberalism and Empire in Nineteenth-Century International Law', *American Historical Review*, 117/1 (02//, 122-40.123)

<sup>348</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law*. 3

Westphalian theory of state sovereignty 'accepting the reality of Western standards of civilisation'.<sup>349</sup> That generation of international lawyers provided the genesis for a culturally aware, critical approach to international law, including Latin American, Asian, Islamic and feminist approaches to international law.<sup>350</sup>

However, the problem for religion in providing a parallel critique of international law is that it might not fit the "emancipation" narrative associated with these critiques of law. Critical Legal Studies has uncovered the history of international law shaped by perceptions embedded in the era of liberalism, nationalism and colonialism, and more recently liberal economics.<sup>351</sup> The transition from Primitive international law to Classical or traditional, and to modern is taken up by Kennedy and Becker.<sup>352</sup> However, in addressing the history of international law from the perspective of a religion it runs the problem of not fitting the legal discourse if its point of departure is from within the broadly western tradition of international law.<sup>353</sup>

Typically this amounts to the risky departure to form a qualified critique of the liberal, and secular basis of international law, which has taken its shape, its structure and its values from the 18<sup>th</sup> century.<sup>354</sup> It remains qualified because even when international law is critiqued, because it is believed that it carries assumptions

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<sup>349</sup> Arnulf Becker Lorca, 'Sovereignty Beyond the West: The End of Classical International Law', *Journal of the History of International Law*, 13/1 (7-73). 550.

<sup>350</sup> Hilary Charlesworth, 'Cries and Whispers: Responses to Feminist Scholarships in International Law', *Nordic Journal of International Law*, 65/3/4 (1996), 561-72.

<sup>351</sup> Nigel Purvis, 'Critical Legal Studies in Public International Law', *Harvard Journal of International Law*, 32/1 ( Martti Koskenniemi, 'The Politics of International Law', *European Journal of International Law*, 1 , Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*. Nathaniel Berman, "'But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law.', *Harvard Law Review*, 106 (1993), 1792, Anghie, *Imperialism, Sovereignty, and the Making of International Law*, Antony Anghie, 'Rethinking Sovereignty in International Law', *Annual Review of Law and Social Science*, 5/1 (291-310, Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', *Third World Quarterly*, 27/5 (2006/07/01, 739-53. David Kennedy, 'Law and the Political Economy of the World', *Leiden Journal of International Law*, 26/01 (7-48. Douzinas, 'The End(S) of Human Rights', (445-465.

<sup>352</sup> See for instance Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation', , Lorca, 'Sovereignty Beyond the West: The End of Classical International Law', (7-73. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', (385-420.

<sup>353</sup> Haskell notes the religious "gap" in the tradition of international law see John D. Haskell, 'Divine Immanence: The Evangelical Foundations of Modern Anglo-American Approaches to International Law', *Chinese Journal of International Law*, 11/3 (2012), 429-67.

<sup>354</sup> Purvis, 'Critical Legal Studies in Public International Law', (81. See Fitzmaurice, 'Liberalism and Empire in Nineteenth-Century International Law', (123. Fitzmaurice suggests that liberalism did not only justify colonialism and offer an apology for empire but also contributed to the debate on the conduct of the civilising missions. He states, 'within international law that a vigorous debate was also conducted about the civilizing mission, the hierarchy of nations, and the degree to which peoples at different levels of that hierarchy possessed rights'. However, missing from this critique is how colonial liberalism justified a particular exclusion along the line of religious confessions. Fitzmaurice does acknowledge the contribution of the clergy of the School of Salamanca who critiqued the Spanish conquistador expansion but this could hardly be termed a liberal challenge.

about the nature of religion, particularly Catholicism in this case, it may not imply a complete reordering of its philosophical shape. It suggests international law has departed from a different point of origin than that found in Catholicism.<sup>355</sup> It remains a risk to do so because it retains the temptation to represent one particularly orthodox version of the critique of international law, which Catholicism can offer from its historical experience, to the exclusion of other positions found within Catholicism on the question of the place of Catholicism in international law. There is also the risk that a critique stemming from Catholicism will be viewed as “other” to the Western experience of international law much as non-European critiques have been, particularly were the development of international law is presented along one dominant line of argument. This can be said even if we acknowledge the development of international law that reveals how Catholicism has been integral to its earlier development.<sup>356</sup> Establishing how that relationship became fraught to the point of becoming almost extraneous to international legal thought has therefore involves tracing the place of Catholic principles in the various *loci* in which these debates took place. Even this may seem not enough, to present a case for the relevance of historical Catholic jurisprudence, which aspires to broaden the resources available to international law in the light of the many practical and philosophical challenges it faces today.

If we approach a re-evaluation of the structure of international law from the account of various historians of international law we can identify that is not an unfamiliar critique. Legal historian John D. Haskell optimistically remarks that '[T]o a certain extent, this has begun to be corrected by legal historians, but these efforts are still relatively new directions in scholarship'.<sup>357</sup> Christianity, in other words, may be usefully deployed 'to de-naturalize settled understandings about the possibilities and limits of the contemporary international legal architecture'.<sup>358</sup>

International law carried with it many of the religious and cultural qualifications of the Reformation and thereby shaped its response to religion and international law. Even when law was deemed “secular”, it had become so through the enactment of a particular religious tradition. The exclusionary element in international law of particular religious traditions continues to shape its discourse. Driessen suggests a

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<sup>355</sup> Terrence Merrigan, 'Newman and Theological Liberalism', *Theological Studies*, 66/3 (2005), 605-21.

<sup>356</sup> See for instance, Muldoon, 'The Contribution of the Medieval Canon Lawyers to the Formation of International Law', (483-497. Hernandez, 'The Internationalization of Francisco De Vitoria and Domingo De Soto', (1031.

<sup>357</sup> Haskell, 'Divine Immanence: The Evangelical Foundations of Modern Anglo-American Approaches to International Law', (429-467.

<sup>358</sup> *Ibid.*

conflation between the state, law and secularism arises in that, ‘the rise of the nation-state, in turn, required a definitive victory over religious claims to political legitimacy and loyalty’.<sup>359</sup> Driessen also submits that, ‘even if some scholars grant that there is still some room for religion to publicly influence politics in democracies, many argue that doing so in a way that is compatible with democracy is still the result of a uniquely Western, Christian conceptual-theological distinction between religion and state’.<sup>360</sup> Equally, this could be developed for international law through a review of the many directions taken by legal and political philosophy.

Kennedy describes Gentili (1552-1608) and Hugo Grotius (1583-1645) as the Protestant equivalents of Francisco de Vitoria and Francisco Suarez and part of the transition period between the primitive and traditional era of international law.<sup>361</sup> This particularity is striking because it helps unravel one of the consequences of the turmoil or “violent shifts” ‘between two primitive schools [...]’<sup>362</sup> In Kennedy’s view ‘the abandonment of primitive scholarship may have resulted from its internal disintegration as much from as its inability to assimilate developing trends towards international political disintegration’.<sup>363</sup> Kennedy alludes to the fragmentation of the historical claims of an integrated and holistic foundation founded in the *respublica christiana* which had held together an overarching concord among sovereigns as far as the 16<sup>th</sup> century. In situating the Catholic Church within this developing polity we find its shrinking authority and a complex search by Catholicism for relevance in a transforming political environment.

Indeed in keeping with the secularisation narrative in International law, Haskell suggests, ‘legal historians typically situate the birth of modern international law in

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<sup>359</sup> Michael D. Driessen, 'Religion, State, and Democracy: Analyzing Two Dimensions of Church-State Arrangements', *Politics and Religion*, 3/01 (2010), 55-80. The idea that the State should be autonomous so as to make political decisions, ‘is often confused by scholars and politicians to mean that a democracy should also be secular, or more correctly, that a democracy is ideally underpinned by a society where religion has little influence outside the private realm’

<sup>360</sup> Ibid. 61 The does not exclude the contrary effect of religion on society, Driessen writes, ‘Throughout early attempts at democratization in several Catholic countries of Europe, for example, as in Spain, Italy, Portugal, and Belgium, religious forces were relatively successful in mobilizing effective opposition against early democratic forces. Incapable of forcing a complete religious retreat from the political realm, democratic leaders often finished by compromising with these religious leaders over the content of their democratic republics in order to gain a majority approval over democratic institutions.

To this day, religious authorities still wield enormous political power in these countries, through the remnants of Christian democratic political parties, state funding for buildings, education and clergy, and as a contentious public voice for laws and decisions on “life” issues like abortion, divorce, euthanasia and war.

<sup>361</sup> Kennedy, 'Primitive Legal Scholarship', (57.

<sup>362</sup> Ibid. 97.

<sup>363</sup> Ibid. 97.

the decline of Christian faith'.<sup>364</sup> This point is developed by a number of scholars, particularly Wilhelm G. Grewe who traced the development of international law from the unifying idea of 'Christendom' to the newer distinction of the 'universal society of mankind based on the natural law, which included the non-Christian world' as engaged by the Spanish scholastics.<sup>365</sup> Grewe believed there was a process of gradual decline in the confessional conviction which had shaped law in the previous centuries. The factors which influenced this trajectory included a concessionary period to tolerate various religious confessions following the Reformation, which commenced a return to classical Greek thought and reliance on rationalism and enlightenment to provide alternative foundations to international law, ideas particularly highlighted during the French revolution, and increasingly secularised international law. As Gross had suggested for him this represents 'the majestic portal which leads from the old into *the new world*'.<sup>366</sup>

However, Grewe notes that the Early Modern legal order was still very much that of Christendom but was also beginning to be describes as "Christian Europe".<sup>367</sup> Offering the examples of the natural law thought of Pufendorf, von Wolff and particularly Emmerich de Vattel, Grewe suggests they began to formulate law based on 'a universal legal community of all mankind derived from abstract principles of reason'.<sup>368</sup> Christendom had retained currency but not with the same vigour in the late seventeenth and eighteenth centuries. While jurists retained a religious reference point, the production of law became increasingly distant and secularised. Beaulac explains further that by the 18<sup>th</sup> century which had seen the systemisation of the law of nations it had been 'deemed a "Protestant science" because of its leading advocates".<sup>369</sup> Koskenniemi remarks:

In Germany and Switzerland legal reform often coincided with protestant (or perhaps better, anti-Catholic) activism -something shared by Rolin - and it is impossible to exaggerate the influence of Protestant public lawyers such as Bluntschli and criminal law reformers such as Franz von

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<sup>364</sup> Haskell, 'Divine Immanence: The Evangelical Foundations of Modern Anglo-American Approaches to International Law', (430).

<sup>365</sup> Grewe, *The Epochs of Interational Law*. 287.

<sup>366</sup> Gross, 'The Peace of Westphalia, 1648-1948', (28 [emphasis added]).

<sup>367</sup> Grewe, *The Epochs of Interational Law*. 288.

<sup>368</sup> Ibid. 287.

<sup>369</sup> Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', (281). Beaulac cites the following from the legal historian Nussbaum's *A concise History of the Law of Nations* (New York, Macmillan 1950) 140. 'In retrospect it appears that all the leading authors of the seventeenth and eighteenth centuries on international law were protestants, a condition persisting during the first decades of the nineteenth century and causing in 1847 the first histographer of international law, Kaltenborn, to declare international law "a Protestant science"'.<sup>369</sup>



Holtzendorff (1829-1889) as they applied their new domestic law methods to international law in the 1870's and 1880s.<sup>370</sup>

Carolyn Evans refers to Mark Janis' observation that, "by 1905, when Oppenheim published his classic *International Law*, religion no longer played the important role that it had in earlier texts: '[r]ather religion was part of the history of international law, something that once had mattered'.<sup>371</sup> Oppenheim could state that 'several jurists teach that the dominion of the Law of Nations extends only as far as Christian civilisation and that Christian States only are subjects of International Law'.<sup>372</sup> In fact he could assert, '[T]here is no doubt that the Law of Nations is a product of Christian civilisation. It originally arose between the States of Christendom only, and for hundreds of years was confined to these States'.<sup>373</sup> Only by the nineteenth century could Oppenheim recognise changes in this state of affairs where an alternative approach, in which the Law of Nations extends 'as far as humanity itself...' and whether civilised or uncivilised, are subjects of international law.<sup>374</sup>

In the 19<sup>th</sup> century there broadly remained a common Christian culture and morality which had 'become the element which bound the international legal community together'.<sup>375</sup> As subtle as this transformation might appear, shifting from confessional to cultural allegiance, it formalised the secularisation of law, on the one hand retaining the unifying and legitimising role which Christian culture preformed but on the other hand showing preference for the predominance of other more recent secular sources attributed to the modern age. Even where Grewe indicates that this process of evolution, from a deeply confessional order of law to a point where seeds of a universal law of nations might develop, it does suggest it carried various strong ideas about religion and religious confession. Over the course of the next century and a half, from the late seventeenth to the early 19<sup>th</sup> century, treaties conducted among states would begin to lose the

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<sup>370</sup> Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*.

<sup>371</sup> Carolyn Evans, 'The Double-Edged Sword: Religious Influences on International Humanitarian Law', *Melburn Journal of International Law*, 6 /1 (2) See also Baderin, 'Religion and International Law: Friends or Foes?', (1.

<sup>372</sup> Oppenheim, L. (Lassa), 1858-1919. *International law, a treatise* (London, New York [etc.] Longmans, Green, and co.. Kindle Locations 1426-1427.

<sup>373</sup> *Id* at Kindle Locations 1428-1429.

<sup>374</sup> *Id* at Kindle Locations 1428-1429.

Oppenheim placed the following conditions on 'admission of new members into the circle of the Family of Nations. A State to be admitted must, first, be a civilised State which is in constant intercourse with members of the Family of Nations. Such State must, secondly, expressly or tacitly consent to be bound for its future international conduct by the rules of International Law. And, thirdly, those States which have hitherto formed the Family of Nations must expressly or tacitly consent to the reception of the new member. (Kindle Locations 1440-1443).

<sup>375</sup> Grewe, *The Epochs of Interational Law*. 291.

Christian character, often explicitly stated in their preambles dedicated to the Holy Trinity, alongside the phrase “*toutes les nations civilisées de la terre*”.<sup>376</sup> Grewe identifies this period as a significant turning point ‘wherein Christianity no longer played its role as the foundation of thinking about the international legal community but was replaced by the ideas of a comprehensive “community of civilised nations”’.<sup>377</sup>

Haskell proposes a place of critique in which we can develop a proposition that law retained ideas about religion that have moulded the modern international legal order. Haskell appropriately states that, ‘liberal Protestantism in fact played a formative influence on the discipline—what might be termed, a modern evangelical—orientation to governance’.<sup>378</sup> Haskell progresses the idea that ‘if the Church was to be abandoned, it was only its Roman Catholic variety, which was increasingly seen as a vestige of the past, symbolizing the stagnation of dogma and fear of liberty’.<sup>379</sup> Haskell proposes that ‘a significant number of 19<sup>th</sup> century jurists wrote warnings against Roman Catholicism’.<sup>380</sup> Indeed, International jurists shared their theological peers’ aversion to Roman Catholicism.<sup>381</sup> Lieber and Bluntschli would regularly equate the Roman Catholic Church as well as trade unions in equally disparaging terms:

[If] the institution is intrinsically bad, or contains vicious principles, it lends additional and fearful power to the evil element within it, and gives a proportionate scope to its calamitous influence... The gigantic institutions of the Society of Jesus, and some of the modern trade unions, are impressive and amazing examples... Thousands who have committed acts of crying cruelty as members of the Holy Office would not have been capable of committing them individually.<sup>382</sup>

In Haskell’s view, ‘historical study suggests that the project to develop the discipline into a distinct intellectual and professional set of expertise was substantively mediated through a Protestant sensibility, which viewed international law as a form of capitalist evangelicalism’.<sup>383</sup> This particular approach, to remake

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<sup>376</sup> Ibid. 289.

<sup>377</sup> Ibid. 289.

<sup>378</sup> Haskell, 'Divine Immanence: The Evangelical Foundations of Modern Anglo-American Approaches to International Law', (430)

<sup>379</sup> Ibid. 462.

<sup>380</sup> Ibid. 462. Haskell lists the international jurists Nys, Bluntschli, Calvo, Phillimore, Ranke and Twiss.

<sup>381</sup> Ibid. 461.

<sup>382</sup> Ibid. 463 at footnote 90. See Francis Lieber, *On Civil Liberties and Self Government* (3rd edn 1883), 266–269.

<sup>383</sup> Ibid.

the state but also to use international law, became an approach for building a uniquely reformed Christian civilisation. Berman remarked that, 'the Western legal tradition, which is now in crisis partly because its historical foundation in religious belief systems has been forgotten'.<sup>384</sup> Suggesting that in the light of globalisation, legal traditions that Western law thought might have consigned religion to history may in the future find it necessary to review those traditions to enable the creation of a truly world law.<sup>385</sup>

It is interesting to observe the comparison between the problem of situating Catholicism within international law and the development of Third World Approaches to International Law.<sup>386</sup> For instance, the scholar Chimni views the historical task of this scholarship as 'undertaken to show how the development of international law since the 16th century was linked to the colonial project'.<sup>387</sup> While this concern for colonialism has focused on the 'laws relating to the acquisition of territory, recognition, state responsibility and state succession', there is no sense of how that concern for territorial sovereignty belonged to a separate legal tradition within the earlier Christian development of international law. If these concerns shaped the necessities of colonialism they did so from one particularly reading of European history that had predominated traditional international law in the 19<sup>th</sup> century. International law's alienation of third world peoples was generated from a particular context with particular exclusive concerns not alone in the political and civic but also in the religious sphere. Religion was not alone a vehicle for colonialism but also because of the shape of early modern international law, one of the exclusions from its Colonial and imperial architecture.

In contrast with Anghie's reading of Spanish scholastic Francisco de Vitoria, the scholastic foundation to de Vitoria's writing leads in a different direction.<sup>388</sup> Anghie views the argument of de Vitoria as a prerequisite for colonisation and providing the means to subdue the population of the Americas. The alternative is to suggest that de Vitoria's argument was to moderate the ongoing colonisation by establishing limits on the sovereignty of the Spanish monarch and limits to papal

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<sup>384</sup> Harold J. Berman, 'The Historical Foundations of Law', (54), 13-24. 24

<sup>385</sup> See M. Mutua and A. Anghie, 'What Is Twail?', *Proceedings of the Annual Meeting (American Society of International Law, 94/April (2000)*, 31-40. 512. They assess those who 'argues the case for an egalitarian Global Law of Peoples'. And remark 'this battle for an egalitarian Global Law of Peoples will be a long and hard one and international lawyers will again have to choose. In short, the discussion of global justice, like global history, will assume a critical edge in the near future'.

<sup>386</sup> Ibid.

<sup>387</sup> B S Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach', *Melburn Journal of International Law*, 8 (501).

<sup>388</sup> Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', ( 742-744.

jurisdiction by arguing for the entitlements for the peoples of the Americas under the laws of *jus gentium*. These particular arguments are located in de Vitoria who provided grounds for reciprocity under the same code of law found historically in the canon law that governed the *res publica christiana*. As the scholastic jurists sought to interpret the ecclesiastical and civil powers, they focused on the right to universal *dominium* and they provided various limitations on the exercise of that power. They applied and extended these limits in their consideration of the Spanish encounter with non-Christian peoples. Influenced by a different understanding of sovereignty than from the post-Westphalian version, this second generation of Thomistic scholastics understood territorial sovereignty quite differently from their contemporaries.<sup>389</sup> Indeed, influenced by the philosophical and theological prepositions of Augustine and Aquinas among others, they provided a basis of communication among peoples. They retained a hierarchical legal order, through an organic unity between natural law, positive law and divine law, which sought to avoid a purely rationalistic legal system that was wholly governed by the external exercise of sovereign power. In Angie's reading of de Vitoria a scholastic interpretation of his writing appears to be absent and therefore Angie tends towards a post-Hobbesian interpretation bound by strict jurisdictional and territorial ideas about the state.

Because of a lack of familiarity with ideas available in scholastic theology and philosophy, the problem we observe, are not that uncommon in international legal scholarship.<sup>390</sup> There remains a tendency to reproduce international law as linear and progressively secularised, and it keeps the cultural qualifications developed during a period when international law became a professional discipline in the 19<sup>th</sup> century.<sup>391</sup> Therefore, with the gradual secularisation of international law it saw religion peripheral to its concerns. This approach appears to continue to shape international law's discourse and gives the impression it has limited its reading of

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<sup>389</sup> See Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*.

<sup>390</sup> Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*. Koskenniemi engages with the history of international law and gives a good account of the catholic contribution to international law but has basically accepted its secularisation and the linear direction of its history.

<sup>391</sup> Ibid. 122-157. Koskenniemi notes that in the 19<sup>th</sup> century 'professional writing is compatible with "positivism" as well as "naturalism" – indeed builds on both' (132). Similarly, 'the professional view replaced a universal natural law with the idea that human history consisted of an objective development towards the fullest realisation of human freedom, manifested internationally in the freedom of the nation to fulfil its "spirit" or purpose. Law manifests history in the way it allows each nation the degree of freedom corresponding to its stage of development in history's objective progress. To be objective and scientific in the professional era was to understand the central role of history in the development of international law' (144, footnotes omitted).

scholastic and early modern international law to justify how religion is a peripheral concern.<sup>392</sup>

## 2.5. Conclusion

As this chapter has detailed, a break in the Early-Modern period of international law occurred not only within Christianity, or between Catholic and Reformed Protestants but also a break from Christianity to a secular understanding of international law.<sup>393</sup> International law inherited a liberal and Enlightenment reading of law but also a secularised idea of law that separated the relationship between theological reflection and international law.<sup>394</sup> As Kennedy observes, there are limitations in linear and progressive narratives of international law providing,

[...] an interesting structure - political and social roots transformed by philosophy into institutional modernity. Religion begins as a social force, is transformed into a 'philosophy' and survives only as a set of 'principles', guiding the practice of institutions.<sup>395</sup>

The secularisation thesis, which has dominated this linear and progressive model, dissipates when this narrative is ruptured with the re-emergence of alternative

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<sup>392</sup> George, 'Grotius, Theology, and International Law: Overcoming Textbook Bias', (626. William P. George writes of the historical bias in the narrative of international law that saw Grotius as purely secular rather than at the apex of the humanist Christian era of the 16th century. George suggests that the reintegration of the histories of theology and international law is only beginning. His survey of international scholars who's history omit significant theological elements of Grotius work are reassessed by George to show that Grotius bridged the era between the religious and secular, and was conscious of his theological background which writing his legal theory.

He points to the prominent 20th century theologian Lonergan who charts the intellectual shift to exclude the theological narrative from the work of significant instigators of the modern period. Lonergan notes that as culture removed taken for granted relationship between theological reflection and international law, [the primitive period of international law in Kennedy's view, found in de Victoria, Suarez and Grotius],

...that the remainder will become distorted in an effort to compensate. Further such elimination, mutilation, distortion will, of course, be admired as the forwards march of progress, while the evident ills they bring forth are to be remedied, not by a return to a misguided past, but by more elimination, mutilation, distortion.

Based on this assessment, George recommends international legal scholars provide a 'heuristic framework that can begin to embrace the normative and descriptive issues of development and regression in international law, on the one hand, and the relationship of international law to religion and theology, on the other'.

<sup>393</sup> Danchin, 'The Emergence and Structure of Religious Freedom in International Law Reconsidered', (481. Danchin writes of a "competing theoretical positions" as consequence of major structural shift on religious freedom (460).

<sup>394</sup> Talal Asad, *Formations of the Secular, Christianity, Islam, Modernity* (Stanford: Stanford University Press). Asad offers an original critique of the idea of Europe as "secular" and the modern as it interacts with the religions of world. Austin Harrington, 'Habermas and the "Post-Secular Society"', *European Journal of Social Theory*, 10/4 (November 1, 2007, 543-60. Harrington explains the boundaries between faith and reason which Habermas explores in his later work.

<sup>395</sup> Kennedy, 'Images of Religion in International Legal Theory'. 146.

readings of the role of religion, particularly religions that have been consigned to the history of international law and its structure.

Liberalism's complicity in the development and sustaining of colonialism is well addressed today.<sup>396</sup> While liberal thought had provided an apology for empire, Andrew Fitzmaurice argues that 'a vigorous debate was also conducted about the civilizing mission, the hierarchy of nations, and the degree to which peoples at different levels of that hierarchy possessed rights'.<sup>397</sup> Fitzmaurice has shown liberal thought was capable of internal critique of its values but when this is brought to an engagement with religion, scholarship in international law has a tendency to participate in a defence of an historical narrative that regulates religion to a vestige of the past, willingly contributing to 'an act of historical amnesia'.<sup>398</sup> Haskell proposes that a particular Western version of secularisation has led to an eschewed reality in international law scholarship, stating,

[...] this memory allows members of the discipline to design an almost impenetrable edifice: it is not the fault of international law per se when religious or political violence erupts, but is instead rationalized as a modern vestige of the primitive (irrational) origin of humanity.<sup>399</sup>

There exists the possibility for international law to sustain a critique of its view of religion. There is a temptation to return to maintaining the boundaries between religion and law, where religion is deemed too unpredictable, volatile, and disruptive. An understanding of the evolution of international law and the contribution of Catholicism to that development over many centuries can lead to an appreciation of why religion and law intertwines and how this interaction is never truly exclusionary.

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<sup>396</sup> Fitzmaurice, 'Liberalism and Empire in Nineteenth-Century International Law', (122)

<sup>397</sup> Ibid. 123

<sup>398</sup> See in particular Tina Beattie, "'Justice Enacted Not These Human Laws" (Antigone): Religion, Natural Law and Women's Rights', *Religion and Human Rights*, 3 (2008), 249-67. 258-259. The feminist theologian Beattie suggests,

[...] a double barrier was erected between the modern self and its Christian antecedents. First, the Reformation barred access to many of the texts and traditions of the medieval Church, with their synthesising of faith and reason, and their sacramental vision of a creation graced in all its aspects by its creator. Second, the Enlightenment substituted the rational God of theism for the personal God of the Christian faith, preparing the way for the gradual erasure of God altogether from philosophical reflection, so that modern and postmodern theory, including feminist theory, positions itself unquestioningly on the near-side of the death of God and the end of theology as a viable form of intellectual enquiry.

<sup>399</sup> Haskell, 'Divine Immanence: The Evangelical Foundations of Modern Anglo-American Approaches to International Law', (433). See in particular Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict*

## Chapter 3: **Moving from the Periphery to the Centre of International Law**

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### **3.1. Introduction**

By the end of the 19<sup>th</sup> century Catholicism had become a peripheral player in the international arena. This would change in the 20<sup>th</sup> century as Catholicism would re-emerge as a formative participant in the creation of the Human Rights project. Drawing upon its own understanding of the natural law and the formation of the state, the Catholic Church would shape democratic Constitutions across Europe. The Catholic Church's engagement with the construction of human rights became a vehicle to participation in the international legal system mapped out in a number of ways. Firstly, Section 3.3 traces the evolution of Catholic Church as it began to prioritise the civil sphere, becoming more engaged as a non-state actor and developing a theoretical groundwork for Christian democracy which appeared in the post-World War II democratic movements. Secondly, Section 3.4 appraises the Catholic Church's advancement by prioritising the soft power diplomacy of the Holy See, and looks to modern theoretical concepts to understand this process. This emphasis on soft power became a way to counter its isolation from the international community, particularly during the period of the loss of the Papal States and the formation of the League of Nations. Thirdly, Section 3.5 proceeds to assess in what manner the Catholic Church began to prioritise the role of the Holy See as an observer state at the United Nations. This reveals increasingly broader participation in the formation of future human rights treaties, with activism taking up by US Catholics, after the establishment of the United Nations. This Chapter concludes by determining how this latter engagement provided the Catholic Church with theoretical underpinnings to further shape the direction of human rights, in its negotiation and engagement with a globalised world.

Understanding the influence of the Catholic Church and Catholicism in general in the 19<sup>th</sup> and early 20<sup>th</sup> century requires that we situate our analysis in a broader context of the European international order, a context that included the imperial ambitions of European nations, and as a consequence the use of colonialism. The Catholic Church's position as a formative influence on the international order had significantly shifted to becoming peripheral to its structure and normative framework. Responding to this new environment the Catholic Church reacted in a number of ways, which included focusing its missionary objectives to colonial settlements of imperial nations. International law had consolidated the

justification of state sovereignty of the nation state to support the imperial projects of the Great Powers, which included their colonial adventures. The Catholic Church responded to this transformation in international law, and its own peripheral status, both directly and indirectly. There were a number of elements to explain how the Catholic Church repositioned itself in the international legal order, which includes participating in the development of human rights as a legal and not just a moral category. If jurists who began to give content to international law had believed legal positivism as the only coherent framework to support state consent and the binding of treaty law, the Catholic Church reemphasised natural law as the foundations of justice and the relations of states. That emphasis on natural law provided the Catholic Church with the groundwork to push their understanding of human rights towards becoming a legally recognised norm of international law. However, the struggle for the Catholic Church to renegotiate its place within the legal order and take up this role as an early advocate of human rights meant it had to resolve other issues which had developed before the language of human rights could be embraced. State sovereignty had been a product of the Westphalian order and the growing nationalism that had consumed Western nations in the 19<sup>th</sup> century. Democracy produced a civil space which the Catholic Church quickly tried to fill but first the Church had to come to terms with its own ideological preference for autocratic governments. That journey was through understanding totalitarian systems of both the far right and far left, fascism and communism. Only by rejecting autocracy and the temptation to support totalitarianism regimes could the Catholic Church begin to highlight human dignity and human rights within the democratic state, which had become the preferred post-war outcome of Western Europe.

The internal structure of the Western international legal order produced a model of state sovereignty that could be highly restrictive. The Catholic Church found itself on the periphery of that structure because it had lost its place as sovereign state when the papal states were overthrown, a product of Italian nationalism. The Catholic Church was also a beneficiary of the same international order's model of state sovereignty as it benefited from the imperial expansion of European states around the globe to colonise "non-states". This duality of being both a beneficiary of imperialism because European state sovereignty could view their conquests as unequal in the sovereign system, and as peripheral to the same sovereign system is central to this account. The international order had produced a standard of civilisation with a particular understanding of state sovereignty which could include and exclude states. The Catholic Church was both complicit in creating this standard and subject to its regulation.



The defining of non-European peoples according to a standard of civilisation was part of the project of the formation of international law and the positioning of religion.<sup>1</sup> Anghie points out that the theory and history of international law is deeply connected. This evolution included shaping international law to align with a concept of civilisation that had Christian roots but was predominantly concerned with a 19<sup>th</sup> century understanding of civilised society and culture. That ideal, both included and excluded Catholicism, thereby setting the Catholic Church on a course of participation with colonialism and collision with the newly formed nation state. This reality left the Catholic Church with a significant post-colonial legacy around the world particularly shaping subsequent church-state relations where the Church was influential. It also impacted on the priorities the Catholic Church developed in its Post-World War II participation in the international order with the founding of the United Nations.

### **3.2. The Catholic Church Situated in Classical International Law**

A pivotal period in the history of international law is described as its classical or traditional period of legal scholarship that had defined the resources upon which international law could be developed.<sup>2</sup> Anghie suggest that in transitioning to the modern period of international law, following the Second World War there was a sense of making good the complicity of international law in facilitating colonialism and ‘subsequently made decolonization a central mission of the international system in the period of the United Nations’.<sup>3</sup> Anghie critiques the view that International law had been reformed by taking up the plight of unrecognised nations who had been denied sovereignty and relegated to the peripheral of the international system in an earlier period. In contrast, he argues that in the period of classical international law, ‘ancient societies with established political systems and complex forms of government, such as China and Japan, for instance, were

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<sup>1</sup> Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', (128)

<sup>2</sup> Kennedy, 'Primitive Legal Scholarship', ( This division of international law scholarship follows Kennedy's use of primitive, traditional and modern. However, traditional international law has been interchangeable with the use of classical international law to define the post-Westphalian period up until the First World War, focusing in particular on the 19<sup>th</sup> century concerns with legal positivism, state sovereignty (with nationalism) and colonialism. See further Hans-Ulrich Scupin, 'History of International Law, 1815 to World War I', in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, (Online (opil.ouplaw.com/home/EPIL) edn.; Oxford: Oxford University Press, 2011).

<sup>3</sup> Antony Anghie, 'Towards a Postcolonial International Law', in Prabhakar Singh and Benoît Mayer (eds.), *Critica International \* Law: Postrealism, Postcolonialism, and Transnationalism* (Oxford: Oxford Scholarship Online), 124-42. 128.

regarded as not properly sovereign'.<sup>4</sup> The exclusion and unwillingness to recognise Non-Western States was one of the hallmarks of the kind of state sovereignty developed in the 19<sup>th</sup> century during the classical period of international law. A primary model of sovereignty developed after Westphalia governed the inter-state relationships of sovereign states in the Western framework. This balance of power of equal sovereign states within the Western world was not extended to the imperial subjects of other nations and peoples around the world. Anghie argues that 'Western sovereignty developed a series of manoeuvres by which non-Western models of sovereignty could be excluded and subordinated'.<sup>5</sup> This distinct model of sovereignty was applied to the imperial projects of Western states as they created colonial footholds around the globe. Imperialism reshaped state sovereignty as it developed in the Western hemisphere, distorting its premise and applying a different standard to non-Western nations. Some factors of that exclusion rested upon a cultural and societal sense of Western superiority, their "standard of civilisation".<sup>6</sup> Anghie continues with a reproduction of the struggle of non-western states to establish their equality within the Law of Nations, moving from non-state representation at the periphery to recognition as sovereign equals, some enduring difficult anti-colonial struggles for self-determination, to participation as equals in the modern international system.<sup>7</sup>

Whilst Anghie analysis goes part way in providing an understanding of the construction of international law's theory of sovereignty, imperialism and colonialism, what is obscured in this reading is the complex relationship with religion in the Western world.<sup>8</sup> There are a number of reasons why religion has remained concealed from the analysis. One argument is that international law had been perceived as a secular science by the mid-19<sup>th</sup> century.<sup>9</sup> The once valued secularisation thesis, which believed in the advance of secularity, progress and

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<sup>4</sup> Ibid. 129.

<sup>5</sup> Ibid. 130. It might be interesting to consider that the colonial encounter that shaped the sovereignty doctrine of Western states been initiated

<sup>6</sup> Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', ( 65. See also G.W. Gong, *The Standard of Civilization in International Society* (Oxford University Press, Incorporated).

<sup>7</sup> Anghie, *Imperialism, Sovereignty, and the Making of International Law*.

<sup>8</sup> Antje Von Ungern-Sternberg, 'Religion and Religious Intervention', in Bardo Fassbender et al. (eds.), *The Oxford Handbook of the History of International Law* (Kindle edn.; Oxford: OUP Oxford, 2012). 294. Ungern-Sternberg discerns that 'two general developments— towards a secular legal order and towards an equal treatment of all religions in international law— can be discerned'. In Ungern-Sternberg's view the sectarian division of international law is gradually replaced 'by norms respecting the equality of all religions and denominations', thereby removing religious sources and motivation for the creation of international law norms. Ungern-Sternberg defined secularisation in the context of international law: 'secularization signifies that a legal order gets detached from religion' (294).

<sup>9</sup> Ibid. 294.

modernity, had shaped a view that religion was not a significant factor in understanding classical international law.<sup>10</sup> Religion had been consigned to its own peripheral status within the Western international order. The social and cultural values that shaped classical international law and its imperial world view reconfigured its relationship with religion, redefining the boundaries between religion and the state.<sup>11</sup> If the concept of *Terra nullius* had justified the conquest of uninhabited territory beyond Western states, a void within the international system of law, once filled by religious sources, required a wholly new set of legal and scientific doctrines.<sup>12</sup> The subjugation of religion to the state was an important element in defining sovereignty but also the use of religion in support for conquest and dispossession.

Anghie proposes applying a framework he terms the “dynamic of difference” to the structure of classical international law’s methodology. Drawing on earlier sources, particularly Francisco de Vitoria, he indicates how the naturalistic jurisprudence of de Vitoria is one of the first elements of the dynamic of difference. In Anghie’s view, de Vitoria produces sufficient legal argument to facilitate Spanish acquisition of new territory, including justifying war, on the basis that non-western nations had inadequately compared with western ideals of sovereignty. This argument is superimposed on 19<sup>th</sup> century classical international law without acknowledging the shifting context by which sovereignty was transformed. It would appear the move from naturalism that informed de Vitoria, to positivism of 19<sup>th</sup> century jurists, is too simply stepped to create a parallel of how difference between non-western civilisations and sovereign states was understood in each historical period.

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<sup>10</sup> See further Kennedy, 'Images of Religion in International Legal Theory'. For a discussion of secularisation theory see José Casanova, 'The Secular and Secularisms', *Social Research*, 76/4 (Winter 2009 2009), 1049-66. and Berger, *The Desecularization of the World : Resurgent Religion and World Politics*.

<sup>11</sup> Scott M. Thomas, 'Taking Religious and Cultural Pluralism Seriously', in Fabio Petito and Pavlos Hatzopoulos (eds.), *Religion in International Relations: The Return from Exile* (New York: Palgrave MacMillan, 2003). 25 -28. Thomas notes that scholars now acknowledge a secularised reading of the history of Westphalia 'retrospectively apply a modern concept of religion – as a set of privately held doctrine or beliefs- to societies that had yet to make this transition'. Comprehensive religious views held by communities and embraced by nations fragmented in the early-modern period leading to the privatisation of religious faith and the gradual separation of positive law from religious morality (and natural law) in the governing of the nation state. Tomas further proposes that for 'international society to be born, religion had to be privatised and nationalised by the state...' (28).

<sup>12</sup> Kennedy, 'Images of Religion in International Legal Theory'. 148 - 149. Roman law, legal positivism and laws of trade and war ensured 'international law slowly matured as a comprehensive doctrinal fabric rendered coherent by a set of 'general principles' and authoritative by its 'positivist' link to sovereign consent'. Further Kennedy remarks the price for self-determination was offered by the secular order to outsiders,

[...] so long as religion can be kept marginal...In short, the outside only can come into being as an institution – a 'state', a 'people', a 'citizen'. And we will insist on the marginality of religion at the core of our practice, writing and rewriting the practice of chastened participation, of faith reduced to inspiration, or religion as the animator or handmaiden of international order – never quite forgotten, indeed insisted upon in its intermittency (150).

Europe's transformation between Westphalia and the 19<sup>th</sup> century included a profound religious and sectarian divide about the place of Christianity in the international legal order. Christianity's place as justifying 19<sup>th</sup> century imperialism and colonialism and as a companion to the sovereignty of the nation state in Western Europe was not as well defined as its precursors had been. The rhetoric of Christian civilisation used by 19<sup>th</sup> century jurists was not evenly understood and applied because it became both secularised and part of the sectarian divide within Europe. In post-Reformation Europe there were many Christianities rather than a homogenous and unified understanding of the nature of religion. Post-Westphalian Europe reconfigured the place of religion in relationship to the state, subordinating religion to the state, secularising the state and aligning the state along confessional lines. The "standard of civilisation" was part of the techniques applied by the exercise of state sovereignty to reinforce both a Confessional division within Christianity and the secularisation of the state in international order. Christianity played its part in the Western imperial project of colonisation but it did so along its older confessional and sectarian divisions and was bound by a secularised and exclusive international order, that both subordinated religion to the state and often on the periphery of the *raison d'état* of states. Where Anghie proposes that 'imperialism is not simply of historical interest, but rather, of ontological interest: it is a crucial element of the very being, the very character of international law', the place of religion in that ontological transformation is unfortunately obscured.<sup>13</sup>

However, Anghie has cautioned 'the essential structure of the civilizing mission may be reconstructed in the contemporary vocabulary of human rights, governance, and economic liberalization'.<sup>14</sup> Simpson has further suggested that Civilisation 'was a usefully elusive term'.<sup>15</sup> It could be said that Christianity was no longer the predominant mark of the civilizational project of Western Imperial powers but was part of the elusive language marshalled and utilised to serve the goals often at odds with the tenants of any religion and argues that,

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<sup>13</sup> Anghie, 'Towards a Postcolonial International Law'. 140.

<sup>14</sup> Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', (80. See H.M. Carey, *God's Empire: Religion and Colonialism in the British World, C.1801–1908* (New York: Cambridge University Press, 2011). 17. Cary proposes it is better 'to consider colonisation as one phase in a series of imperial encounters which might begin with first contact...The Churches were engaged with the progress of colonisation in all its phases'. Further Carey remarks for the churches, 'colonialism continued well after the departure of more overt institutions of imperial power[...].'

<sup>15</sup> G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge Cambridge University Press, 2004). 243.

[...] the standard of civilisation can be perceived as an early example of liberal anti-pluralism since the result was the exclusion from the system of those states that failed to meet the (liberal) standard.<sup>16</sup>

This suggests that the particular standard used by Western states was not only applied to relations with non-Western states but also internally to states considered civilised. Therefore, while the standard of civilisation excluded non-Christian states, it had the potential to establish an internal standard based on the various post-Reformation Christianities upheld by states as well. In post-Reformation Europe there was no monolithically dominant Christian denomination but rather many Christianities. The distinction post-Reformation international law made about religion excluded not alone the religions of non-Western states but also carefully reshaped its relationship with religion in the West. It thereby precluded some Christianities and included others, in other words, preferred a deeply secularised idea of religion. In particular, Christianities that competed with new shape of the modern Western state, the modern understanding of sovereignty as a secular institution and the nature of international relations, were set on the periphery.

### **3.2.1. A Civilisation Project**

The Catholic Church had participated in the Imperial ambitions of European states since the 15<sup>th</sup> century, and earlier.<sup>17</sup> The expansion of Spain and Portugal in the Americas had led to a considerable advance of Catholic missionary efforts.<sup>18</sup> As detailed in Chapter two, (Section 2.2.5) there were a number of legal and political responses to the encounter with the peoples of the Americas by Christopher Columbus, and from the subsequent process of colonisation, including the religious

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<sup>16</sup> Ibid. 243. Simpson stresses that 'the standard of civilisation was a way of imposing a particular set of values on the international order'. It is striking that Simpson references the role of the Ottoman Empire as 'a major, if not the major, source of religious competition to European Christianity in the seventeenth and eighteenth centuries...' The exclusion and unequal (inferior) sovereignty of the Ottoman Empire led to the belief that for Turkey to reform it must be secularised thereby excluding incompatible forms of Islam, just as Western powers had sought to exclude incompatible forms of Christianity. The removal of religious competition meant the relegating of competitive religions to the periphery of the emerging international order.

<sup>17</sup> For a brief history of earlier European expansion, particularly on the Crusades and European relations with the Mongol Empire, see Brett Bowden, 'The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization', *Journal of the History of International Law / Revue d'histoire du droit international*, 7/1 (2005), 1-24. 4-8. See also Muldoon, 'Papal Responsibility for the Infidel: Another Look at Alexander VI's "Inter Caetera"', (177. Pope Alexander VI's Papal Bull "Inter Caetera" (4 May 1493) was followed on the return of Christopher Columbus and provided justification for colonial expansion by Spain.

<sup>18</sup> See S.J. Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004). 16-19. See further P. Thornberry, *Indigenous Peoples and Human Rights* (New York: Juris Publishing, 2002). 63-79.

challenges to its morality and legality.<sup>19</sup> This colonial expansion, coupled with missionary activity in China and Asia revealed how synonymous Christianity had become with trade and empire.<sup>20</sup> Bowden goes further to say, 'European expansion was largely an aggressive act involving what was usually the violent conquest and suppression of indigenous peoples'.<sup>21</sup> It would appear that far from this earlier colonial expansion being a cohesive programme extending across Europe outward, it was instead an extension of the complex network of empires geographically located across Europe. He proposes that 'for centuries Europe's violence and exploitation was directed inward toward conquering immediate neighbouring peoples just as much as it was directed against distant peoples'.<sup>22</sup> This internal Western strife included an often violent repositioning of the place of religion in the political *raison d'état* of Western states. Only in the latter part of the seventeenth and eighteenth centuries could comprehensive agreements among states stemming from their national (and secularised) sovereignty provide stability to Europe.<sup>23</sup> This same balance of power provided justification for colonial expansion in that period to non-European countries and "non-nation" lands deemed lacking sufficient sovereignty and civilisation to be subjects of international law.<sup>24</sup> Non-European nations were 'relegated to both the geographical and

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<sup>19</sup> On the debates at Valladolid in 1550–51 between Juan Gines de Sepulveda and Bartolome de las Casas See Brunstetter, 'Sepúlveda, Las Casas, and the Other: Exploring the Tension between Moral Universalism and Alterity', ( 412. See also Vitoria's three *relectiones* of 1532 and 1533 *De potestate ecclesiae* [the power of the church] and *De potestate papae et concilii* [the power of the pope and the council] precede the famous *Relectiones de indiis* [On the American Indians] which he delivered in 1538 and 1539. See also De Vitoria, *De Indis Et De Ivre Belli*. See also De Vitoria, *Francisco De Vitoria: Political Writings*.

<sup>20</sup> Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', (393. See also Carey, *God's Empire: Religion and Colonialism in the British World, C.1801–1908*. Carey suggests that Irish Catholicism 'came to dominate the Catholic Church throughout much of the settler British world' (115) thereby transforming 'the Catholic Church as a worldwide movement, breaking the dominance wielded by Catholic states of the *ancient regime*' (144). The Catholic Church extended into British Colonies and 'represented the most significant Irish investment in the empire that British enterprise opened up to Catholic settlement' (115). Prior to the French Revolution it was French Catholicism 'that left the largest imprint on colonial territories under British rule' (117). Carey further notes that 'Missions and colonial churches had declined with the fading imperial fortunes of Spain and Portugal and the revolutionary implosion in France' but with the fall of Napoleon, 'the Vatican busied itself with planning and implementing a massive global expansion that, for the first time in centuries, would be financially independent of the old regimes in Europe' [footnote omitted] (126). On the Church's path to financial independence in the 19<sup>th</sup> century see further John Pollard, *Money and the Rise of the Modern Papacy: Financing the Vatican, 1850-1950* (Cambridge: Cambridge University Press, 2005).

<sup>21</sup> Bowden, 'The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization', (2. See also Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', (7-8.

<sup>22</sup> Bowden, 'The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization', (3.

<sup>23</sup> Gong, *The Standard of Civilization in International Society*. 4.

<sup>24</sup> Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', (3.

theoretical peripheries of the discipline of international law.<sup>25</sup> This would apparently include their cultural and religious sources of law.

Anghie suggests one distinction of a positivistic reading of international law originating in this period was the distinction between civilised and non-civilisation nations 'and asserted further that international law applied only to the sovereign states that composed the civilized "Family of Nations"'.<sup>26</sup> In this logic of sovereignty, expressed through positivistic thought,

[...] the sovereign asserts its supremacy by presenting itself as the means by which society comes into being and operates. Through recognition doctrine, sovereignty doctrine is reconstructed and presents itself as self-contained, coherent, comprehensive, and all encompassing.<sup>27</sup>

In Anghie's view society and culture become part of the Western theory of sovereignty and shaped colonialism to create distinctions between states. Recognition of sovereignty was a key to equal status within the system of International law in the 19<sup>th</sup> century. Anghie remarks that the sovereign European state 'was established through reliance on the concept of society'.<sup>28</sup> Therefore Anghie proposes,

[...] all of the interactions between European and non-European societies in the previous four centuries, which suggested the existence of a family of nations that included non-European societies, are largely dismissed.<sup>29</sup>

The historical experience of Christendom's interaction with non-European societies is largely forgotten as a new conception of the sovereign state is forged and a new set of priorities are established. While European states maintained their status as Christian states, that understanding had also become altered to affect their relationship with Christian religions in the West and their negotiations with non-Western states, including with their cultures. The unified idea of Christendom had all but become a loosely arranged confederation of numerous and fragmented Christian confessions. The contestation between these Western and non-Western states revealed 'that the concepts themselves are far from neutral, that

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<sup>25</sup> Ibid. 3.

<sup>26</sup> Ibid. 4. Anghie contrasts this with naturalistic accounts which viewed 'a universal international law deriving from human reason and applying to all peoples, European and non-European'.

<sup>27</sup> Ibid. 65.

<sup>28</sup> Ibid. 69.

<sup>29</sup> Ibid. 69.

they are racialized and contain within them the discrimination that non-European people have attempted to contest'.<sup>30</sup>

Saba Mahmood identifies that the missionary endeavours of Western Christianity in the 19<sup>th</sup> century was predicated on a lengthy history of re-negotiating the place of religion in Western Europe. Therefore she says that missionary activity,

[...] did not simply pave the way for colonial rule (as is often noted) but played a crucial role in shaping and redefining modern Christianity to the requirements of an emergent liberal social and political order in Europe.<sup>31</sup>

Missionary activity was a central concern of many Western nations' expansion during their imperial projects and 'was important to developments within Christianity and to many of the central ideas and institutions of Latin Christendom'.<sup>32</sup> In examining the development of secular power formed and developed the shape of religiosity and the "non-secular" that informed the development of the modern state, Mahmood asks, '[w]hat are the mechanisms, institutions, and strategies of modern governance through which an authoritative definition of secular religiosity is secured in modern liberal societies?'<sup>33</sup> She proposes that 'the greatest challenge of our time' is the prising apart of 'an account of Christian secularism that remains blind to the normative assumptions and power of Western Christianity'.<sup>34</sup> Understanding the influence of the renegotiation of the Christian religion in relationship to the state and with the emerging international order, particularly through its colonial endeavours, offers a response to Mahmood's challenge.

The liberal secularism of the emerging international legal order was a highly circumscribed worldview with a specific cultural and historical perspective about religion, including the Christian religion.<sup>35</sup> The ordering and structure of religion is

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<sup>30</sup> Ibid. 79.

<sup>31</sup> Saba Mahmood, 'Can Secularism Be Other-Wise?', in M. Warner, J. Vanantwerpen, and C.J. Calhoun (eds.), *Varieties of Secularism in a Secular Age* (Harvard: Harvard University Press), 282-99. 287.

<sup>32</sup> Ibid. 287.

<sup>33</sup> Ibid. 294. Mahmood emphasises that the "otherness" of non-secular religious subjectivities 'is not only a product of their unruly actions but also an effect of how secular power establishes its claim to truth and normativity'.

<sup>34</sup> Ibid. 299.

<sup>35</sup> See Yasuaki, '2 J. Hist. Int'l L. 1 2000', (25. Yasuaki notes that imperialist expansion through colonialism did not occur to propagate Christianity, rather 'the European expansion on a global scale and development of the sovereign states system occurred in the process of the secularization of the European mind from the sixteenth to the nineteenth century'. However, while persistently critiquing the liberal state, the Catholic Church did provide ample justification for colonialization. See for example Pope Leo XIII, 'Encyclical Letter Immortale Dei. On the Christian Constitution of States', *Acta Sanctae Sedis*, 18 (1st November, 1885). § 21:



not a new phenomenon but was developed in parallel with the emerging nation state and international order. The privatisation of religion and the exclusion of religious belief had been associated with Western progress and development, elements of the secularisation thesis that dominant in the 19<sup>th</sup> and 20<sup>th</sup> century.<sup>36</sup> This viewpoint became entangled in the colonial export of Western governance and international law because it emerged from the context of disciplining religion within the European and Western context.<sup>37</sup> It was not just non-western religions that had become peripheral to the structure of colonial rule but the Christian religion also had to be shaped by the same ordering of religious participation in the *raison d'état* of the secular and liberal state.

The 19<sup>th</sup> century and early 20<sup>th</sup> century saw the transformation of law into positivistic science but also saw attempts by Catholic jurists to find resources to sustain the position of a natural law as a basis for a Catholic understanding of jurisprudence and the international order of states. That distinction was paramount for Catholic jurists in their approach to developing their interpretation of the international system and to develop a theory of human rights. Lorca Arnulf Becker proposes that non-European semi-peripheral lawyers,

[...] pursued a distinctively non-European interpretation of the classical law of nations, in which they re-signified and redeployed its fundamental elements – positivism, the standard of civilisation and absolute sovereignty – to advocate for change in extant rules of international law and to justify the extension of the privileges of formal equality to their own states in their interaction with western powers.<sup>38</sup>

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Christian Europe has subdued barbarous nations, and changed them from a savage to a civilized condition, from superstition to true worship. It victoriously rolled back the tide of Mohammedan conquest; retained the headship of civilization; stood forth in the front rank as the leader and teacher of all, in every branch of national culture; bestowed on the world the gift of true and many-sided liberty; and most wisely founded very numerous institutions for the solace of human suffering. And if we inquire how it was able to bring about so altered a condition of things, the answer is-beyond all question, in large measure, through religion, under whose auspices so many great undertakings were set on foot, through whose aid they were brought to completion.

<sup>36</sup> Gong, *The Standard of Civilization in International Society*. 39. Gong suggests, Europeans 'tried to disassociate the more objective conception of "civilisation" from its Judaeo-Christian roots' while retaining some of the more prosaic definitions of what it meant to be "civilised". The concept of 'semi-peripheral lawyers' is used by scholars pursuing a Third World Approach to International Law to identify non-Western legal scholars who developed a strategy of adapting a western legal methodology, particularly legal positivism the standard of civilisation and absolute state sovereignty, in the interest of non-Western states.

<sup>37</sup> See An-Na'im, 'Islam and Human Rights'. Kindle Locations 1729-1730. 'Sharia principles were effectively displaced by European legislation and enforcement of positive state law during the colonial period in all fields except family law'.

<sup>38</sup> Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation', (482-483. Becker uses "semi-peripheral lawyers" to define those jurists who were non-Western.

This had been the process for non-European international jurists, but there seems to have also been another strand of critique existent within Europe from Catholic jurists. The classical law of nations had shifted from the sources of law recognised from within Catholic juridical history. International law has readjusted its relationship with the Christian religion and become fragmented along denominational and secular lines of thought.

### 3.2.2. From Natural Law to Positivism

Rovira traces the development of positivism in international law that had begun in the 19<sup>th</sup> century.<sup>39</sup> Travers Twiss the 19<sup>th</sup> century international lawyer had like many of his generation sought a theoretical foundation for international law.<sup>40</sup> In his study of the Renaissance humanist Alciatus of Milan, Twiss recognised that there was a procedure of 'emancipating Roman law from the conflicting, verbal subtleties of scholastic philosophy', and therefore developed 'the first systematic enunciation of rules'.<sup>41</sup> Rovira concludes that Twiss had identified how to apply a method of purification of law to be a scientific system from these earlier humanistic sources.<sup>42</sup> The positivist foundation which Twiss sought became

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<sup>39</sup> Rovira, *The Project of Positivism in International Law*. 20. See also Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*. 131. Koskenniemi notes that while international lawyers professionalised their trade, by turning to modern methods such as attempting to locate objective standards of law through the use of legal positivism, they retained descending arguments available from the natural law, reason or God's will. Koskenniemi suggests that 19<sup>th</sup> century jurists could not return an exclusively naturalistic basis international law because 'it would have signified abandoning the liberal distinctions between morality/law, or imperfect/perfect rights, and reopen the early faith/sin debate which it was the purpose of the classic discourse to close'. Ascending arguments stemming from state practice and consent of the state provided a positivistic counterbalance to the naturalistic descending arguments of a preceding era. However, the distinction remained fluid even as 19<sup>th</sup> century jurists sought to establish their profession along scientific lines. For a modern explanation of the current place of positivism in international law as compared to natural law see Frauke Lachenmann, 'Legal Positivism', in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, (Online (opil.ouplaw.com/home/EPIL) edn.; Oxford: Oxford University Press, 2011). § 3.

Legal positivism 'endeavours to abstain from any value judgements, asserting that it is possible to have a morally neutral descriptive theory of law. Thus it rejects the main tenet of its counterpart in legal theory, naturalism'.

On natural law in international law see also Alexander Orakhelashvili, 'Natural Law and Justice', *ibid.*(2007). § 28.

The most plausible explanation of natural law in international law is that which draws on the legal institutions recognised under positive international law, explains their inherent character and makes them operate justly and fairly. In other words, international law can accommodate that natural law which suits the nature of the society of nations and at the same time expresses the ideal of law and justice in relation to the positive legal institutions to ensure the meaningful degree of justice, the state of things where justice can reasonably be found and be functioning, so that this goal is not compromised by the absence of specific positive rules that would require such outcome.

<sup>40</sup> Twiss (1809-1897). See Rovira, *The Project of Positivism in International Law*. 20.

<sup>41</sup> *Ibid.* 20. On the influence of Roman Law on jurists of the 19<sup>th</sup> century see Vadi Valentina, 'Alberico Gentili on Roman Imperialism: Dialectic Antinomies', *Journal of the History of International Law / Revue d'histoire du droit international*, 16/2 (2014), 157-77.

<sup>42</sup> Rovira, *The Project of Positivism in International Law*. 2. See also C. Sylvest, 'Our Passion for Legality': International Law and Imperialism in Late Nineteenth-Century Britain', *Review of International Studies*, (2008).

intertwined in a complex search for an overarching formula or set of principles. Rovira identifies that positive international law could be validated on a number of grounds including, Bentham's utilitarianism 'the general happiness of mankind', by public opinion, or the conscience of every state, or by reference to God.<sup>43</sup> Twiss's contribution to the idea of an international law which developed like a superstructure, or a substantive *civitas maxima* remained influential up to the period when Oppenheim developed his 'community of interests'.<sup>44</sup> In that period, the concept of a community of nations remained marginal to jurists concerns and a remote prospect, where the state was prioritised and the state alone was fundamental to relations among nations.

Rovira also observes a 'shift from the notion of "common good" to that of "public interest" had occurred in the European political arena of the 17th century'.<sup>45</sup> Rovira suggests, public would become associated with self-interest of states, relying on 'abstract qualities of humanity'.<sup>46</sup> The role of public interest comes to the fore as states seek to align common concerns or to resolve conflicts by creating norms. As Rovira states, '[t]he existence of norms presuppose a common political project or political conflict'.<sup>47</sup> The gradual evolution from norms established in the pre-modern period and founded on such concepts as a "common good" to a concerted effort to establish public interest with aligned states is managed by the abandonment of natural law and the elevation of positivism.<sup>48</sup> Rovira proposes that while the concept of public interest had existed in a limited way from the 13<sup>th</sup> century it was 'from the 15th century onwards, the notion of interests took on increasingly clear economic and political contours'.<sup>49</sup> A particular moral order underpinned international law's formation and shaped the modernisation of industrial manufacturing and production and the further rationalisation of economics and politics. By the 19th century, the sovereign state, had embraced legal positivism and had gradually encompassed the concerns of international law. Rovira submits that public interest had become a humanist concern emerging

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Intriguingly, Sylvest remarks that international lawyers 'formulated and interpreted law in an endless series of appeals to custom, treaties and some indispensable moral principles that few dared term by their proper name, natural law' (402).

<sup>43</sup> Rovira, *The Project of Positivism in International Law*. 21.

<sup>44</sup> *Ibid.* 21.

<sup>45</sup> M.G.S. Rovira, 'the Politics of Interest in International Law', *European Journal of International Law*, (2014). 766.

<sup>46</sup> *Ibid.* 767. This tradition evolves through the intellectual effort of a number of authors from the 17<sup>th</sup> century. Rovira includes Hugo Grotius, Thomas Hobbes, Adam Smith and Jeremy Bentham who's positivistic ideas about international law became gradually utilitarian in outlook.

<sup>47</sup> *Ibid.* 765.

<sup>48</sup> *Ibid.* 766.

<sup>49</sup> *Ibid.* 766.

energetically during the Italian renaissance particularly among the Italian republics of Venice, Genoa, and Florence. Recourse to public interest had the potential to conflict with religion and 'required some justification due to its negative connotations or the moral development of subjects and states'.<sup>50</sup> This turn to self-interest over and against a "common good" or *jus gentium* becomes formative in the creation of normative standards for international relations in the proceeding centuries. Legal positivism had the effect of projecting a deeply secularised understanding of international law, thereby ensuring those states who participated in the international order had to internally regulate and secularise their legal culture.

Becker argues that for semi-peripheral jurists, the break of positivism from naturalism as a source of international law 'was crucial to overcoming international law's Christian theological underpinnings and therefore useful to substantiating the inclusion of non-Christian political entities as international legal subjects on a morally-neutral basis'.<sup>51</sup> However, the strategic use of positivism by semi-peripheral jurists implies an appropriation of a dominant Western legal tradition that had previously reconfigured its relationship with the natural law and religion. This reconfiguration, to establish positivism, absolute sovereignty, and the standard of civilization, had created its own internal regulation of religions and cultures, setting them to the periphery. Colonialism had exported those internal regulated and secularised interpretations of the international order, and it would appear semi-peripheral jurists had also appropriated this tradition.<sup>52</sup> It would seem that semi-peripheral jurists had to reject their naturalist legal history, which was seen as culturally bound, so as to address the international order and advocate sovereign equality. Becker proposes that by appropriating positivism they 'countered the legal doctrines that European and U.S. international lawyers had developed to provide their states with greater scope for legal interventions in non-European states [...]'.<sup>53</sup> Nevertheless, 'semi-peripheral publicists adopted central tenets of the international legal tradition at face value, only subsequently adjusting the uses and interpretations thereof to serve particular and local interests'.<sup>54</sup> It would

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<sup>50</sup> Ibid. 766.

<sup>51</sup> Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation', (489).

<sup>52</sup> Ibid. 492. Becker uses the phrase "semi-peripheral jurists" to indicate their place in the international system and their strategic use of legal positivism: 'Positivism instead proved useful to non-Western states by defining their revocation of certain international legal rules, such as widespread international legal customs, principles, and doctrines legitimizing unequal treatment of non-European states, as expressions of their sovereign will'.

<sup>53</sup> Ibid. Becker suggests that by the 19<sup>th</sup> century 'the link between Christianity and international law softened' (496). However, in reality it had already been ruptured, with the collapse of Christendom and the regulation of religion by the modernising and centralising state.

<sup>54</sup> Ibid. 522.

appear that in this process of appropriation, their understanding of the historical relationship between Christianity and international law was shaped by the same dominant tradition that had forged their understanding of positivism, absolute sovereignty, and the standard of civilization. The appropriation of the subordination of religion to the state, as part of the secularising, modernising and centralising trends of the state, seems to have been another consequence. It is suggested there was a fourth element that needs inclusion to the categories of positivism, absolute sovereignty, and the standard of civilization that dominated the 19<sup>th</sup> century interpretation of international order. Semi-peripheral jurists responded to a secularised and internally regulated understanding of their religions in appropriating an interpretation of the international order, a process that Western jurists had already undergone.

### 3.2.3. Transforming Catholic Thought

In the 19<sup>th</sup> century Catholic jurists were turning to the thought of the scholastic jurist of the 16<sup>th</sup> century, scholars like Francisco Suárez among others to sustain their engagement with the establishment of a modern international legal system.<sup>55</sup> The system of 19<sup>th</sup> century international law has produced a gradual mutation of natural law principles under the pressure of legal positivism. While international lawyers had begun to emphasise state interest as the rational principle of sovereignty, Catholic theorists articulated the common historical priorities that structured Catholic juridical thought, and began to apply them to social problems of the autonomous sovereign state. The reaffirmation of Thomistic theology manifested itself through familiar concepts, namely, natural law, a concern for public society and the common good.<sup>56</sup> O'Donovan proposes that by means of these concepts, 'the principle of subsidiarity, together with the nature and task of political rule, has been progressively articulated[...].'<sup>57</sup> The effort to situate a common Catholic political theory of the nation state, leading to an understanding of the emerging international order, involved a lengthy reconstruction.

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<sup>55</sup> The period of the 15<sup>th</sup> and 16<sup>th</sup> century, is often describes as Second Scholasticism, which had followed the earlier period of scholasticism the Middle Ages. This later 19<sup>th</sup> century period, with its heightened awareness of a need to return to natural law thought might be considered as the Third Scholastic era.

<sup>56</sup> These priorities are made in, and follow O'donovan and O'donovan, *Bonds of Imperfection. Christian Politics Past and Present*. 226. See also O'donovan, 'The Language of Rights and Conceptual History', (193–207). It's important to note that when tracing these histories, the division between political and theological philosophy in the Catholic Church is not so clearly defined, not at least until Suárez, and afterwards.

<sup>57</sup> O'donovan and O'donovan, *Bonds of Imperfection. Christian Politics Past and Present*. 226. See also John Finnis, 'Subsidiarity's Roots and History: Some Observations', *The American Journal of Jurisprudence*, 61/1 (2016), 133-41.

The thought of Suárez was important to the revival of scholastic theology in the late nineteenth century.<sup>58</sup> He had applied various historical meanings to explain *ius naturale* including one that saw it as a faculty or power ‘inherent in human nature’.<sup>59</sup> Previously, it was observed, Suárez was well aware he was using ‘a long established technical vocabulary’, and his thought transmitted Scholastic thought into the 19<sup>th</sup> century.<sup>60</sup> Neo-Scholasticism of the nineteenth and early twentieth centuries prepared the way for the acceptance of human right language within Catholicism by locating a relationship between natural rights and natural law from a longer tradition of reflection on the nature of justice and the meaning of rights.<sup>61</sup> It is from within a context of appreciating Suárez thought that Catholic theorists, including Jacques Maritain, could develop their understanding of the human rights project.<sup>62</sup> Maritain’s recognition of the existence of human rights, located in a Catholic natural law tradition is set apart from the dominant positivistic tradition. In Maritain’s view positivism,

[...]is powerless to establish the existence of rights which are naturally possessed by the human being, prior and superior to written legislation by the agreements between governments, rights which the civil society does not have to *grant* but to *recognise* and sanction as universally valid, and

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<sup>58</sup> This is a point developed in Chapter 1. Section 1.2.3. See for instance Brust, '10 Ave Maria L. Rev. 343 2011-2012', (343. Cortest, *The Disfigured Face: Traditional Natural Law and Its Encounter with Modernity*. 7. Garcia, 'The Spanish School of the Sixteenth and Seventeenth Centuries: A Precursor of the Theory of Human Rights', (1.

<sup>59</sup> Tierney, *The Idea of Natural Rights : Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. 58 & 76. The canonists therefore understood the difference between claimed rights and active rights. Rights were being actively asserted and demanded.

<sup>60</sup> Ibid. 76. Suárez developed his own doctrine of rights and used *ius in re* and *ius ad rem*. Suárez had also developed an understanding of the right to resist an unjust ruler. See also Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*. 128. H.E. Braun, *Juan De Mariana and Early Modern Spanish Political Thought* (Ashgate, 2007).

<sup>61</sup> Tierney suggests that another path for subjective rights came via the nominalism of Ockham via Gerson (1363-1429). As noted in Chapter 1, according to Finnis, there is a point in the history of rights between Aquinas and Suárez which results in having “crossed a watershed”. Finnis, *Natural Law and Natural Rights*. 207. [Emphasis mine]. See also Lisska, *Aquinas’s Theory of Natural Law: An Analytic Reconstruction*. Suárez understands *jus* as ‘a kind of moral power [*facultas*] which every man has, either over his own property or with respect to that which is due to him’. Therefore ‘*jus* is essentially something someone *has*, and above all (or at least pragmatically) a *power* or *liberty*’. See Finnis, *Natural Law and Natural Rights*. 207. See also Emily Kadens and Ernest A. Young, 'How Customary Is International Law', *William & Mary Law School*, 54 (2013). 903.

<sup>62</sup> See Eudaldo Forment Giral, 'Suarez Y El Personalismo De Maritain', *Espritu*, 34 (1985), 109-36. See also Maritain, *Man and the State*. 85. Maritain writes that the natural law tradition goes back in history via Grotius, Suárez and de Vitoria and to Aquinas, suggesting the latter’s thought ‘was expressed in an insufficiently clarified vocabulary, so that its deepest features were soon overlooked and disregarded [...]’. He therefore sees himself as recovering and developing this rights tradition. Maritain was well aware of claims that human rights belong to schools of thought excluding Thomism stating, ‘it is no more necessary to be a follower of Rousseau to recognise the rights of individual than it is to be a Marxist to recognise the economic and social rights’ (105).

which no social necessity can authorise us even momentarily to abolish or disregard.<sup>63</sup>

Maritain argued that that if positivism could not secure human rights, then the state was given jurisdiction over rights of the person, as an extension of its sovereignty. If this was the case then the absolute nature of state required regulation.<sup>64</sup> Furthermore, the development of Catholic thought included the gradual adaptation of the principle of subsidiarity and Corporatism, which reiterated a belief in shared sovereignty within the state, as an alternative to absolute sovereignty, placing limits on the scope of the state.

The idea of a negotiated sovereignty became a possible proposition in the future from this developed understanding of subsidiarity and sovereignty.<sup>65</sup> Subsidiarity (the Latin root *subsidium* means “aid”) emphasised the self-sufficiency of individual sub-strata within the political community in a state, with the right to a level of self-

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<sup>63</sup> Maritain, *Man and the State*. 96 [italics included]. See also Heinrich A. Rommen, *The Natural Law. A Study in Legal and Social History and Philosophy* (Kindle edn.: Liberty Fund, (1946) 2013). Kindle Locations 68-69. Rommen was ‘relentlessly critical of legal positivism’. See also Kindle Locations 2404-2407:

Positivism has only one criterion for law: the will of the sovereign formulated in accordance with the legislative process prescribed by the constitution. This formal criterion, consisting in the observance of the method and form of legislation as provided by the technical constitutional rules, is all; any material criterion (conformity of the law with the ethical end of the state, with the objective common good, with the objective moral law) is repudiated by positivism.

<sup>64</sup> Maritain, *Man and the State*. 194-195. Maritain proposed the need to challenge to the absolute sovereignty of the modern state.

[W]e must come down to the roots, that is, we must get rid of the Hegelian or pseudo-Hegelian concept of the State as a person, a supra-person, and understand that the State is only part (a topmost part, but a part) and an instrumental agency in the body politic, - thus bringing the state back to its true, normal, and necessary functions as well as to its genuine dignity.

<sup>65</sup> O'donovan and O'donovan, *Bonds of Imperfection. Christian Politics Past and Present*. 228-232. On the the principle of subsidiarity see Pope Leo XIII, 'Encyclical Letter Rerum Novarum ', (§14 & §51. Pope Pius XI, 'Quadragesimo Anno AAS 23 (1931)', (§ 80. Pope John Paul II, 'Encyclical Letter Centesimus Annus', *ibid.*83 (1 May 1991. §15. *Rerum Novarum* challenged the approach of states in their regulation of *laissez faire* capitalism and their response to threat of radical socialism, which undermined the right to property and relations between workers. He saw a greater role for states to safeguard the basic economic and social needs of people, particularly the traditional family. He spoke of the dehumanising conditions of workers and in the language of subsidiarity proposed a role for trade unions and social movements.

It is of note that *Rerum Novarum* preceded Article 123 of the anti-clerical Mexican Constitution of 1917 which details economic and social rights for the first time in a Constitution:

Every person has the right to dignified and socially useful work. To that effect, the creation of jobs and the social organization shall be advanced in accordance with the law.

On the link between Constitutionalism and Catholic Social Thought see Wright-Carozza, 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights', (304. Carozza notes that the ‘principles of the 1917 Constitution were borrowed or imitated in varying degree by virtually every Latin American constitution thereafter, and made themselves felt in the next wave of European constitutionalism, too’. Carozza suggests that there is ‘good reason to conclude that the pervasive presence and influence of Catholic social doctrines that became prominent in the decades preceding 1917 also contributed to the social guarantees of the Constitution’ (308). See also Moyn, *Christian Human Rights*. Kindle Locations 469-470. Moyn also notes the principle of subsidiarity in the Mexican Constitution is influenced by Catholic social thought.

governance and with a capacity to contribute to the greater good of the state.<sup>66</sup> The state therefore allows a degree of liberty to those groupings as they participate in the common good, and provides aid only when required, and where they lack the self-sufficiency of larger groupings within the state.<sup>67</sup> Importantly, in 1931 subsidiarity was more clearly defined by the Catholic Church, with a consciousness of a trend towards “total” state government, stating ‘[f]or every social activity should, by its very nature, prove a help [*subsidiuum*] to members of the body social, it should never destroy or absorb them’.<sup>68</sup>

The principle of subsidiarity was gradually applied to the larger political structure of relations among states but before this could happen it went through a number of changes to propose a *third way* in economic and social matters. This *third way* was supposed to be ‘not “between” capitalism and socialism but beyond them and [...] the result of a different conception of man, as well as of scientific knowledge’.<sup>69</sup> It was essentially a return to the natural law, by providing support to natural institutions and forms of solidarity that would strengthen society, exposed to prevailing ideologies of the period. It had in effect given legitimacy to the organisation of the modern state by seeking to order the social and economic sphere of society along Christian principles.<sup>70</sup> Catholic jurists had sought to

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<sup>66</sup> John Finnis presents subsidiarity as a principle of justice. To Finnis, subsidiarity (the Latin for help or assistance is *subsidiuum*) ‘affirms that the proper function of association is to help the participants in the association to help themselves ...’ See Finnis, *Natural Law and Natural Rights*. 144-147 § VI. 5

<sup>67</sup> For further explanation of the principle of Subsidiarity see Franz H. Mueller, ‘The Principle of Subsidiarity in the Christian Tradition’, *The American Catholic Sociological Review*, (1943), 144-57. Paolo G. Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’, *The American Journal of International Law*, 97/1 (2003), 38-79. Patrick Mckinley Brennan, ‘Subsidiarity in the Tradition of Catholic Social Doctrine’, in Michelle Evans and Augusto Zimmermann (eds.), *Subsidiarity in Comparative Perspective* (London: Springer, 2014), 29-48.

<sup>68</sup> Pope Pius XI, ‘Quadragesimo Anno AAS 23 (1931)’, ( § 78. Pius XI had also begun to condemn certain forms of collective/socialist economic Internationalism and also financial imperialism that exploits capital, created by workers. He writes, on international relations, ‘two different streams have issued from the one fountain-head: On the one hand, economic nationalism or even economic imperialism; on the other, a no less deadly and accursed internationalism of finance or international imperialism whose country is where profit is’.

<sup>69</sup> Stefano Solari, ‘The Corporative Third Way in Social Catholicism (1830 to 1918)’, *The European Journal of the History of Economic Thought*, 17/1 (2010b), 87113. Solari provides a detailed account of Social Catholicism. Solari notes that by the turn of the 20<sup>th</sup> century Catholics intellectuals had just about given up on convincing market capitalism about the value of corporate forms of economics with Christian principles, and turned to the development of professional Catholic associations and mutual aid societies (Trade unions and Credit Unions), and to promotion of state regulation of the labour market for the protection of workers.

<sup>70</sup> See also N. W. Barber, ‘The Limited Modesty of Subsidiarity’, *European Law Journal*, 11/3 (2005), 308-25. 313-314. Barber suggests the European principle of subsidiarity ‘should be understood as a development of one of the oldest and most basic principles of democratic government: the maxim asserting that ‘what touches all should be approved by all’. Barber observes, the ‘maxim might therefore be considered a ‘thin’ political principle, one that is compatible with a wide range of different democratic models’ (317). Further, ‘the adoption of subsidiarity by the authors of the European Treaty is significant: it amounts to a rejection of the principle of national self-determination, and also distances the EU from the ideologies advanced by the liberal nationalists’ (323). The principle ‘represents a commitment to democracy, to de-centralised power and, most



respond to the effect of positivism and the absolute sovereignty of the modern state by offering an alternative conception of the state and of international law. Their efficacy was mixed, and is evident across a number of concerns that preoccupied the Catholic Church from the late 19<sup>th</sup> century and well into the 20<sup>th</sup> century.

A corporatist understanding of the nation state embraced subsidiarity as an important governing principle.<sup>71</sup> Corporate models of government predominately shaped many Catholic majority countries beginning with Italy in the 1920's and included Portugal under Salazar and Caetano (1929-74), and Spain under Franco (1939-75) with social partnership models which were highly regulated.<sup>72</sup> Other corporatist governments followed which for instance include Poland (1926-35), Austria (1934-38), and Ireland (1937).<sup>73</sup> Constitutions written for these countries embodied the values and ideals of early Christian democracy. Many of these corporate states were in truth established on the confession of one religion, Catholicism and strengthened by concordats with the Holy See.<sup>74</sup> This process

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importantly, opposition to nationalist ideals of state legitimacy' (325). In this observation we can recognise a consequence of post-World War II thought.

<sup>71</sup> See William Patch, 'The Catholic Church, the Third Reich, and the Origins of the Cold War: On the Utility and Limitations of Historical Evidence', *The Journal of Modern History*, 82/2 (396-433. 402. Patch details, [...] the fierce debate in the 1920's and 1930's between Catholic social theorists who supported parliamentary democracy and independent trade unions and those who disseminated authoritarian versions of "Catholic corporatism".

Patch suggests Pius XI relied on Jesuits who belonged to the parliamentary democracy group to draft the papal encyclical *Quadragesimo Anno*, setting out the future relationship between the church and the state. See also Pope Pius XI, 'Quadragesimo Anno AAS 23 (1931)', (§ 1. See also an example of a Catholic corporatist model in S.J. Rev. E. Cahill, *The Framework of a Christian State. An Introduction to Social Science* (Dublin: M.H. Gill & Son Ltd., 1932). See also S. Solari, 'The Corporative Third Way in Social Catholicism (1830 to 1918)', *European Journal of the History of Economic Thought*, (2010a). See also Hittinger, *The First Grace: Rediscovering the Natural Law in a Post-Christian World*. 116 (footnote omitted). There was a strong idea that state had a duty to uphold the close relationship between law and morality, particularly Catholic morality. This position influenced the very conservative public policy of many of these states. The catholic jurist Rommen held the belief that wherever there exists a Bill of Rights 'there is a "strong presupposition" that the human law must be in harmony with natural law'. A classical work by Heinrich A. Rommen is, *The State in Catholic Thought: A Treatise in Political Philosophy* (St. Louis, Mo.: B. Herder Book Company, 1945) [in particular see pages 477-480 on European verse American model].

<sup>72</sup> H.J. Wiarda, *Corporatism and Comparative Politics: The Other Great Ism* (M. E. Sharpe Incorporated, 1996). 37-41. The Freiburg commission of 1881-1884 defined corporatism as a,

[...] system of social organisation that has at its base the grouping of men according to the community of their natural interests and social functions, and as true and proper organs of the state they direct and coordinate labour and capital in matters of common interest.

<sup>73</sup> Ibid. 41. It is important to note that corporatism also flourished in Latin America, which in turn became a resource for democratisation and the authoritarian regime of Argentina for example.

<sup>74</sup> Moyn, *The Secret History of Constitutional Dignity*. The contribution of catholic social thought particularly the ideas invested in the encyclicals *Rerum Novarum* and *Quadragesimo Anno* to the shaping of various constitutions in Europe and the Post War Basic law of Germany has been highlighted more recently by Moyn. See also R.J. Araujo and J.A. Lucal, *Papal Diplomacy and the Quest for Peace: The Vatican and International Organizations from the Early Years to the League of Nations* (Sapientia Press of Ave Maria University). See also

reflects the tendency of a broad policy in Catholicism to respond to the nation state by insisting on a confessional state. The democratic state was viewed as requiring significant regulation because of a perception that it would accumulate and centralise power.<sup>75</sup>

The Corporatist state was a 'third way' which sought to navigate the nation state between liberal capitalism and Marxism.<sup>76</sup> As a political philosophy it was established to blunt the effect of socialism following the growing trade union movement and the organisation of labour. It proposed an organic relationship between labour and capital rather than enmity, and it was similar in kind to the feudalism which was organised around a view of humanity as bonded in common effort towards a common good, often inspired or identified with the Christian religion. However, prior to World War II Wiarda noted that many state that followed this model in the 1920's and 1930's were 'usually authoritarian, often repressive, and statist if not dictatorial'.<sup>77</sup> This Right leaning and conservative political philosophy led to accusations of sympathy towards fascism and authoritarianism, even if corporatism was seen to be implemented in a variety of political directions. Wiarda proposes that corporatism became a realistic prospect in the light of the 1917 Bolshevik revolution in Russia which nationalised banking, disavowed foreign debt and seized churches and church property.<sup>78</sup> It was also a response to Black Tuesday, the crash of the world stock markets in 1929 and the ensuing global depression, which revealed that *laissez faire* capitalism was similarly an unreliable option.<sup>79</sup> That desire to balance capital and the rights of labour was intrinsic to the encyclical *Rerum Novarum*.

Wiarda distinguishes between two directions which the corporatism model might have taken, that of neo-corporatism, found very often in post-World War II democracies, which is mainly, 'democratic, pluralistic, societal, orientated towards social welfare and a product of the modern planned economy and the welfare state'<sup>80</sup> and a model, often found in pre-World War II states but also latterly in South American dictatorships, marked by 'authoritarian, monolithic, statist, orientated towards social control, and often a product of underdevelopment and

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Silvio Ferrari, 'Concordats', in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Online (opil.ouplaw.com/home/EPIL) edn.; Oxford: Oxford University Press).

<sup>75</sup> Moyn, *The Secret History of Constitutional Dignity*. 96. Moyn suggests that the presence of personalist ideas may have lead 'to the subordination of the otherwise sovereign democratic polity to God, and for many to the moral constraints of his natural law'. In response, see Mccrudden, 'Human Rights Histories', (12.

<sup>76</sup> Solari, 'The Corporative Third Way in Social Catholicism (1830 to 1918)', (87-113.

<sup>77</sup> Wiarda, *Corporatism and Comparative Politics: The Other Great Ism*. 41.

<sup>78</sup> Ibid. 41.

<sup>79</sup> Ibid. 41.

<sup>80</sup> Ibid. 44.

weak institutions'.<sup>81</sup> Wiarda notes that what they have in common is the 'functional organisation of society, the licensing of interest groups, and their incorporation into the machinery of the state'.<sup>82</sup> Many states which had begun with a corporatist model, continued to implement neo-corporatist policies, even while strengthening institutions of the state to provide for greater democratic and pluralist governance. Corporatism was a product of catholic social thought and endured because of the emphasis given to subsidiarity, which prioritised civil society as a partner to political governance and preserved its autonomy. The spread of these ideas included establishing natural law as the basis of state constitutions, embedding a naturalist understanding of human rights in their legal systems.

### 3.3. The Civil Sphere and Democracy

Catholic response to democracy shifted from ecclesiastical quietism in the mid-19<sup>th</sup> century to the mobilisation of lay Catholic's when traditional diplomatic means were confronted with the rise of anti-clericalism.<sup>83</sup> Pope Leo XII, writing in his encyclical on the Christian state *Immortale Dei* (1885), had suggested a "plan of action",

[...] to make use of popular institutions, so far as can honestly be done, for the advancement of truth and righteousness; to strive that liberty of action shall not transgress the bounds marked out by nature and the law of God; to endeavour to bring back all civil society to the pattern and form of Christianity which We have described.<sup>84</sup>

The encyclical had suggested 'the incompatibility of [the Church's] notion of authority with the very essence of democracy'.<sup>85</sup> Sigmund observes that 'as late as

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<sup>81</sup> Ibid. 44

<sup>82</sup> Ibid. 44.

<sup>83</sup> S. N. Kalyvas, *The Rise of Christian Democracy in Europe* (Chicago: Cornell University Press, 1996). 22. See generally Martin Conway, 'Introduction', in T. Buchanan and M. Conway (eds.), *Political Catholicism in Europe, 1918-1965* (Oxford: Clarendon Press). 1-33. Conway defines the shift as follows: 'The state-directed policies of discrimination against Catholics in the Netherlands, Switzerland, and Bismarckian Germany during the so-called *Kulturkampf* of the 1870's as well as anti-clerical campaigns by liberal political groups in France, Italy and Spain had in effect obliged many Catholics to be conscious of their collective identities' (19).

<sup>84</sup> Pope Leo XIII, 'Ass 18 (1885)', (§ 46. However Leo XII adds as was a matter of course for his time, 'in matters merely political, as, for instance, the best form of government, and this or that system of administration, a difference of opinion is lawful'.

<sup>85</sup> Yves R. Simon, 'The Doctrinal Issue between the Church and Democracy', *Logos: A Journal of Catholic Thought and Culture*, 14/1 (2011), 132-64 The idea that democracy was incompatible was restated in a number of Papal encyclicals and letters. See the Encyclicals of Leo XIII, *Diuturnum* (June 29, 1881) and *Immortale dei* (November 1, 1885), and the Letter of Pius X on the *Sillon* (August 25, 1910). This letter to French bishops

the 1940's, the official Vatican position on politics was still that enunciated in *Immortale Dei*.<sup>86</sup> This continued the proposition that “error has no rights” and reveals how in an earlier phase, Christian democracy was more of a rhetorical phrase than a concerted political theory.<sup>87</sup> However, this proposition was to become moderated with the view that democracy would concur in the “complete Catholic state”, and later to an understanding of Catholicism in civil society.

For the Catholic Church, the break with the state began with the French Revolution and the rise of a specific form of anti-clericalism from an erstwhile Catholic country,

[...] throughout the nineteenth century it remained a French affair; the statements of Leo XIII, as well as those of Pius VI and Pius X, were aimed at theories erected by French thinkers into a universal pattern of democratic thought and accepted as the genuine formula of democracy all over the Latin world.<sup>88</sup>

The relationship of the Catholic Church with the democratic state was not a clearly defined political theory but one that began with a certain level of shock towards

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condemned moves to reconcile the Church with French democracy, *laïcité* and philosophy of modernism. On the history of the *Sillon* movement see Gearóid Barry, 'Rehabilitating a Radical Catholic: Pope Benedict Xv and Marc Sangnier, 1914-1922', *Journal of Ecclesiastical History*, 60/3 (2009), 514-33. 531. According to Barry there was a gradual refinement of the policies of Leo XIII following a period of deep suspicion of Modernism and of 'subordinating revealed religion to an exogenous political philosophy', particularly with the reign of Benedict XV. See also Misner, 'Catholic Anti-Modernism: The Ecclesial Setting'. 298-306.

<sup>86</sup> The seeds of Papal teaching on democracy are located in earlier papal messages by Michel Schooyans, 'Democracy in the Teaching of the Popes', in Hans F. Zacher (ed.), *Democracy* (Vatican City: Pontifical Academy of Social Sciences, 12-13 December 1996). 24.

In the Radio message *Benignitas et humanitas*, Christmas (December 24, 1944) (1944), Pius XII 'refers to the equal dignity of each person, and his right to freedom—an elliptical reference to the great declaration on human rights as the basis of a peaceful society which he pronounced in his Radio message *Con sempre nuova freschezza*, Christmas (December 24, 1942) in 1942. Schooyans observes: 'This pioneering but too little-known declaration holds the seeds of the teaching that he would devote to democracy two years later'.

Prominent in the catalogue of previously reactionary texts is Pope Gregory's *Mirari vos* and Pope Pius IX's *Quanta cura* with the supplementary Syllabus of Errors, which recalled the many shortcomings of the modern world from the Catholic hierarchy's point of view. See also Paul E. Sigmund, 'The Catholic Tradition and Modern Democracy', *The Review of Politics*, 49/4 (534). Pope Leo XIII explains in *Immortale Dei* (1885):

“To exclude the Church, founded by God Himself, from life, from laws, from the education of youth, from domestic society, is a grave and fatal error. A State from which religion is banished can never be well regulated. ... The Church ... is the true and sole teacher of virtue and guardian of morals. She it is who preserves in their purity the principles from which duties flow, and, by setting forth most urgent reasons for virtuous life, bids us not only to turn away from wicked deeds, but even to curb all movements of the mind that are opposed to reason, even though they be not carried out in action” (§32).

<sup>87</sup> See Pope Leo XIII, 'Graves De Communi Re (on Christian Democracy)', *Acta Sanctae Sedis*, 34 /XXXIII (18th January, 1901), 385-96. The encyclical had rejected idea of the politicisation of Christian democracy, stating 'under the shadow of its name there might easily lurk a design to attack all legitimate power, either civil or sacred' (§4). Pope Leo XIII, 'Longinqua Oceani (on Catholicism in the United States)', *Acta Sanctae Sedis*, XXVII/1894-95 (6th January, 1895), 387 - 99. While respecting the liberty American democracy offered, this encyclical rejected the separation of Church and state as 'dissevered and divorced' (§6).

<sup>88</sup> Simon, 'The Doctrinal Issue between the Church and Democracy', ( 37).

the vehement anti-clericalism exhibited in what had been the heartland of Catholicism in Europe. With alarm about the situation in France following the 1905 separation of Church and state, Pius X wrote in 1906, that ‘the State must be separated from the Church is a thesis absolutely false, a most pernicious error’ and continues, ‘this thesis [of separation] is an obvious negation of the supernatural order’.<sup>89</sup> Perusing this invective he continued, that separation ‘upsets the order providentially established by God in the world, which demands a harmonious agreement between the two societies’.<sup>90</sup> Finally, he states, ‘this thesis inflicts great injury on society itself, for it cannot either prosper or last long when due place is not left for religion, which is the supreme rule and the sovereign mistress in all questions touching the rights and the duties of men’.<sup>91</sup> Pope Leo XIII had envisaged the succession of the older regime, the establishment of two powers working in collaboration because God ‘has given the charge of the human race to two powers, the ecclesiastical and the civil, the one being set over divine, and the other over human, things’.<sup>92</sup> In language reflecting the science of cosmology, both powers were imagined to exist within their own limited sphere as planets might orbit a common centre, that of the human race. The encyclical implicitly followed an idealised version of the organic Christian state matured in the political philosophy of the *ancien regime*.<sup>93</sup> The church and state’s relationship was considered by Pope Leo XIII to ‘exist between these two powers a certain orderly connection, which may be compared to the union of the soul and body in man’.<sup>94</sup>

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<sup>89</sup> Pope Pius X, 'Encyclical Letter Vehementer Nos. On the French Law of Separation', *Acta Sanctae Sedis*, 39 (February 11th 1906).§ 3. For context of the “thesis” in French political thought see also Philippe Portier, 'L'église Catholique Face Au Modèle Français De Laïcité', *Archives de sciences sociales des religions [Online]*, 129/janvier - mars (2005). 6. and also Perreau-Saussine, *Catholicism and Democracy: An Essay in the History of Political Thought*.

<sup>90</sup> Pope Pius X, 'Vehementer Nos Ass 39', (§ 3

<sup>91</sup> Ibid. § 3.

<sup>92</sup> Pope Leo XIII, 'Encyclical Letter Immortale Dei. On the Christian Constitution of States', *ibid.*18 (1st November, 1885). § 13.

<sup>93</sup> The Pope places blame for the loss of this accord between ecclesiastical and the civil government squarely at the feet of the Reformation. It is not difficult to locate this position in modern responses to the place of Catholicism in the international order. *Ibid.* § 13:

But that harmful and deplorable passion for innovation which was aroused in the sixteenth century threw first of all into confusion the Christian religion, and next, by natural sequence, invaded the precincts of philosophy, whence it spread amongst all classes of society. From this source, as from a fountain-head, burst forth all those later tenets of unbridled license which, in the midst of the terrible upheavals of the last century, were wildly conceived and boldly proclaimed as the principles and foundation of that new conception of law which was not merely previously unknown, but was at variance on many points with not only the Christian, but even the natural law.

<sup>94</sup> *Ibid.* § 14.

The working out of a contemporary relationship between the Church and state had begun in the Jesuit journal *La Civiltà Cattolica* from 1850.<sup>95</sup> It was an effort to respond to the development of *laïcité* in the French state, and the spread of those ideas more widely.<sup>96</sup> This was a defence of a Catholic state, and ‘of the principle that only truth had the right to exist, and consequently the denial of a right to religious freedom for those who do not profess the true religion’.<sup>97</sup> The confessional state, ‘excluded all public worship to other religions’.<sup>98</sup> A number of papal documents provided the basis for what became known as the “thesis” but according to Burns, it was Bishop Felix Dupanloup of Orleans who gave the confessional and corporate state the title “the Thesis” following Bellarmine and Pius IX that an officially established Catholic Church, was ‘the preferred or perfect institutional arrangement everywhere’.<sup>99</sup> Burns suggest that, for reasons of

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<sup>95</sup> M. Rhonheimer and W.F. Murphy, *The Common Good of Constitutional Democracy: Essays in Political Philosophy and on Catholic Social Teaching* (Catholic University of America Press, 2013). 386. The fortnightly journal also stands accused of having ‘waged a violently anti-Semitic campaign, one riddled with the usual accusations of ritual murder, economic exploitation of Christians and other conspiracy theories...’ See John Pollard, ‘Clerical Fascism’: Context, Overview and Conclusion’, *Totalitarian Movements and Political Religions*, 8/2 ( 437. See also Witte and Alexander, *The Teachings of Modern Roman Catholicism on Law, Politics, and Human Nature*. 14. By the mid nineteenth century, neo-Thomists had ‘began to chart a middle course between the absolutist claims of monarchy and the absolutist claims of popular sovereignty’.

<sup>96</sup> Timothy W. Burns, ‘John Courtney Murray, Religious Liberty, and Modernity Part I: Inalienable Natural Rights’, *Logos: A Journal of Catholic Thought & Culture*, 17/2 (Spring2014, 13-38. 17. Burns writes that previous Church teaching, affirmed numerous encyclicals since Pius IX’s “Syllabus of Errors” (1864) had condemned the *laïcité* model. See Pope Pius IX, ‘Encyclical Letter *Quanta Cura*’, ( This Encyclical included an appendix titled the ‘Syllabus of Errors’ in which errors included those regarding relationship between the Church and state was enumerated. For example:

No. 39. The State, as being the origin and source of all rights, is endowed with a certain right not circumscribed by any limits.

No. 55. ‘The Church ought to be separated from the State, and the State from the Church’.

See also Hünermann et al., *Compendium of Creeds, Definitions, and Declarations on Matters of Faith and Morals*. 2901-2980. The Syllabus condemnations of the state had been drawn from previous church documents including, Allocution “*Maxima quidem*,” June 9, 1862 and Allocution “*Acerbissimum*,” Sept. 27, 1852, and collated by ‘a commission of cardinals on the basis of a pastoral instruction of Bishop Gerbert of Perpignan (1860) ...’

<sup>97</sup> Rhonheimer and Murphy, *The Common Good of Constitutional Democracy: Essays in Political Philosophy and on Catholic Social Teaching*. 386.

<sup>98</sup> Burns, ‘John Courtney Murray, Religious Liberty, and Modernity Part I: Inalienable Natural Rights’, (17. See also Maritain, *Man and the State*. 154. Maritain further assesses this pragmatic approach of the Church as it applied its “immutable principles” about the relationship of the Church to the State.

<sup>99</sup> Burns, ‘John Courtney Murray, Religious Liberty, and Modernity Part I: Inalienable Natural Rights’, (17. See further Félix Antoine Philibert Dupanloup, *La Souveraineté Pontificale Selon Le Droit Catholique Et Le Droit Européen* (Paris: C. Douniol, 1860). On the Church’s view of various forms of government see Pope Leo XIII, ‘Encyclical Letter *Libertas Praestantissimum* (on the Nature of Human Liberty)’, *P.M. Acta, VIII Romae 1889*, (20th June, 97-144.

“The Church does not disapprove of any of the various forms of government [...] It is not forbidden to prefer temperate, popular forms of government, without prejudice, however, to Catholic teaching on the origin and use of authority.”

In 1944 the Christmas Message Pope Pius XII, “Democracy and a Lasting Peace,” he explained that the Church judged the legitimacy of “republics” and “monarchies” by precisely the same logic. He further noted that, “democracy, broadly defined, admits of various forms, and can be realized in monarchies as well as in republics.” *Ibid.* §15-6.

expediency, a second-best arrangement, a "hypothesis" 'was acceptable until such time as the "deplorable" religious pluralism had given way.'<sup>100</sup> The thesis followed the thought of the Jesuit Bellarmine and 'had held that an officially established Catholic Church, with preferential treatment, was the preferred or perfect institutional arrangement everywhere'.<sup>101</sup> The "hypothesis" proposed a compromise with modern culture, and acted as a 'kind of *reservatio mentalis*, an acceptance of what was inevitable', and offered flexibility so as to be able to 'get along in the modern world [...]', particularly where the church was a minority.<sup>102</sup> While this solution was pragmatic it did lead to initial suspicion toward the Catholic Church, that the Catholic Church would slide into authoritarianism when Catholic political parties obtained enough power. However, this approach did also afforded Catholicism a flexibility to adapt to modern society while retaining a utopian vision of the perfect Catholic society. The confessional politics of *Rerum Novarum*, the encyclical that defined the social doctrine of the Church, based on Dupanloup's "thesis" remained in the background of political Catholicism and would remain the model for Catholicism well into the period after the Second World War.<sup>103</sup> The gradual transformation of this approach involved the integration of the experience of the Church under different regimes into its political thought, and the emergence of rights language with concern for human dignity.

The political scientist Kalyvas, records that from the late 19<sup>th</sup> century there was a shift in thinking among Catholics in Europe as they responded to the centralising and state-building projects of national governments.<sup>104</sup> This involved a moving out of the "ghettoisation" of the Catholic Church in Europe.<sup>105</sup> The prospect of challenging anti-clerical trends meant that the Catholic Church needed to enter the political arena and establish 'electoral coalitions based on existing Conservative factions'.<sup>106</sup> This shift from unsystematic support for Conservative candidates to coordinated electoral action, with the mobilisation of Catholic mass organisations, developed a mechanism for indirect political participation by the Church. Kalyvas defines the strategy as follows: '[...] the church would contract out to Conservative

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<sup>100</sup> Burns, 'John Courtney Murray, Religious Liberty, and Modernity Part I: Inalienable Natural Rights', (17.

<sup>101</sup> Ibid. 17.

<sup>102</sup> Rhonheimer and Murphy, *The Common Good of Constitutional Democracy: Essays in Political Philosophy and on Catholic Social Teaching*. 386.

<sup>103</sup> Burns, 'John Courtney Murray, Religious Liberty, and Modernity Part I: Inalienable Natural Rights', (17.

<sup>104</sup> Kalyvas, *The Rise of Christian Democracy in Europe*. 22. See further Conway, 'Introduction'. 20. See also Luigi Sturzo, 'The Philosophic Background of Christian Democracy', *The Review of Politics*, 9/01 (3-15). Sturzo suggests one of the first leaders of Christian Democracy was Frederic Ozanam among others, 'well-known for his writings and for the foundation of the St. Vincent de Paul Society'.

<sup>105</sup> See further Conway, 'Introduction'. 19.

<sup>106</sup> Kalyvas, *The Rise of Christian Democracy in Europe*. 23.

political elites the political struggle against anticlerical reforms, and Conservative politicians would contract out mass organisation to the Church'.<sup>107</sup> This did not predicate the creation of confessional political parties, rather the Church preferred to engage on single issue concerns where their interests were at stake, preserving political neutrality towards the general political orientation of the state.<sup>108</sup> Conway notes that 'the Church rarely played a pre-eminent role in the creation and development' of Catholic political parties across Europe.<sup>109</sup> However, Chamedes suggests that the Pope 'emerged as a crucial partner of Christian Democratic movements, as Vatican funds gave Christian Democratic movements an indispensable starting budget, and parishes and monasteries acted as early meeting halls'.<sup>110</sup> Instead of creating Catholic political parties and as a reaction to anti-clerical trends across Europe, a deep Catholic sub-culture had developed by establishing, for example, voluntary catholic youth and educational movements, co-operatives, peasant leagues, and trade unions.<sup>111</sup> Lay Catholic's drawing from the growing middle-class Catholic bourgeoisie took up the leadership of Catholic democratic parties motivated 'to protect the Catholic Church and the faithful from anticlerical assaults'.<sup>112</sup> During the interwar years the Catholic Church had 'begun to translate into reality' the vision of Pope Pius XII to renew their nations along the lines of a Catholic understanding of the state.<sup>113</sup>

Martin Conway proposes that a 'plethora of competing forms of legitimacy which emerged in many areas of Europe during the war years left Europeans free to construct their own political structures or simply to drop out of political life altogether'.<sup>114</sup> In post-War War II Europe, confessional political parties did inevitably evolve from these Catholic mass political movements, when the threat of anti-clericalism had subsided, eventually becoming increasing independent from

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<sup>107</sup> Ibid. 23. See also S. N. Kalyvas, 'from Pulpit to Party: Party Formation and the Christian Democratic Phenomenon', *Comparative Politics*, (1998). Kalyvas stresses, the 'formation and action of the Catholic movement and confessional parties created a Catholic political identity, rather than the other way around'.

<sup>108</sup> See Kalyvas, *The Rise of Christian Democracy in Europe*. 6. Kalyvas argues that the formation of confessional politics 'was the unplanned, unintended, and unwanted by-product of the strategic steps taken by the Catholic Church in response to Liberal anti-clerical attacks'.

<sup>109</sup> Conway, 'Introduction'. 20.

<sup>110</sup> Chamedes, 'The Vatican and the Making of the Atlantic Order, 1920-1960', ( 2.

<sup>111</sup> See Todd H. Weir, 'The Christian Front against Godlessness: Anti-Secularism and the Demise of the Weimar Republic, 1928–1933', *Past & Present*, 229/1 (2015), 201-38. Interestingly Weir argues that it is important to see struggle over the role of secularism as 'integral part of the inter-war Kulturkampf, which was a profound clash between three principal milieux: the socialist–communist, the Catholic and the conservative Protestant'. The mobilisation of these groupings did not solidify their external opposition to each other but further contributed to internal division.

<sup>112</sup> Conway, 'Introduction'. 20.

<sup>113</sup> Chamedes, 'The Vatican and the Making of the Atlantic Order, 1920-1960', (1.

<sup>114</sup> Martin Conway, 'Democracy in Postwar Western Europe: The Triumph of a Political Model', *European History Quarterly*, 32/1 (59-84 62.



the Church altogether.<sup>115</sup> Conway proposes that democracy in Europe was based on 'a reassertion of the authority and responsibilities of the nation state'.<sup>116</sup> This implied reaffirming old hierarchies and certainties which would stabilise the post-War Europe nation state but with the added reaffirmation of democracy in a more complete way. In fact post-War democracy was 'the consequence of processes that had been occurring over the preceding twenty years'.<sup>117</sup> Therefore, the Second World War 'had both a destructive and a catalysing effect' to the establishment of parliamentary democracy in Europe and even accelerated the process.<sup>118</sup>

As part of the process of a democratic transformation of Europe, confessional political parties that rose on the success of confessional politics gradually declericalised and secularised themselves to become autonomous political organisations.<sup>119</sup> In consequence, this process of translating the mobilising of politicised religion into *de facto* political parties 'had beneficial effects for democratic development'.<sup>120</sup> The process of engagement with parliamentary democracy by the Catholic Church, which had encountered numerous anti-clerical measures while on the periphery, paradoxically 'contributed to the consolidation of democratic regimes'.<sup>121</sup> Müller describes this as the politicisation of religion, which gives rise to the secularisation of politics.<sup>122</sup> This differentiation of democratic politics from religion had to first occur within Catholicism by Catholic intellectuals initiating a debate about the political form democracy ought to take, even when drawing on 'explicitly *anti-liberal* ideologies'.<sup>123</sup> Christian democracy was tolerably prepared to fill the role of a conservative guarantor of the nation state, and had a strong sense of the internal forces that could return the state to its

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<sup>115</sup> Kalyvas, *The Rise of Christian Democracy in Europe*. 24. Conway, 'Introduction'. 10. Conway notes a dominant phenomenon in Western Europe for later Catholic democracy has been 'the gradual abandonment of a natural identification with the politics of the conservative right and the emergence of a Catholic political tradition of the centre-left'. see S. N. Kalyvas and Kees Van Kersbergen, 'Christian Democracy', *Annual Review of Political Science*, 13/1 (2010). Later Confessional parties 'redefined religion into a nebulous humanitarian and moral concept that allowed them to be simultaneously Christian and secular' (188).

<sup>116</sup> Conway, 'Democracy in Postwar Western Europe: The Triumph of a Political Model', (64).

<sup>117</sup> *Ibid.* 71.

<sup>118</sup> *Ibid.* 71.

<sup>119</sup> Kalyvas, *The Rise of Christian Democracy in Europe*. 25.

<sup>120</sup> *Ibid.* 25.

<sup>121</sup> *Ibid.* 25.

<sup>122</sup> Jan-Werner Müller, 'Towards a New History of Christian Democracy', *Journal of Political Ideologies*, (2013). 247. Citing the philosopher Charles Taylor he suggests that 'modern culture, in breaking with the structures and beliefs of Christendom, also carried certain facets of Christian life further than they ever were taken or could have been taken within Christendom' [footnote omitted].

<sup>123</sup> *Ibid.* 247 [emphasis included]. See also Conway, 'Introduction'. 11. Pre-1945 Christian democratic movements had retained nostalgia for pre-industrial society of natural hierarchies, and were 'precursors of post-1945 Christian democrats in name only'.

radical anti-democratic past. Lönne remarks that in Germany a 'more broadly based supra-confessional Christian party' replaced the German Centre Party and in the post-War era this developed into 'a new attitude of co-operation and collaboration [that] had replaced the long-established tendencies to separation and confrontation'.<sup>124</sup>

Jan-Werner Müller offers an approach to understanding the transformation of the Catholic Church's response to democracy that has been noted during the 19<sup>th</sup> century.<sup>125</sup> In particular, this relationship between the Catholic Church and democracy raised challenges conceptually where there exists 'the presence of a centralized institution issuing binding pronouncements not just on faith in general, but also on how the faithful are to think about politics'.<sup>126</sup> The bonding of democracy to Christianity was initially a novel innovation. Over the course of a century the Catholic Church developed its ideas about democracy and 'sought to challenge publicly the secular character of modern life'.<sup>127</sup> The approach of the Catholic Church to democracy came by way of articulating historical concepts about the Church and state to address new political forms of state governance. In this case, democracy was initially seen by the Catholic Church as one potential option among other competing theories. However, as Catholicism broadly began to recognise the advantages of democratic ideas, it shifted more decisively in that direction.

In Müller's view Christian democracy is 'a free standing form of modern political thought' with its own original political theory rather than a hybrid of other ideas about democracy that had been current and thereby responded to by Catholic politicians and clergy.<sup>128</sup> Therefore, Müller believes it is possible to define a tradition of thinking about the state, and the political form, that is not merely reliant upon a Christian response to the various challenges at any one period in political history. The development of an understanding of modern parliamentary democracy came by way of engaging with the many problems confronting Christianity as the democratic state developed. This process also responded to reactionary movements that the state produced from both theocratic and totalitarian political ideologies. It also initiated a proving ground for the early

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<sup>124</sup> Karl-Egon Lönne, 'Germany', *ibid.* 177.

<sup>125</sup> Müller, 'Towards a New History of Christian Democracy', (244. For a good general overview of the history of Christian democracy see Kalyvas and Van Kersbergen, 'Christian Democracy', (22. See also Hans-Martien Ten Napel, 'Christian Democracy', in Michael T. Gibbons. (ed.), *The Encyclopedia of Political Thought, First Edition.* (John Wiley & Sons, Ltd., 2015), 473-75.

<sup>126</sup> Müller, 'Towards a New History of Christian Democracy', (244.

<sup>127</sup> Conway, 'Introduction'. 22.

<sup>128</sup> Müller, 'Towards a New History of Christian Democracy', (244.

formulation of human rights ideas in a Christian idiom. The originality of human rights language within Christianity, and particularly from Catholics, came by way of their response to the political forces that utilise religion for their own ideological ends or sought to suppress Christianity from the political and social sphere altogether.

The precedents used to develop a theory of Christian democracy at the turn of the 20<sup>th</sup> century needed to be resourced from a tradition of Catholic political theory. In many respects it had to be thought anew, clarifying principles that would ‘build bridges to modern democracy without feeling they had simply betrayed their own convictions’.<sup>129</sup> Müller notes that as a consequence of the internal working out of a response to democracy there were ‘three paradigmatic strategies devised either to reconcile Christianity— and Catholicism in particular— and modern democracy or at least to render modern democracy safe [...]’.<sup>130</sup> The first strategy, had been a particularly statist response with the ambition to “baptise the revolution” thereby taking on the democratic impulse and infusing it ‘with thoughts and moral intuitions still recognizably Christian’.<sup>131</sup> The second strategy, ‘sought to constrain European states through a newly invigorated papacy’.<sup>132</sup> Curious as this kind of international response appears, this proposal for an overarching governing structure to limit the power of the modernising nation state was not uncommon at the turn of the 20<sup>th</sup> century.<sup>133</sup> Reliant on the theory of papal indirect power (*potestas indirecta in temporalibus*), Christianity as a constraint was no longer to operate ‘through concrete legal and political institutions [...] but as a form of social power’.<sup>134</sup> From this intuition we can deduce the later development of the non-coercive language of the human rights in Catholicism (as soft power), which becomes a check on the excesses of the modern liberal state. This model proposed the advancement of initiatives of lay Catholics in various professions and vocations influencing society as a “leaven”, which would integrate Christian principles into society. However, this model was problematic because it also restrained

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<sup>129</sup> Ibid. 247.

<sup>130</sup> Ibid. 247. Emphasis included.

<sup>131</sup> Ibid. 247. See further Hastings, ‘Hugues-Flicite Robert De Lamennais: A Catholic Pioneer of Religious Liberty’, (321).

<sup>132</sup> Müller, ‘Towards a New History of Christian Democracy’, (248).

<sup>133</sup> Ibid. 248. In Tocqueville’s *Democracy in America* Müller notes that in Tocqueville there is an argument that explicitly contends that Catholicism and democracy were compatible and would balance the excesses of the liberal democratic state. See also Scott, *The Catholic Conception of International Law: Francisco De Vitoria, Founder of the Modern Law of Nations, Francisco Suárez, Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations : A Critical Examination and a Justified Appreciation*. P. 8, 399, 414-419. Scott discusses the role of the papacy as a universal court to adjudicate inter-state disputes among catholic princes, and that ‘in the words of Victoria, indicates that authority – indeed, the best of authority – was at hand; “This is also the view of Torquemada,” de Victoria declares, “and of all the doctors” [p 8].

<sup>134</sup> Müller, ‘Towards a New History of Christian Democracy’, ( 248).

Catholicism (and religion) from direct participation in politics, a tactic that was highly criticised because it indicated the Church's silence (or quiteism) during authoritarian or totalitarian regimes.<sup>135</sup>

The third strategy Müller proposes was the development of Christian democratic party politics with 'a defensive holding the line at core natural law commitments, especially to do with family and schooling, [which] became the default strategy for Christian Democratic parties'.<sup>136</sup> This particular manifestation of Christian political thought strongly emphasised Catholic identity politics rather than the clusters of ideas and principles, drawn from Christian sources, around which a political party could later coalesce. Müller emphasises that this particular strand of thought was initially unconvinced by the idea of democracy and did 'not necessarily entail an acceptance of the legitimacy of parliamentary democracy'.<sup>137</sup> Committing to democratic principles involved a long process of acclimatisation to the political form of the nation state, and a letting go of much of the Catholic suspicion about the impact democracy might have on the Catholic religion.<sup>138</sup> Again the very guarantees that the Catholic Church sought to preserve was the space of religion in democracy, and this contributed to an emphasis placed on human rights, especially religious liberty, and human dignity.

Catholicism and the conservative politics it engendered contributed to shaping the form of parliamentary democracy, particularly in post-War Europe. It was a continuation of a lengthy negotiation originating in the 19<sup>th</sup> century mobilisation of Catholic mass movements and culminating in Christian democratic parties that had grown beyond their theological foundations.<sup>139</sup> Müller has suggested that 'post-War Western European elites deeply distrusted popular sovereignty and sought to constrain the demos both internally and externally [...]'.<sup>140</sup> The distrust in

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<sup>135</sup> See in particular Cavanaugh, *Torture and Eucharist: Theology, Politics, and the Body of Christ*. This work details the role of the Catholic Church in authoritarian Latin American countries and its silent complicity. Cavanaugh contrasts different political approaches to the state with the existing political theology of the Church that separated Catholics dualistically as body and soul. The authoritarian state governed the temporal sphere, the body, and therefore led to the Church obedience and acquiescence, including silence about abuses by the state, including torture. The Church retained spiritual hegemony and social influence over education and social services.

<sup>136</sup> Müller, 'Towards a New History of Christian Democracy', (250).

<sup>137</sup> Ibid. 250.

<sup>138</sup> Ibid. 250. Müller points to the period of transition that German Catholics underwent suggesting 'it was arguably only in the late 1950s that Catholic thinkers (as opposed to Christian Democratic Union politicians) emerged from a defensive and sometimes deeply antiliberal form of political thought'.

<sup>139</sup> See Weir, 'The Christian Front against Godlessness: Anti-Secularism and the Demise of the Weimar Republic, 1928–1933', (214. For instance in Germany, Weir notes that the church was forced into 'a defensive position by the *Kulturkampf* of the 1870s, [so that] most Catholic leaders and the ecclesiastical hierarchy rallied to the Centre Party and developed a host of confessional organisations'.

<sup>140</sup> Müller, 'Towards a New History of Christian Democracy', (251).

democratic politics displayed by the Catholic Church manifest itself in efforts to constrain the modern liberal state, both internally with the development of Christian politics and externally through proposition of new institutions such as constitutional courts and (supranationally) the European Court of Human Rights.<sup>141</sup> Catholicism became a strong ally to overarching political projects for European unity and international order, restoring the nation state to its properly aligned and hierarchical position. It appears that if the Catholic Church had found itself peripheral and subject to the modernising democratic state, it would, in turn, ensure the state's powers were curtailed by new theories of shared sovereignty, and over-arching agreements of international law and human rights norms.

### 3.3.1 Authoritarian and “total” states

Understanding the relationship to authoritarianism and the totalitarian state provides a further context in which to situate the Catholic Church's approach to human rights and liberal democracy. The period between the late eighteenth century and the late nineteenth century is traditionally noted for the Catholic Church's reaction to the emerging nation state.<sup>142</sup> The Church's political philosophy has relied on traditional authoritarianism and it remained the archetypal political form proposed in response to a shifting political landscape. Justification for this view hinged on the idea that the state could not function effectively without the counterbalance of religion to provide it with moral and spiritual direction. State sovereignty was bound up in the idea that to rule was to share in a religious vocation, organised and clarified by the Catholic Church. Joseph Maistre wrote, '[m]ore Pope more sovereignty, more sovereignty more unity, more unity more authority, more authority more faith'.<sup>143</sup>

Authoritarian ideas, promoted by Joseph de Maistre in the early 19<sup>th</sup> century, and defined as a project of monarchical restoration, have been judged by Isaiah Berlin to be a precursor of the political authoritarianism of the German jurist and political theorist Carl Schmitt.<sup>144</sup> Such a view is rejected by Spektorowski who believed Maistre's political philosophy 'not only did not generate fascism but because of its reliance on providential legitimacy and the idea of transcendence, [but] set an

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<sup>141</sup> Ibid. 251. See further M. Duranti, 'Conservatism, Christian Democracy, and the European Human Rights Project, 1945–50', PhD dissertation, Yale University, 2009.

<sup>142</sup> Schuck, 'Early Modern Roman Catholic Social Thought, 1740-1890'. 99

<sup>143</sup> Joseph Marie Maistre, *Du Pape* (Paris: Droz, 1966 (1841)) 475. Maistre's view was ultramontanist, meaning he held that there existed an absolute papal sovereignty over the whole church.

<sup>144</sup> Spektorowski, 'Maistre, Donoso Cortés, and the Legacy of Catholic Authoritarianism', (284)

epistemological barrier against fascist development'.<sup>145</sup> Even as he suggests that both positions remain anti-liberal and anti-democratic their ideological roots and political implications remain distinct.<sup>146</sup> Therefore, Spektorowski proposes that Maistre prerequisite for legitimacy was founded on traditional authoritarianism and remained a central justification for his beliefs. It's proposed it is possible to distinguish between traditional authoritarianism, which recognised predetermined religious boundaries, and political authoritarianism that simulated religion, resulting in totalitarianism.<sup>147</sup> In Spektorowski view, by interpreting Maistre, and Cortés who held similar authoritarian views, 'Schmitt was preparing his own political shift away from Catholic conservatism towards political authoritarianism, fascism, and National Socialism'.<sup>148</sup> Maistre and Cortés represented traditional authoritarianism in Catholic thought and reflected an effort abandoned by later Catholic political theorists to find a middle road between political authoritarianism and liberalism.<sup>149</sup>

Catholicism came to engage with Fascist ideas initially from its rejection of liberal democracy and to protect its vision of traditional authoritarianism in the 19<sup>th</sup> century and early 20<sup>th</sup> century.<sup>150</sup> The Catholic Church had sought some political

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<sup>145</sup> Ibid. 284.

<sup>146</sup> Ibid. 284.

<sup>147</sup> Ibid. 284. Spektorowski is arguing that there is a difference between religious and secular understandings of authoritarianism, which distinguished Maistre and traditional Catholicism from Schmitt's ideas. Schmitt had argued that the modern concepts that underline the theory of the state were "secularized theological concepts". His adaptations of theological concepts, particularly Catholic ones, were gradually viewed with profound suspicion in the Catholic intellectual milieu. See C. Schmitt, G. Schwab, and T.B. Strong, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press, 2010). 36.

All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent law giver.

See also Michael Hollerich, 'Carl Schmitt', in P. Scott and W.T. Cavanaugh (eds.), *The Blackwell Companion to Political Theology* (Oxford: Wiley). On the relationship between politics and the distortion of theological concepts see in particular Eric Voegelin, *The New Science of Politics, an Introduction* (London: Univ of Chicago Press, 1987). Also Thierry Gontier, 'From "Political Theology" to "Political Religion": Eric Voegelin and Carl Schmitt', *The Review of Politics*, 75/01 (2013), 25-43. Anthony Carty, 'Carl Schmitt's Critique of Liberal International Legal Order between 1933 and 1945', *Leiden Journal of International Law*, 14/01 (2001), 25-76.

<sup>148</sup> Alberto Spektorowski, 'Maistre, Donoso Cortes, and the Legacy of Catholic Authoritarianism', *Journal of the History of Ideas*, 63/2 (2002b), 283-302.283.

<sup>149</sup> Spektorowski, 'Maistre, Donoso Cortés, and the Legacy of Catholic Authoritarianism', (283).

<sup>150</sup> See for example A. Crăiuțu, *Liberalism under Siege: The Political Thought of the French Doctrinaires* (Lexington Books, 2003). 123 While Guizot and Cortes expressed monarchal ideas, they rejected the unlimited sovereignty of the people and of the unlimited sovereignty of the King. They proposed limited sovereignty on both accounts, as counterweights to the power of tyranny. This is a concept embedded in Catholic political thought evolving from Francisco Suárez thought on the limited *dominium* of the papacy. It is driven by the thought that all power is indirectly sourced in a higher legal order. This was something Hobbes rejected, believing it would result in conflict. However, potentially, the opposite is the case. See further on the development of these ideas, Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*. and Terpstra, 'The Political Theology of a Potestas Indirecta', (133-151).

vehicle to reaffirm the place of religion in a dramatically secularising society. In Pollard's view, the advance of Catholic Fascism stemmed from,

[...] a belief that fascist movements and ideas offered the best political vehicle for the protection and promotion of religious interests and objectives, and a sense that those ideas were consonant with Christian ideals and practices.<sup>151</sup>

The historian John Pollard's account of political Catholicism in Italy reveals the Vatican's "marriage of convenience" with Facism in the 1920's and 1930's with 'a high degree of convergence between the Church and Facism in the areas of economics, social, and even foreign policy until 1938'.<sup>152</sup> However, Pollard also identifies that the 1929 Concordat with the Italian state was 'of crucial importance for the future development of political Catholicism in Italy, for it ensured the survival of Catholic Action as the only autonomous, non-Facist organisation in Mussolini's totalitarian state'.<sup>153</sup> Pollard proposes that from the point of view of Catholic theology, it could not subscribe to the exaggerated nationalism and racialism associated with Facism because 'the theological essence of Catholicism remained universalistic [...]' and not defined by one instance of a state's ideology.<sup>154</sup> Therefore, an identity based on race or nation would be thought of as too temporal and materialistic approach to the human condition for Catholic theology. However, Pollard suggests the actual practice of Catholics might have been otherwise, given how particularly anti-Semitic Christian Europe was in the early 20<sup>th</sup> century.<sup>155</sup>

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<sup>151</sup> Pollard, 'Clerical Fascism': Context, Overview and Conclusion', ( 443.

<sup>152</sup> John Pollard, 'Italy', in T. Buchanan and M. Conway (eds.), *Political Catholicism in Europe, 1918-1965* (Oxford: Clarendon Press, 1996). 82 [footnote omitted].

<sup>153</sup> Ibid. 83. Catholic Action spread across continental Europe at a fast rate, carrying many of the key ideas from Catholic social thought. See in particular Pollard, 'Pius XI's Promotion of the Italian Model of Catholic Action in the World-Wide Church', (758-784). Pollard notes the key papal text that initiated this movement for the Christian restoration of society was Pope Pius XI, 'Quas Primas', *Acta Apostolicae Sedis*, 17 (1925). Where Christian principles are followed rulers 'will exercise their authority piously and wisely, and they will make laws and administer them, having in view the common good and also the *human dignity* of their subjects' (§19) [emphasis added]. The encyclical saw the Christian society as 'an excellent remedy for the plague which now infects society. We refer to the plague of anti-clericalism, its errors and impious activities' (§24). It insisted 'the Church, founded by Christ as a perfect society, has a natural and inalienable right to perfect freedom and immunity from the power of the state...' (§31).

<sup>154</sup> Pollard, 'Clerical Fascism': Context, Overview and Conclusion', (439. For example, Pollard points to Pope Pius XI condemnation of *Action Française* in 1926, his criticism of Fascist doctrine in the encyclical *Non Abbiamo Bisogno* (June 29, 1931), and later Pope Pius XI, 'Encyclical Letter Mit Brennender Sorge', *Acta Apostolicae Sedis*, 29 (14 March 1937 1937a).

<sup>155</sup> Pollard, 'Clerical Fascism': Context, Overview and Conclusion', (437-41.

In Germany, Hitler had avoided open conflict with the Catholic Church preferring to postpone confrontation until after the war.<sup>156</sup> Under the Nazi regime, Catholic's in Germany became alerted to the problem of language, particularly in defining the identity of their neighbour, where this terminology was infiltrated by Nazi ethnic racism and social discrimination.<sup>157</sup> References to 'citizen' after the Nuremberg Laws (1935) were wholly compromised in its exclusion of German Jews. After this point ecclesiastical statements became more nuanced and inclusive, even as the Church presented a weak defence for its own values and ideals.<sup>158</sup> The violations of the 1933 *Reichskonkordat* led to some protests by Pius XI about racialism, paganism and "statolatry" but the message of the German Bishops and Catholic Action did not resonate significantly in European Catholicism.<sup>159</sup> In responding to the new environment, clerical calls to public participation in social justice concerns moved away from referencing citizenship to the theological category of "persons", made in the image of God.<sup>160</sup> This basis for the right to social justice, including dignity and life, began to reshape the attitude of clergy caught in the throes of the Nazification of the State.<sup>161</sup>

Efforts to condemn fascism by the Catholic Church seemed to be further thwarted by the inadequacy of Catholic political philosophy to challenge the Nazis politically. The German Centre Party, which largely represented political Catholicism during

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<sup>156</sup> Hans Mommsen, 'National Socialism as a Political Religion', in H. Maier and M. Schäfer (eds.), *Totalitarianism and Political Religions, Volume II: Concepts for the Comparison of Dictatorships* (Oxon: Taylor & Francis, 2007). For a summary of the clashes with the Nazis, see also Waldemar Gurian, 'Hitler's Undeclared War on the Catholic Church', *Foreign Affairs*, 16/2 (1938), 260-71. 264 Gurian traces the changes in the German Catholic Church between 1933 and 1937, and notes the Nazis strategy was to assert "No martyrs, just criminals". This proposition attributed to Hitler indicated the Nazis sought to de-politicise and criminalise the Catholic Church, while resisting open and public attacks. It is noteworthy that in the Weimar period, out of twenty cabinets, ten were led by Centre Party Politicians, a political party influenced by political Catholicism. That was up until the appointment of Hitler as Chancellor on 30<sup>th</sup> January 1933. See Lönne, 'Germany'. 162.

<sup>157</sup> Dietrich, *Human Rights and the Catholic Tradition*. 40

<sup>158</sup> See Pollard, 'Pius XI's Promotion of the Italian Model of Catholic Action in the World-Wide Church', (772). The Catholic Action movement had been alerted to the threat of Fascism in the 1930's, particularly concerned with its infiltration into their organisation. The Nazi influence on Mussolini led to the Racial Laws against the Jews in 1938. Pius XI publicly protested stating "We are all Semites" in July 1938.

<sup>159</sup> Ibid. 772. See Matthias Ehrenfried, 'Nazi Acts Decried by Reich Bishops', *New York Times (1923-Current file)*, 1942 Jun 07 p. 12. The pastoral letter of March 22<sup>nd</sup> 1942 condemned the euthenasia of the ill, illegal arrests and imprisonment in concentration camps, forcable confiscation of property and 'to destroy Christianity in Germany during the war, before the soldiers, whose Christian faith gives them the stenght for heroic battles and sacrifices, return home'.

<sup>160</sup> Dietrich, *Human Rights and the Catholic Tradition*. 42

<sup>161</sup> A letter from Konrad von Preysing, Bishop of Berlin, reveals that the Pope was aware of the situation as early as January of 1941, particularly caught the attention of the commission. In that letter, Preysing confirms that awareness.

"Your Holiness is certainly informed about the situation of the Jews in Germany and the neighbouring countries. I wish to mention that I have been asked both from the Catholic and Protestant side if the Holy See could not do something on this subject [...] in favour of these unfortunates." [See further <http://www.jewishvirtuallibrary.org/> ]



the Weimar era, had considerable political power but was reluctant 'to look for allies on the left to help to defend democracy, or to countenance the state-imposed dissolution of the Nazi Party'.<sup>162</sup> Karl-Egon Lönne proposes that as the political Right grew in strength 'so the centre of gravity of political Catholicism shifted increasingly in that direction'.<sup>163</sup> Anxieties about the inner cohesiveness of the Centre Party as an exponent of confessional politics and concern about the spread of secularisation contributed to its inability to develop into a broader pluralist and liberal coalition, acceptable to a broader base.<sup>164</sup> Lönne further argues that the political Catholicism of the Centre Party 'missed a precious opportunity to identify with the ideals and practical political potential of the new democratic state and hence to make a complete emotional commitment to the creation of the Weimar Republic'.<sup>165</sup> The Centre Party's belief in coalition politics as a means to tame National Socialism failed to appreciate their special characteristics as a radically anti-democratic movement. The entry into power of the Centre Party with the National Socialist majority in 1933 to form a coalition and help secure the Enabling Law, granting dictatorial plenary powers to Hitler, revealed political Catholicism as tactically unsophisticated before Nazi manoeuvring. Lönne points out that Catholic Bishops further weakened Centre Party resistance by 'acknowledging the new facts of power relations in Germany and making the support and preservation of this regime a matter of duty for Catholics'.<sup>166</sup> The later concordat between the Catholic Church and the National Socialists 'finally confirmed the already *de facto* marginalisation of political

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<sup>162</sup> Lönne, 'Germany'. 162.

<sup>163</sup> *Ibid.* 162.

<sup>164</sup> *Ibid.* 165. Karl-Egon Lönne emphasises the failure to create a broader based Centre Party that would appeal to protestants in Germany.

<sup>165</sup> *Ibid.* 165. Karl-Egon Lönne notes the export of the Italian movement Catholic Action to Germany led to the depoliticisation of Catholic organisations from the 1920's to focus on spiritual and liturgical renewal.

<sup>166</sup> *Ibid.* 171. See footnote 25. A declaration from the Catholic Bishops of Fulda (23 March 1933), recognised the legitimate authority of the Nazi government because it had guaranteed the Church's religious freedoms, agreed to Concordats. The Declaration further stated:

Without going back on the condemnations of specific moral and religious errors contained in our earlier declarations the episcopate is therefore satisfied that the aforesaid general prohibitions and warnings do not need to be repeated. 'There is no need at the present juncture to make any special exhortation to Catholic Christians, for whom the voice of the Church is holy, to be loyal to their legally established sovereign and to carry out their civil duties conscientiously, eschewing absolutely any illegal or subversive behaviour' [reference omitted].

This lift of a prohibition on Catholic involvement with the NSDAP (Nationalsozialistische Deutsche Arbeiterpartei) and their new political structure held a hope that Catholics might influence its direction. However, Hastings suggests that 'the pseudo-sacral spectacle of the Nazi aesthetic continued on its own trajectory, developing outside— and, in many ways, in clear contrast to— any Catholic or Christian framework, with the trappings of the more overt Catholic content of the early movement continuing only in residual form'. See Derek Hastings, *Catholicism and the Roots of Nazism: Religious Identity and National Socialism: Religious Identity and National Socialism* (Kindle edn.; New York: Oxford University Press, 2010) 312. 171.

Catholicism'.<sup>167</sup> Karl-Egon Lönne remarks that 'the Concordat associated the Church with a regime which had already shown that it had not the least respect for right or law'.<sup>168</sup> The factors that led to this particular situation for political Catholicism included an abiding sense of alienation from the modern state and society felt as a Catholics minority, leading to a tendency to withdraw into the religious sphere. Also there existed a defensive strategy to protect sectarian interests, particularly of religion and church liberty and catholic education 'as crucial arbiters of political policy'.<sup>169</sup> A tendency towards anti-liberalism led to suspicion towards the enlightenment ideas of parliamentary-democratic models of government, which contributed to an unwillingness to build broader coalitions with Left leaning political parties.<sup>170</sup> After 1933 a key failure identified by Karl-Egon Lönne is to suggest the Catholic Church was 'limited almost exclusively to the defense of the ecclesiastical and institutional positions of the Church rather than to any broader political and moral positions'.<sup>171</sup> The historian Pollard further points out that many Christians in Germany, 'interpreted the coming to power of National Socialism as a moment of spiritual and moral cleansing of Weimar's Augean Stables [...]'.<sup>172</sup> And the churches in Germany did not express alarm at 'the progressive development of Jewish persecution by the Nazis until after 1933'.<sup>173</sup> Therefore, there was an initial failure to see the dangers inherent in Nazi neo-romanticism and anti-political politics.

Nevertheless, the dominant romantic, organic and antimodernist strains of Nazi ideology did not seduce Catholicism in its totality.<sup>174</sup> Catholic theology's rigidity prevented it from conforming to the Nazi theory of the state, just as it had towards other political forms.<sup>175</sup> Karl-Egon Lönne proposes 'the real influence of Catholicism during the Nazi years was not political but ethical and religious'.<sup>176</sup>

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<sup>167</sup> Lönne, 'Germany'. 171. The Concordat was agreed on 8<sup>th</sup> July, 1933. The Centre Party, which had represented political Catholicism, was dissolved on 5<sup>th</sup> July, 1933 [emphasis included].

<sup>168</sup> Ibid. 172.

<sup>169</sup> Ibid. 173.

<sup>170</sup> Ibid. 173.

<sup>171</sup> Ibid. 173.

<sup>172</sup> Pollard, 'Clerical Fascism': Context, Overview and Conclusion', ( 435.

<sup>173</sup> Ibid. 438. See in particular J. Isaac, *The Teaching of Contempt: Christian Roots of Anti-Semitism* (New York: Holt, Rinehart and Winston, 1964).. Isaac had written extensively on Christian –Jewish relations meeting catholic theologians, and in 1949 with Pius XII. In 1958 Pope John XXIII eliminated the word *perfidis* in the prayer for the Jews, both in Latin and in the vernacular.

<sup>174</sup> Dietrich, *Human Rights and the Catholic Tradition*. 152.

<sup>175</sup> Pollard, 'Clerical Fascism': Context, Overview and Conclusion', (439. Pollard notes that 'Catholicism was too "dogmatic

and rigid" to permit any tampering with an age-old belief system: Roman centralism and the need to conform under the 1870 dogma of Infallibility made this impossible'. See also Emilio Gentile, 'New Idols: Catholicism in the Face of Fascist Totalitarianism', *Journal of Modern Italian Studies*, 11/2 (2006).

<sup>176</sup> Lönne, 'Germany'. 175.

However, a theologically distinctive and even stoic independence from the Nazis in defence of their minority position was limited to a defence of Catholic interests.<sup>177</sup> Efforts to assert that distinctiveness include the fact that Pope Pius XI had commissioned an encyclical against racialism in 1938 but *Humani Generis Unitas* (On the Unity of the Human Race), but it was not published.<sup>178</sup> In June 1938, Pius XI had assigned American Jesuit John LaFarge, a strong supporter of anti-racist policies, to prepare a draft of *Humani Generis Unitas*. Jesuit Superior-General Wlodimir Ledóchowski assigned two other Jesuits, Gustav Gundlach and Gustave Desbuquois, to assist LaFarge. The draft of the encyclical was written by Gundlach and LaFarge in 1938 in Paris.<sup>179</sup> Gundlach had to emigrate from Germany in 1934 for his polemical writing against Nazism, and for condemnation of the “myth of the Führer”, and condemning its biological racism.<sup>180</sup> Gundlach’s first-hand familiarity with Nazism, instigated when ‘his pre-1933 views on liberalism and democracy began to experience a metamorphosis’.<sup>181</sup> Dietrich suggests that Gundlach, who had contributed to an earlier papal encyclical *Quadragesimo Anno*, had begun to see democracy and rights in a new light.<sup>182</sup> Pius XII, ‘relied on Gundlach in a large measure’ and thereby saw,

[...] the dignity of the person was elevated from the level of a basic, albeit generally implicit principle of Roman Catholic social morality to a position of explicit and formal concern.<sup>183</sup>

However, there had been no formal approval of democracy and rights, even though speeches of Pius XII came close.<sup>184</sup>

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<sup>177</sup> Ibid. 176.

<sup>178</sup> Pius XII, However, his first encyclical *Summi Pontificatus* (On the Supreme Pontificate, October 12, 1939), published after the beginning of World War II, has an echo of the previous title in its sub-title: On the Unity of Human Society and uses many of the arguments of the text. See also on this historical period of drafting documents condemning totalitarian movements, racism and nationalism in Patch, 'The Catholic Church, the Third Reich, and the Origins of the Cold War: On the Utility and Limitations of Historical Evidence', (406-407, 408

<sup>179</sup> Pollard, 'Clerical Fascism': Context, Overview and Conclusion', (439. Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 278-279. See also Peter Eisner, *The Pope's Last Crusade: How an American Jesuit Helped Pope Pius XI's Campaign to Stop Hitler* (Kindle edn.; New York: HarperCollins. , 2013). Kindle Locations 1583-1584. The preamble declared: “The Unity of the Human Race is forgotten, as it were, owing to the extreme disorder found at the present time in the social life of man.”

<sup>180</sup> Dietrich, *Human Rights and the Catholic Tradition*. 165.

<sup>181</sup> Ibid. 167.

<sup>182</sup> Ibid. 167. See also Pope Pius XI, 'Quadragesimo Anno AAS 23 (1931)', (§1. and Eisner, *The Pope's Last Crusade: How an American Jesuit Helped Pope Pius XI's Campaign to Stop Hitler* Kindle Location 1268.

<sup>183</sup> Dietrich, *Human Rights and the Catholic Tradition*. 169. See John P. Langan, 'The Christmas Messages of Pius XII (1939-1945): Catholic Social Teaching in a Time of Extreme Crisis'. See also Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 476. It's been suggested that these Christmas message could be viewed as sort of “baptism” of democracy.

Pollard clearly identifies that the absence of denunciation of anti-Semitism by Pius XI in the encyclical *Mit brennender Sorge* (1937), which had condemned the Nazi ideology, was an undeniable failure for the Catholic Church.<sup>185</sup> There was also little condemnation by the Church of the introduction of discriminatory laws against Jews across Europe or even of *Kristallnacht*, in Germany. In the absence of vocal protest to anti-Semitism prior to World War, which might have stimulated a deeper level of opposition from Catholics in Europe, any protest during the War would have fallen into irrelevance.<sup>186</sup> Ulrike Ehret proposes that the anti-Semitism of the Catholic Right 'was certainly the most virulent form of Jew hatred among Catholics in Weimar Germany'.<sup>187</sup> Catholic anti-Semitism was also 'dependent on the place of Catholics in national politics'.<sup>188</sup> Hardline *völkisch* nationalism expressed by the Catholic Right was invariably coupled with anti-Semitism and 'more radical than the anti-Jewish sentiments expressed by the Centre Party or the German Bishops'.<sup>189</sup> The fusion of theological anti-Semitism with exadurated folk nationalism contributed to a more general hostility to the place of jews in German society, and the improbability of rights language rising to the surface of Catholic concerns.

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<sup>184</sup> See further John P. Langan, 'The Christmas Messages of Pius XII (1939-1945): Catholic Social Teaching in a Time of Extreme Crisis'.

<sup>185</sup> Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 474. See Pope Pius XI, 'Mit Brennender Sorge, AAS (1937)', (§4. A passage from the encyclical states:

The experiences of these last years have fixed responsibilities and laid bare intrigues, which from the outset only aimed at a war of extermination. In the furrows, where We tried to sow the seed of a sincere peace, other men - the "enemy" of Holy Scripture - oversowed the cockle of distrust, unrest, hatred, defamation, of a determined hostility overt or veiled, fed from many sources and wielding many tools, against Christ and His Church. They, and they alone with their accomplices, silent or vociferous, are today responsible, should the storm of religious war, instead of the rainbow of peace, blacken the German skies.

§ 8. Whoever exalts race, or the people, or the State, or a particular form of State, or the depositories of power, or any other fundamental value of the human community - however necessary and honorable be their function in worldly things - whoever raises these notions above their standard value and divinizes them to an idolatrous level, distorts and perverts an order of the world planned and created by God; he is far from the true faith in God and from the concept of life which that faith upholds

<sup>186</sup> Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 474.

<sup>187</sup> On the complex relationship between Catholics and anti-Semitism, see further Ulrike Ehret, 'Antisemitism and the Jewish Question in the Political Worldview of the Catholic Right', in Larry Eugene Jones (ed.), *The German Right in the Weimar Republic: Studies in the History of German Conservatism, Nationalism, and Antisemitism* (Oxford: Berghahn Books, 2014). See also Ulrike Ehret, 'Catholics and Antisemitism in Germany and England, 1918-1939', Thesis (Ph.D.) (King's College London (University of London), 2006). See further Hastings, *Catholicism and the Roots of Nazism: Religious Identity and National Socialism: Religious Identity and National Socialism*. 171. On the defence of the Third Reich by Von Papen, and his role in signing the *Reichskonkordat* see L. E. Jones, 'Franz Von Papen, Catholic Conservatives, and the Establishment of the Third Reich, 1933-1934', *The Journal of Modern History*, 83/2 (2011), 272-318.

<sup>188</sup> Ehret, 'Antisemitism and the Jewish Question in the Political Worldview of the Catholic Right'. 221. Ehret further explains that the Catholic Right were distinguished from Catholics belonging to the Centre Party, in their belief in a revival of feudal aristocracy and autocratic government, and associated with rejection of Jewry, liberalism and freemasonry. 222-227.

<sup>189</sup> *Ibid.* 236.

### 3.3.2 The theory of Totalitarianism

The recognition that there was a relationship between the authoritarian nature of the ideologies of both the Left and the Right in Europe during the early part of the 20<sup>th</sup> century was an important and significant, if controversial, step for Catholicism in Europe. In the view of the historian James Chappel previous scholarship had credited anti-totalitarianism to secular humanism, particularly from the Left but the theory's circulation among liberals and secularists pales 'in comparison with the theory's prominence in the Catholic public sphere [...]'.<sup>190</sup> This particular strand of thought laid the grounds for more progressive approaches to the democratic state. Corrin makes that important point that among the Catholic intellectuals who were concerned with social justice, they had a better insight into discerning the problems with Marxism than the philo-fascist Catholics of the period.<sup>191</sup> Corrin further asserts that 'their approach to the problem was more balanced, firmly grounded sociologically, and thus more analytical; it was not driven by the impulse of a crusade'.<sup>192</sup> He therefore states that what had 'separated them politically from their co-religionists on the right was their recognition that Fascism was every bit as evil as Marxism'.<sup>193</sup> Linking the ideologies of the Left and Right was to become the focus of Catholic thought in their effort to reconcile Catholicism with the modern state.<sup>194</sup>

As proposed in this Chapter, there is a distinction between the theory of totalitarianism which emerged as a response to Bolshevism and Nazism in the early 20<sup>th</sup> century, and the authoritarianism favoured by right leaning Catholics in the 19<sup>th</sup> century. The latter is a retrospective attachment to the *ancien régime*, the previous marriage of church and state. While in the case of the former, the theory of totalitarianism is a reaction to the development of the absolute state, which subjugates religion and all other public and private associations in the civil sphere

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<sup>190</sup> Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', (564).

<sup>191</sup> Corrin, *Catholic Intellectuals and the Challenge of Democracy*. 231. On 'clerical fascism' historically and up to the contemporary period, see also Pollard, 'Clerical Fascism': Context, Overview and Conclusion', (442).

<sup>192</sup> Corrin, *Catholic Intellectuals and the Challenge of Democracy*. 231

<sup>193</sup> Ibid. 231 Pius XII had expressed concern overrule by the "masses". See Pius XII, *Democracy and a Lasting Peace* (24 December 1944), §19, and Pius XII, *Speech to the Rota Romana* (2 October 1945), AAS, 37 (1945), 256-62, when he noted that 'lascia le decisioni giudiziarie in balla di un mutevole istinto collettivo'.

<sup>194</sup> See for instance the very striking account by Patch, 'The Catholic Church, the Third Reich, and the Origins of the Cold War: On the Utility and Limitations of Historical Evidence', (406 -407). Patch records that in mid-1930's the Vatican worked toward an internal Report compiled by two Jesuits to analysis Hitler's *Mein Kampf* and his speeches from which they 'identified fourteen core propositions of Nazi ideology that were incompatible with Christianity'. This led to a proposed encyclical linking Nazism and Communism as totalitarian movements, finally producing the papal encyclical *Divini Redemptoris* (1937) on Communism, and a much 'watered down' papal encyclical *Mit brennender Sorge* (1937) on Fascism and racism.

to the demands of the state.<sup>195</sup> There are some key authors who articulated the early precedents for this move to identify a link between Fascism and Marxism, and to distinguish between forms of authoritarian thought, which are found particularly in the work of three of interwar Europe's most prominent Catholic political thinkers and critics of Schmitt. This strand came from recognition of the common ideological grounds shared by both Fascism and Marxism and developed into a totalitarian theory.<sup>196</sup> Chappel considers the writing of Waldemar Gurian, Dietrich von Hildebrand, and Jacques Maritain to be seminal in the creation of a totalitarian theory.<sup>197</sup> These political philosophers were considering the implications of the move towards democracy within Europe and from autocratic authority. Their concern had been to address how to situate Catholicism within civil society and the public sphere, and the threats to its position. Chappel reconfirms that,

Catholic political theory has, since at least the nineteenth century, argued for the *decentring of sovereignty* away from the nation state and towards a cluster of legitimate, non-political institutions: notably the family, the profession, and the Church.<sup>198</sup>

German Catholics in particular, as the country's largest minority, greeted the turn to democracy in 1918 with suspicion. They had existed 'as a hated and often persecuted minority during the imperial era' but also 'recognized the benefits of civil liberties and parliamentary representation vis-à-vis the Protestant majority'.<sup>199</sup> Greenberg proposes that in the 1920's, Catholic intellectuals began to formulate their thesis about the state, drawing from the Schelers philosophy of

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<sup>195</sup> Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', (563. Chappel proposes, 'totalitarianism theory argues that Bolshevism and Nazism, despite obvious differences in legitimating ideologies, are similar movements because each seeks to totally dominate its citizens, subjecting them to the party and its whims'. See also John Courtney Murray, 'The Church and Totalitarian Democracy', *Theological Studies*, 13/4 (1952), 525-63. 532. The theologian Murray described totalitarianism as follows:

Its cardinal assertion is a thoroughgoing monism, political, social, juridical, religious: there is only one Sovereign, one society, one law, one faith. And the cardinal denial is of the Christian dualism of powers, societies, and laws—spiritual and temporal, divine and human. Upon this denial follows the absorption of the Church in the community, the absorption of the community in the state, the absorption of the state in the party, and the assertion that the party-state is the supreme spiritual and moral, as well as political, authority and reality.

<sup>196</sup> See in particular Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', (562. Udi Greenberg, *The Weimar Century: German Emigres and the Ideological Foundations of the Cold War* (Princeton University Press).

<sup>197</sup> Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', (562. See also Von Hildebrand and Crosby, *My Battle against Hitler: Faith, Truth, and Defiance in the Shadow of the Third Reich*. However, Catholic and conservative historians like Christopher Dawson continued to engage with Schmitt, see forward to Carl Schmitt and Christopher Dawson, *The Necessity of Politics: An Essay on the Representative Idea in the Church and Modern Europe* (5: Sheed & Ward, 1931).

<sup>198</sup> Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', (565 [my emphasis]).

<sup>199</sup> Greenberg, *The Weimar Century: German Emigres and the Ideological Foundations of the Cold War*. 122-123.

Personalism.<sup>200</sup> They had identified secular individualism, nationalism and Bolshevism as key oppositional forces to Catholic participation in the democratic state. However, while their attacks on the democratic state included calls for alternative authoritarian and monarchical regimes, some within the movement began to recognise the benefits of democracy.<sup>201</sup> In Gurian's view 'the Nazi movement—nationalism's most extreme manifestation—represented secularism's final revolution'.<sup>202</sup> Nazism and Bolshevism had a common thrust in creating a secular religion from their respective ideologies and 'held a fanatical belief in secular redemption through complete politicization of society'.<sup>203</sup> However, Greenberg points out 'Gurian had virtually nothing to say about the Nazis' perverse anti-Semitism, intense militarism, or imperialist aspirations, all of which were core tenets of Hitler's political vision'.<sup>204</sup> Gurian's embrace of democracy and identification of Fascism as part of the same complex array of ideas as anti-clerical liberalism, nationalism, and Bolshevism, isolated him from prominent Catholic intellectual culture, when the Centre Party had capitulated following the signing of the 1933 *Reichskonkordat*.<sup>205</sup> Gurian saw democracy as the antidote to the prospect of the totalitarian state, at a time when the political philosophy in Catholicism was still in a reactionary stance towards the state.

A 1931 article on the "total state" by Carl Schmitt provoked a strong reaction from Catholic intellectuals.<sup>206</sup> Schmitt had previously been well received in Catholic

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<sup>200</sup> Ibid. 125.

<sup>201</sup> Lönne, 'Germany'. 179. Lönne notes for instance, the publication of the Cologne Principles (July 1945) as a foundation for the Christian Democratic Union in post-war Germany. The writing of these principles began during the National Socialist era. M. Mitchell, *The Origins of Christian Democracy: Politics and Confession in Modern Germany* (Michigan: University of Michigan Press). 49.

<sup>202</sup> Greenberg, *The Weimar Century: German Emigres and the Ideological Foundations of the Cold War*. 132.

<sup>203</sup> Ibid. 132.

<sup>204</sup> Ibid. 132. Greenberg suggests that the Personalist philosophy of Catholics disinhibited them from making a connection between their anti-communism and the rise of national-socialism, which included anti-Semitism. However, Greenberg is vague about the connection he alleges in Personalism between Catholic anti-communism and the support it gives to a radical right wing anti-Semitism in Fascism.

<sup>205</sup> Ibid. 130.

<sup>206</sup> Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', (566. See Carl Schmitt, 'The Way to the Total State [Die Wendung Zum Totalen Staat]', in Simona Draghici (ed.), *Carl Schmitt, Four Essays, 1931–1938* (Washington, D.C: Plutarch Press (1931) 1989). Schmitt writes,

Ernst Jünger has come up with a very pregnant formula to describe this astonishing process: total mobilization. With the necessary qualifications regarding contents and accuracy, the formulas of potential armour and total mobilization are individually befitting. One must pay attention to the important insight gained from them and make good use of it. They impart a sense of sweeping range while conveying the idea of a great and profound transformation: as it has organized itself into state, society is in the process of changing from a neutral state of the liberal 19th century into a potentially total state. The tremendous turning may be construed as the one side of a dialectical evolution which passes through three stages: from the absolute state of the 17th and the 18th centuries, over the neutral state of the liberal 19th century, to the total state of the identity between state and society.

circles and among various political factions, including Christian democrats.<sup>207</sup> The proposal from within the Catholic milieu for a strong centralised state via a “total state”, occupying civil society, represented a dangerous turning point.<sup>208</sup> Greenberg suggests Gurian recognised ‘the dangerous consequences of this shift were epitomized by Carl Schmitt’s theory of the “total state”’.<sup>209</sup> Gurian appropriated Schmitt’s concept of the total state, turning it against the Catholic Church’s enemies, including Schmitt.<sup>210</sup>

The challenge to address Schmitt’s concept of the state was particularly challenging and has engaged political and legal thought to this day.<sup>211</sup> Political scientist Michael Hollerich proposes that Schmitt was ‘driven by his Christian faith to wage lifelong war against secular reason, unbelief, and nihilism’.<sup>212</sup> Hollerich suggests a

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<sup>207</sup> Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', (566. See Von Hildebrand and Crosby, *My Battle against Hitler: Faith, Truth, and Defiance in the Shadow of the Third Reich*. 265. Von Hildebrand had written extensively about democracy and against anti-semitism. Responding to Nazi anti-semitism in 1941, particularly Hitler’s Nuremberg’s speeches in 1933, he wrote,

The foundation of all authentic democracy, on the other hand, is the dignity of every person and the fundamental rights which every man possesses as a human being. Democracy thus presupposes not only the essential difference between man and animal but also the common spiritual nature of all human beings regardless of race.

<sup>208</sup> Greenberg, *The Weimar Century: German Emigres and the Ideological Foundations of the Cold War*. 130. This Catholic Right wing movement is well developed in Jones, 'Franz von Papen, Catholic Conservatives, and the Establishment of the Third Reich, 1933–1934', (272-318) and in Larry Eugene Jones, *The German Right in the Weimar Republic: Studies in the History of German Conservatism, Nationalism, and Antisemitism* (Oxford: Berghahn Books, 2014).

<sup>209</sup> Greenberg, *The Weimar Century: German Emigres and the Ideological Foundations of the Cold War*. 130.

<sup>210</sup> W. Gurian and E.I. Watkin, *Bolshevism: Theory and Practice* (Sheed and Ward, 1932). See also Waldemar Gurian, 'The Philosophy of the Totalitarian State', *Proceedings of the American Catholic Philosophical Association* (15, 1939), 50-66. Waldemar Gurian, 'Totalitarian Religions', *The Review of Politics*, 14/1 (1952), 3-14.

<sup>211</sup> See Jan-Werner Müller, 'Carl Schmitt's Method: Between Ideology, Demonology and Myth', *Journal of Political Ideologies*, 4/1 (1999), 61-85. For instance Müller notes that ‘Schmitt’s ‘method’ cannot be isolated from his larger political-cum-legal theory and philosophical-cum-religious convictions’. Müller proposes that Schmitt’s ‘underlying belief in the primarily ideological nature of political battle, and the use of concepts, myths and images remained largely the same’. As an indication of the complexity of Schmitt, Müller further proposes ‘Schmitt’s method was based on substantial metaphysical and religious beliefs, which led him to strategically deploy concepts, myths and his own private demonology’.

<sup>212</sup> Hollerich, 'Carl Schmitt'. Kindle Location 1800. Hollerich also quotes the Jewish philosopher Jacob Taubes, who describes Schmitt’s secular framework reliant on Hobbes as in actuality ‘an apocalypticist of the Counter-Revolution’ [footnote omitted]. See further Michael Hollerich, 'Catholic Anti-Liberalism in Weimar. Political Theology and Its Critics', in Leonard V. Kaplan and Rudy Koshar (eds.), *The Weimar Moment: Liberalism, Political Theology, and Law* (Lanham: Lexington Books, 2012). Hollerich details how people such as Eric Peterson and Alois Dempf as ‘ardently anti-liberal Catholic thinkers could yet come to a principled opposition to the National Socialist version of anti-liberalism’. Their argument was thereby focused against Schmitt. Hollerich proposes an number of qualities that Catholic anti-liberalism possessed in Germany. In summary: Hostility to the principles of 1789, viewed as a driver of de-Christianisation of Europe; Suspicion of democratic forms that emphasised strict separation of Church and state; condemnation of individualism as “atomistic” and breakdown of natural communities; A preference for pre-political organic society rooted in natural law as opposed to “mechanistic” (possibly positivistic) forms of state; a preference for a clear definition of authority; a nostalgia for the medieval ideal of Christendom; a sense of the special vocation of Germany in Europe, attached to its imperial Christian heritage (p. 21).



twofold project developed, to understand the roots of sovereignty, and secondly 'presents the Roman Catholic Church as a *Machtform*, a bulwark of authority in an unsteady social world'.<sup>213</sup> In this interpretation, there is a deep critique of modern state required, to which Schmitt sees the 'necessity for a sociological consideration of these concepts', namely the concepts that underline the state that are derived from theology.<sup>214</sup> Underlining Schmitt's thought is the search for legitimacy for the modern authoritarian state but also a rejection of the Catholic Right's attachment to an organic conception of society, located in natural law propositions and summed up in their attachment to *Reichstheologie*.<sup>215</sup>

Highlighted in contemporary thought is the problem that our existing understanding of sovereignty remains vulnerable to the question of authority, particularly in times of national arrest and conflict. The turn to the work of Schmitt occurs because of his incisive account of the relationship between authority and sovereign power. Schmitt's solution revolves around what exceptional powers are given to a sovereign in moments of state crisis. In Schmitt's view all law can be reduced 'to the capacity of a would-be legal sovereign to judge a state of emergency or exception'.<sup>216</sup> As noted previously, Spektorowski differentiates Maistre's traditional authoritarianism and the Schmittian theory of the idea of non-normative decisionism.<sup>217</sup> Spektorowski points out that Maistre 'would not accept Schmitt's interpretation of non-legitimate decisionism and would be even more reluctant to accept the fascist attempt to transform the moment of exception to a permanent situation'.<sup>218</sup> Spektorowski suggests the Nazi transformation of the moment of exception 'entails a totalitarian state and a totalitarian ideology of political mobilization'.<sup>219</sup> Therefore, there are in theory at least, safeguards against the existence of a permanent state of exception that gives rise to totalitarianism because of the existence of religious legitimacy in Catholic thought of the political form. This is a point reneged on by Schmitt when he secularised the sources of authority for the sovereign, and whose non-normative decision is unrestrained by

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<sup>213</sup> Hollerich, 'Carl Schmitt'. Kindle Location 1800. See further Hollerich, 'Catholic Anti-Liberalism in Weimar. Political Theology and Its Critics'. 22.

<sup>214</sup> Hollerich, 'Carl Schmitt'. Kindle Location 1814 [footnote omitted].

<sup>215</sup> Ibid. Kindle Location 1881-1889. *Reichstheologie* was a return to the historical balance of powers between Church and state, throne and altar. Hollerich suggests, 'he preferred a rationale unencumbered by natural law categories or medieval precedents' located more likely in 'contemporary Protestant political theologians such as Wilhelm Stapel, with whom he was in close contact, and Emmanuel Hirsch, with whose Kierkegaardian decisionism he shared much in common'.

<sup>216</sup> Carty, 'Carl Schmitt's Critique of Liberal International Legal Order between 1933 and 1945', (26).

<sup>217</sup> Spektorowski, 'Maistre, Donoso Cortés, and the Legacy of Catholic Authoritarianism', (289).

<sup>218</sup> Ibid. 290.

<sup>219</sup> Ibid. 290.

legitimate governance.<sup>220</sup> Spektorowski concludes, it 'is fascism, characterized by national mobilization and the total state that is, thus, the clearest representative of Schmitt's non-normative decisionism'.<sup>221</sup> Fascism would be wholly rejected by Catholic political thought despite the ideological parallels at that juncture in history. Therefore, there is a distinction required between the various strands of thought that existed within the Catholic Church and its relationship to the authoritarian and Fascist state.<sup>222</sup> It is suggest that while Schmitt opted for Fascism, another tradition, which became the mainstream in Catholicism, reconceptualised political liberalism to marry with Catholic political theory of the limited modern state. From this position Catholic political thought could constitute a basis for liberal democracy, particularly by developing a Catholic interpretation of human dignity and human rights.

Chappel make the point that the divide between the Personalist philosophers, of Gurian, von Hildebrand, and Maritain was the kind of political form the Church would take in the modern state. They had believed the Church had a legitimate role in politics, while Schmitt had disagreed.<sup>223</sup> The question they debated was not alone about the nature of the Church but the nature of sovereignty. A particular dualism in Schmitt allowed for the Catholic Church to indirectly give *form* to its political existence through moral and ethical authority but not with direct *potestas*, with binding legal power.<sup>224</sup> This would appear to follow traditional Suarezian political thought of *potesta indirecta in temporalibus* (indirect power in the temporal sphere), but Schmitt sought to limit the role of the Church further to

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<sup>220</sup> Chapter 1, 2.4. reviewed the Catholic idea of *synderesis* defined as 'intelligence, which is the practical reason's direct knowledge of first principles' and that Scholastic theology 'was to discern a natural habit in this primordial, sable knowledge and to call it *synderesis*'. See Pinckaers, *The Sources of Christian Ethics*. 384. We also noted that in the development of Catholic political thought, both papal and secular sovereign *dominium* did not exert sovereignty in an absolute form, with the restraint of *plenitudo potestates* from a balance of powers between the throne and altar. This was also followed by the Suárezian theory of papal indirect power, a concept that limited sovereignty, particularly in its theological ambition to simulate religion. See Terpstra, 'The Political Theology of a Potestas Indirecta', (133. Terpstra suggest that a 'political theology of an indirect power claims to represent a higher legal order, God's law, to which political order with its positive laws is subjected' and made accountable.

<sup>221</sup> Spektorowski, 'Maistre, Donoso Cortés, and the Legacy of Catholic Authoritarianism', (300.

<sup>222</sup> See *ibid.* 290. Spektorowski notes that Maistre's traditional authoritarianism was a return to the early political thought of Augustinianism that imagined an unbridgeable gap between the City of God and the City of Man, which approached the state with a radical political theory of both religious and secular uses of power. In post-Reformation Europe, with the end of the *ancien regime*, the temptation to actualise a distortion of Augustine's political thought resulted in the construction of various authoritarian governments. It is instructive to note that in the absence of a comprehensive history of Catholic political thought, it is possible to isolate instances in history to justify most political forms.

<sup>223</sup> See Carl Schmitt and G.L. Ulmen, *Roman Catholicism and Political Form* (Westport, CT: Greenwood Press, 1996).

<sup>224</sup> Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', (571.

realm of moral and spiritual sphere.<sup>225</sup> Schmitt's view was for the Catholic Church to retreat from the political sphere because of its lack of power, 'the Church had to renounce potestas altogether to stave off calamity'.<sup>226</sup> Gurian relied heavily on Maritain's political philosophy that had originated in neo-Scholastic thought to counteract Schmitt's neo-Hobbesian total state.<sup>227</sup> Maritain's theory of the Church, which could manifestly participate politically as an indirect power, contradicted Schmitt's consideration of the Church existing only in political form without institutional presence. Essentially the existence of the Church in the civil and political sphere was by extension an argument by extension for the various natural communities that pre-existed the political state. These Personalist intellectuals retained a traditional Catholic interpretation of sovereignty, which was dispersed, and distinctive from Schmitt's proposition of absolute sovereignty followed the Hobbesian theory to that of a "total" state.<sup>228</sup> In Schmitt's theory the friend-enemy distinction applied not alone to foreign relations but also to deciding upon its domestic enemies.<sup>229</sup> The state as a political entity was transformed by Schmitt into a Hobbesian state of constant mobilisation and in preparation for conflict, radically redefining nature as determined by only one concern: 'The high points of politics are simultaneously the moments in which the enemy is, in concrete clarity, recognised as the enemy'.<sup>230</sup> This very enmity within the state, from within the political community and civil society, from which political opposition stemmed in all its forms, required a new totalitarian response. However, for some Catholics, this eclipse of the political and civil expressions of society went against even the most authoritarian or monarchical expressions found in Catholicism. The very foundations of Catholic political thought, the idea that there existed a pre-political natural community, that articulated a natural law and by abstraction, natural and inherent rights, had been placed in jeopardy. Schmitt's totalitarianism would

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<sup>225</sup> Ibid. 572. Schmitt is therefore following Hobbes, and their precedents in Ockham and Marsilius of Padua, who had rejected a role for religion in the civil sphere. See Brett, *Marsilius of Padua: The Defender of the Peace. With an Interpretive Introduction by Leo Strauss*. Introduction.

<sup>226</sup> Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', ( 572).

<sup>227</sup> Ibid. 573. See also Maritain, *Integral Humanism; Temporal and Spiritual Problems of a New Christendom*. Chappel points out that Maritain began to reference the ideas of Gurian suggesting, "'totalitarianism" is the name that Maritain gives to the tragedy of secular modernity: the fate of a Europe that ignores Christian principles is, Maritain argues repeatedly, totalitarianism' (581).

<sup>228</sup> See Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', ( 573).

<sup>229</sup> Carl Schmitt, *The Concept of the Political: Expanded Edition*, trans. G. Schwab (Chicago/London: University of Chicago Press). 45. See further Ernst-Wolfgang Böckenförde, 'Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory, The', *Canadian Journal of Law & Jurisprudence*, 10 (1997), 5. See also Hollerich, 'Carl Schmitt'. For an account of Schmitt's own application of a personal mythic understanding of the friend/ enemy, see the fascinating account of Müller, 'Carl Schmitt's Method: Between Ideology, Demonology and Myth', (61-85).

<sup>230</sup> Schmitt, *The Concept of the Political: Expanded Edition*. 67.

extend the state's positivistic chimera from the political into the natural foundations of society.

Schmitt had defined the Reich as a 'leading and racial power whose political ideas spreads outward into a particular *Grossraum*, and which categorically excludes interventions in that space by powers alien to it [*fremdrämige Mächte*]'.<sup>231</sup> Fassbender suggests 'in the political-historical reality Schmitt said, there always existed leading great powers'.<sup>232</sup> While states continued their recognition of state sovereignty, Schmitt had contended they ignored the 'true hierarchy of the subjects of international law'.<sup>233</sup> The unique characteristics of Western political thought, and embodied in National Socialism's totalitarianism, would serve to rectify the problems he observed in 19<sup>th</sup> century international law. Schmitt had viewed international law as a product of the western inter-state system but had also,

[...] bitterly resented that universalisation entailed not simply a geographical expansion but the radical transformation of the *Ius Publicum Europaeum*, into the "spaceless universalism" of a liberal international legal order that no longer differentiated between Western and non-Western states.<sup>234</sup>

Schmitt had delivered a particular strand of Catholic political thought in to the service of National Socialism, and with it the retreat of international law into an isolationist and defensive ideology of racial superiority.<sup>235</sup> In contrast, Gurian,

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<sup>231</sup> Bardo Fassbender, 'Stories of War and Peace on Writing the History of International Law in the 'Third Reich' and After', *European Journal of International Law*, 13/2 (April 1, 2002 2002), 479-512. 498. See Carty, 'Carl Schmitt's Critique of Liberal International Legal Order between 1933 and 1945', ( 30 - 34. Carty shows how Schmitt's insistence on the importance on the subjective dimension of international law provided justification for 'a specifically National Socialist concept of international law', as a rhetorical device to emphasize absolute national state sovereignty. In Carty comments Schmitt thought revealed, law 'is a matter of a correct relationship with the concrete existence of a People. There is no separation of the juridical Norm from the People's right to life (*völkisches Lebensrecht*)' (32). Carty also notes how Schmitt's thought was a critique of the positivist, liberal 'and therefore abstract-normativist, rule-orientated *Weltanschauung* [world view]', thereby consistent with anti-liberal Catholic thought at the time.

<sup>232</sup> Fassbender, 'Stories of War and Peace on Writing the History of International Law in the 'Third Reich' and After', (498).

<sup>233</sup> Ibid. 498. As cited in Schmidt, *Raum und Grossraum im Völkerrecht*, 24 *Zeitschrift für Völkerrecht* (1940) 145. In his essay, Fassbender seeks to acquit Wilhelm Grewe, a historian of international law, who was a contemporary of Schmitt, of supporting Schmitt's political thought.

<sup>234</sup> Ibid. 498.

<sup>235</sup> See Carty, 'Carl Schmitt's Critique of Liberal International Legal Order between 1933 and 1945', (37-39. Carty suggests that for Schmitt, there existed a particularly nuanced German legal and philosophical history developed 'by linking the cosmic concepts of organism, *Weltanschauung*, and myth, all drawn back to the spirit of the German People [...]'. This produced an idea of a physical legal order rooted in that particular national self-understanding and thereby this 'Konkretesordnungsdenken will mean for Schmitt a defensive German resistance to perceived, above all, cultural imperialism from the Anglo-American world'. Schmitt's challenge to the Universalist claims of international law is backed up by his observations about the use and abuse of reservations to international treaties based on state self-interest by the same Anglo-American world (39).

Maritain and von Hilderbrand had sought to engage with the new politics of democracy, seeing it as potentially an ally for Catholicism's universalist and naturalistic theory of sovereignty and the state.

Chappel suggests that more prominent totalitarian theorists like Hannah Arendt and Carl Friedrich 'helped to translate a fundamentally theological notion into acceptably secular language'.<sup>236</sup> While Greenberg proposes that during Gurian's exile from Germany he 'built upon his early writing to develop the famous "theory of totalitarianism," which claimed that Nazism and communism were essentially identical'.<sup>237</sup> Gurian had recognised that in Bolshevism an 'attempt to establish a society devoid of any transcendental sources of authority or legitimacy'.<sup>238</sup> Bolshevist communism had emulated religion but promised a materialistic resolution of the social and political evils that beset society. It was an ideology that required total submission, relegating religion to the fringes of public life. Greenberg suggests, 'communism became for Gurian not only the church's enemy but also its dark mirror image'.<sup>239</sup> It was Gurian's move towards democratic politics, wedded to his totalitarian theory that had linked both fascism and communism as twin threats, which became foundational in future post-war Christian democratic movements thought.<sup>240</sup>

As Chappel recognises it is the "total" nature of the ideologies of both Bolshevism and Fascism, which had attempted to offer a complete system.<sup>241</sup> This system was identified in the further assessment that it was underpinned by a "total" humanism, closed off from a transcendent conception of the person.<sup>242</sup> This very

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<sup>236</sup> Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', ( 565. For example see Greenberg, *The Weimar Century: German Emigres and the Ideological Foundations of the Cold War*. 145. Arendt 'developed a close friendship with Gurian and was deeply impressed by his political theory also sent the Review drafts of her work on "totalitarian terror," which she subsequently developed in her post-war writing'.

<sup>237</sup> On the contribution of Gurian to the development of totalitarian theory see Greenberg, *The Weimar Century: German Emigres and the Ideological Foundations of the Cold War*. 122. See further Gurian, 'The Philosophy of the Totalitarian State'. Waldemar Gurian, 'Trends in Modern Politics', *The Review of Politics*, 2/3 (1940), 318-36. Gurian, 'Totalitarian Religions', (3-14. Waldemar Gurian, 'The Totalitarian State', *The Review of Politics*, 40/4 (1978), 514-27.

<sup>238</sup> Greenberg, *The Weimar Century: German Emigres and the Ideological Foundations of the Cold War*. 129.

<sup>239</sup> Ibid. 129.

<sup>240</sup> Ibid. 130. According to Greenberg this position contrasted with many Catholic's hostility in Germany towards the Weimar Republic as it failed to grasp the problems brought about by economic depression. See further Krieg, *Catholic Theologians in Nazi Germany*. 40.

<sup>241</sup> Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', ( 581. As Maritain defined it as 'a complete system of doctrine and of life, which claims to unveil the meaning of existence, respond to all fundamental questions that life poses, and manifest an unequalled totalitarian power. It is a religion.'"

<sup>242</sup> See in particular Hermann, 'Total Humanism: Utopian Pointers between Coexistence and Pluralism', (69-77. See also Jurgen Moltman, 'Hope without Faith: An Eschatological Humanism without God', *Concilium*, 6/2 (1966), 14-21. The protestant Reformed theologian Jürgen Moltmann recognised an "esoteric Marxism" in the writing of the Marxist Ernst Bloch. He thought was considered a potential ground for dialogue with Christianity and an alternative to the "total humanism" that excluded religious engagement with Marxism. Unlike Fascism

prospect made it impossible to be a basis for human dignity or the natural ordering of human life, as a basis for human rights and a democratic state. The thought of these Catholic intellectuals was driven by a profound scepticism towards the nature of the state and sovereignty that centralised its power, over every vestige of society.<sup>243</sup> In World War they saw the complete collapse of European civilisation and the modern project, rooted in Christianity and the Enlightenment, and proposed an alternative built on new foundations.

The historian John Pollard recounts the gradual introduction of references to human rights in Papal speeches and encyclicals, which underlined a new conscious of totalitarianism.<sup>244</sup> For the Popes of the 1920's and 1930's, namely Pius XI and Pius XII, this new concept of human rights was 'a weapon against persecution by totalitarian and other regimes, and in condemnation of war crimes'.<sup>245</sup> In their rejection of totalitarian systems they emphasised the value of human dignity and

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there were some redeemable qualities in Marxist thought. Bloch had described pre-Marxist sources stemming from the prophetic history belonging to Judaism and Christianity, and from the religious and political revolutions in Western history. Bloch suggested these sources were the "thermal current" for dialogue with Marxism. Moltman suggests that Bloch had 'concentrated [his] historical examination on two themes: utopian socialism and natural law. Bloch has stated, 'utopian socialism was concerned with human happiness and natural law with human dignity. Utopian socialism described in advance conditions in which *those who labour and are heavily-laden* will find rest; natural law contrived conditions in which those who *hunger and thirst after righteousness* will find satisfaction' [as cited; Moltman emphasises here the Christian scriptural references in Bloch's utopian account of socialism and natural law]. See Ernst Bloch, *Atheism in Christianity*, trans. J.T. Swann (New York: Herder and Herder, 1972). and Ernst Bloch, *Natural Law and Human Dignity* (Baskerville: MIT Press/Suhrkamp Verlag, (1961) 1985).

<sup>243</sup> Maritain, *Man and the State*. 15. Maritain wrote, sovereignty 'implies not only actual possession of and right to supreme power, but a right which is *natural* and *inalienable*, to a supreme power which is supreme *separate from* and *above* its subjects' [italics included].

<sup>244</sup> Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 475. See also {Moyn, 2015 #1958} Kindle location 768. See further John P. Langan, 'The Christmas Messages of Pius XII (1939-1945): Catholic Social Teaching in a Time of Extreme Crisis'. Pope Pius XII, 'Radio Message of His Holiness Pope Pius XII. On the Eve of His Christmas (to All Peoples of the World)', *Acta Apostolicae Sedis*, 35 (24th December, 1942), 9-24. Based on Christianity, each citizen,

§ 1 [...] should cooperate, for his part, in giving back to the human person the dignity given to it by God from the very beginning; should oppose the excessive herding of men, as if they were a mass without a soul; their economic, social, political, intellectual and moral inconsistency;

He should favor, by every lawful means, in every sphere of life, social institutions in which a full personal responsibility is assured and guaranteed both in the early and the eternal order of things. He should uphold respect for and the practical realization of the following fundamental personal rights [...]

<sup>245</sup> Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 475. See also Moyn, *Christian Human Rights*. Kindle location 768. 'It was papal usage that proved most relevant to postwar affairs— the bridge from the late 1930s to the late 1940s'.

See Heiner Bielefeldt, 'Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Counter-criticism', *Canadian Journal of Law & Jurisprudence*, 10/01 (1997b), 65-75. Bielefeldt argues that from a Kantian perspective towards human dignity and human rights, as a response to the Schmittian critiques of liberalism and neutrality. While the Catholic Church shared with Schmitt its anti-liberal critique, rather than as a process of liberal self-criticism, there is common ground. It was a similar working out of a Catholic position towards these concepts of dignity and rights but from a natural law tradition that helped the Catholic Church arrive at the similar Kantian conclusions.

the family as immutable, rejecting any notion of the erasure of the person in the service of an historical process but at the same time these papal encyclicals rejected racial doctrines by emphasising the fundamental unity of the human race.<sup>246</sup> Ernest Huber, Hitler's constitutional lawyer had said in the Third Reich, there were 'of course no inborn inalienable political rights which are inherent in the individual himself and which would tend to limit and hamper the leadership of the Reich'.<sup>247</sup> In return, in 1942 the Papal Christmas message proposed,

The juridic sense of today is often altered and overturned by the profession and the practice of positivism and a utilitarianism which are subjected and bound to the service of determined groups, classes and movements, whose programs direct and determine the course of legislation and the practices of the courts. The cure of this situation becomes feasible when we awaken again the consciousness of a juridical order resting on the supreme dominion of God, and safeguarded from all human whims [...].<sup>248</sup>

Responding with a true appraisal of Nazism, especially based on inalienable rights, when Catholic political philosophy had perpetuated the philosophy of traditional authoritarianism, seemed all but to curtail the papal response to speeches and encyclicals, raising accusations of silence, and often indifference to religious minorities in preference for their own concerns.<sup>249</sup> However, the development of the idea of human dignity, drawn from the natural law, had become a retort to the

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<sup>246</sup> Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 475. See also Pope Pius XI, 'Mit Brennender Sorge, AAS (1937)', (§8. Holland, *Modern Catholic Social Teaching: The Popes Confront the Industrial Age, 1740-1958*.

<sup>247</sup> Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*.

<sup>248</sup> see Pope Pius XII, 'Radio Message of His Holiness Pope Pius XII. On the Eve of His Christmas (to All Peoples of the World)', (§ 4 'The Rehabilitation of Juridical Order'.

From the juridic order, as willed by God, flows man's inalienable right to juridical security, and by this very fact to a definite sphere of rights, immune from all arbitrary attack. The relations of man to man, of the individual to society, to authority, to civil duties; the relations of society and of authority to the individual, should be placed on a firm juridic footing and be guarded, when the need arises, by the authority of the courts. This supposes:

- a) A tribunal and a judge who take their directions from a clearly formulated and defined right.
- b) Clear juridical norms which may not be overturned by unwarranted appeals to a supposed popular sentiment or by merely utilitarian considerations.
- c) The recognition of the principle that even the State and the functionaries and organizations depend on it are obliged to repair and to withdraw measures which are harmful to the liberty, property, honor, progress of health of the individuals.

<sup>249</sup> See Frank J. Coppa, 'Between Morality and Diplomacy: The Vatican's "Silence" During the Holocaust', *Journal of Church & State*, 50/3 (Summer2008 2008), 541-68. Krieg, *Catholic Theologians in Nazi Germany*. D.J. Goldhagen, *A Moral Reckoning: The Role of the Catholic Church in the Holocaust and Its Unfulfilled Duty of Repair* (Alfred A. Knopf, 2002). On the debate surrounding the historical record of the papacy during World War II see Patch, 'The Catholic Church, the Third Reich, and the Origins of the Cold War: On the Utility and Limitations of Historical Evidence', (396-433).

positivism of the Nazis and a basis of future Catholic political thought, initiated by papal pronouncements.<sup>250</sup>

In post-World War II Germany, a new generation of Catholic jurists and political philosophers turned to the Conservative democratic movement founded in Christian democracy, and the ideas of the Personalist understanding of human dignity and human rights. In Gordon's view, Post-war Christian democracy in Germany supported an ideological syllogism: Nazism was born from secular materialism, and henceforth West Germany would retain its moral equilibrium only if it cleaved to its Christian heritage.<sup>251</sup> This view stemmed from the belief that modern democracy 'lacks its own secular norms of moral-political stabilisation and for its own sake must draw upon the resources of religious tradition [...]'.<sup>252</sup> Christian conservatives in Germany built upon the memory of Nazi de-Christianisation 'whose rise was predicated up on the radical secularization of society and the concomitant destruction of Christian norms'.<sup>253</sup> Christian democracy would be a bulwark against a socially fragmented and value-free secular state and against a return to neo-pagan nationalism.<sup>254</sup> Gordon points to the underlying parallel with a Schmittian critique of liberal democracy which can be located in German post-war thought, particularly a critique which viewed democracy as an instrumentalisation of law and the creation of a "total" state bureaucracy, which lacked moral and political substance.<sup>255</sup> However, Gordon submits that the post-war Christian critique of German liberal democracy evolved from other resources which had turned away from wholly accepting the Schmittian critique of the democratic state.

The Catholic Jurist Böckenförde provided a response to the political and theological problems of the democratic state for German Catholics.<sup>256</sup> Böckenförde had

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<sup>250</sup> Maritain, *Man and the State*. 106-107.

<sup>251</sup> P. E. Gordon, 'between Christian Democracy and Critical Theory: Habermas, Böckenförde, and the Dialectics of Secularization in Postwar Germany', *Social Research: An International Quarterly*, (2013). 182. On post-WWII Germany see further Mitchell, *The Origins of Christian Democracy: Politics and Confession in Modern Germany*. See also Greenberg, 'The Origins of Christian Democracy: Politics and Confession in Modern Germany', (Mitchell's central argument 'is that religion is the key to understanding Germany's bewildering postwar transformation from a racist dictatorship to a stable democracy').

<sup>252</sup> Gordon, 'between Christian Democracy and Critical Theory: Habermas, Böckenförde, and the Dialectics of Secularization in Postwar Germany', (182).

<sup>253</sup> Ibid. 184. On the concern prior to World War II by Catholic clergy of the destruction of Catholicism by the Nazis see also Patch, 'The Catholic Church, the Third Reich, and the Origins of the Cold War: On the Utility and Limitations of Historical Evidence', (396-433).

<sup>254</sup> Gordon, 'between Christian Democracy and Critical Theory: Habermas, Böckenförde, and the Dialectics of Secularization in Postwar Germany', (184).

<sup>255</sup> Ibid. 184

<sup>256</sup> Böckenförde, 'Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory, The', (5 On Böckenförde see further Hollerich, 'Catholic Anti-Liberalism in Weimar. Political Theology and Its Critics'. 18-



proposed (sometimes simply referred to as the “Böckenförde dictum”) that ‘the liberal, secularised state is nourished by presuppositions that it cannot itself guarantee’.<sup>257</sup> It was a reminder to Catholics that the modern secular state is both a risk for proponents of secularism as well as religious communities. This definition of democracy meant for Catholicism that there is no return to the confessional state as a political programme. Instead it implied the acceptance of a space for popular democratic representation and pluralism as a model for the overlapping visions citizens share regarding the good of society.<sup>258</sup> As we noted, the internal restraint on society that satisfied Catholic political thought was embodied through the development of Christian democratic parties to advocate for a Christian vision of society, and externally by the supervision of constitutional courts and the European Court of Human Rights.<sup>259</sup> By 1950, Böckenförde had made the demand on Catholic society for ‘a clear affirmation of modern secular democracy’ and also ‘an end to the cold civil war among Catholics and the rest of the population that, according to Böckenförde, even characterized a supposedly “Catholic state” like Adenauer’s Federal Republic of Germany’.<sup>260</sup> According to Müller ‘the dictum both served to admonish Catholics—and reassured them that religion continued to have an important role in the “the liberal, secularized state”’.<sup>261</sup>

The example of German Catholicism was central to the development of Catholic political thought and transformed the way the Catholic Church embraced liberal democratic politics and how Catholicism contributed to the constitutional and legal structures of the modern state.<sup>262</sup> Ironically, it was also recognition of the positive contribution of Enlightenment constitutional and democratic ideals to Catholic

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21. See also Ernst-Wolfgang Böckenförde and Raymond Schmandt, ‘German Catholicism in 1933’, *CrossCurrents*, 11/3 (1961), 283-304. This essay was part of Böckenförde’s contribution to the debate on the role of German Catholicism during the rise of the Nazis and the bringing of Hitler to power. The essay includes responses, as a postscript, from Böckenförde’s critics. In particular, Böckenförde critiqued the tendency in Catholic political thought to preference Church self-interest and preservation, based on natural law, above the concern for the political form of the state. In the context of Germany, the shift from the democratic Weimar state to the National Socialist dictatorship, exposed the problematic indifference of political Catholicism to the shape a national government took, while fulfilling its own religious vocation.

<sup>257</sup> As cited in Müller, ‘Towards a New History of Christian Democracy’, ( 251. Müller further suggests that the Böckenförde’s criterion proposed ‘religious actors need to accept democratic forms of institutionalized uncertainty’. See also Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*.

<sup>258</sup> See Pope Benedict XVI, Jürgen Habermas, and F. Schuller, *Dialectics of Secularization: On Reason and Religion*, ed. F. Schuller (San Francisco: Ignatius Press, 2006). this was a dialogue between Habermas and Cardinal Ratzinger, who would later be Pope Benedict XVI.

<sup>259</sup> Müller, ‘Towards a New History of Christian Democracy’, (251.

<sup>260</sup> *Ibid.* 251.

<sup>261</sup> *Ibid.* 251.

<sup>262</sup> On the contribution of Christian democracy to the Construction of the European project see in particular the useful survey Michael Sutton, ‘Political Realism and Roman Catholic Faith in the Construction of Europe: Konrad Adenauer, Robert Schuman and Charles De Gaul’, in L.N. Leustean (ed.), *Representing Religion in the European Union: Does God Matter?* (New York: Taylor & Francis, 2012), 35-46.

political and social thought. It was also recognition that the modern state could be conceived of as reliant on the naturalistic and pre-political ideals of the natural law, such as human dignity and rights, by drawing from a more ancient tradition.

### 3.4. Soft Power Diplomacy by the Holy See

The Catholic Church began to prioritise soft power diplomacy by the Holy See as a way to counter its isolation from the international community, particularly during the period of the formation of the League of Nations and the loss of the Papal States.<sup>263</sup>

Stalin was alleged to ask the French Foreign Minister Pierre Laval, "The Pope! How many divisions has *he*?" Churchill made his own addition in his autobiography stating, "Laval's answer was not reported to me but he might have mentioned that the number of legions are not always visible on parade".<sup>264</sup> This response characterised the understanding then, as now, that religions operate not always through the exercise of hard political power but more often through soft power. Indeed for Troy, it is this moral power which can on occasion successfully move an entire people, as was recognisable during the Solidarity movement in Poland.<sup>265</sup> Joseph Nye coined the phrase soft power as 'the ability to get what you want through attraction rather than coercion or payments'.<sup>266</sup> It arises Nye suggests from 'the attractiveness of a country's culture, political ideals, and policies'.<sup>267</sup>

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<sup>263</sup> See Duncan B. Hollis, 'Why State Consent Still Matters-- Non-State Actors, Treaties, and the Changing Sources of International Law', *Berkeley Journal of International Law*, 23/1 (2005), 137-74. Duncan B. Hollis, 'Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty', *Boston College International and Comparative Law Review*, 25 (2002). Jeff Haynes, 'Transnational Religious Actors and International Politics', *Third World Quarterly*, 22/2 (2001), 143-58. Ivan Valuer, 'The Roman Catholic Church: A Transnational Actor', *International Organization*, 25/03 (1971), 479-502.

<sup>264</sup> Jodok Troy, 'Die Soft Power Des Heiligen Stuhls. Unsichtbare Legionen Zwischen Internationaler Gesellschaft Und Weltgesellschaft', *Zeitschrift für Außen- und Sicherheitspolitik*, 3/4 (2010), 489-511. [Footnotes excluded]. 251.

<sup>265</sup> Ibid. 251.

<sup>266</sup> Joseph S. Nye, *Soft Power: The Means to Success in World Politics* (Public Affairs, 2004). x. See also Joseph S. Nye, 'Soft Power', *Foreign Policy*, 80/Autumn (1990), 153-71. See Alan Chong and Jodok Troy, 'A Universal Sacred Mission and the Universal Secular Organization: The Holy See and the United Nations', *Politics, Religion & Ideology*, 12/3 (2011/09/01), 335-54. I. Cismas, *Religious Actors and International Law* (OUP Oxford). David Ryall, 'The Catholic Church as a Transnational Actor', in Daphne Josselin and William Wallace (eds.), *Non-State Actors in World Politics* (Hampshire: Palgrave). See also Alan Chong, 'Small State Soft Power Strategies: Virtual Enlargement in the Cases of the Vatican City State and Singapore', *Cambridge Review of International Affairs*, 23/3 (383-405). Chong shows how analysing the soft power strategies of small states can reveal their foreign power reach and presence.

<sup>267</sup> Nye, *Soft Power: The Means to Success in World Politics*. x. See also Troy, 'Die Soft Power Des Heiligen Stuhls. Unsichtbare Legionen Zwischen Internationaler Gesellschaft Und Weltgesellschaft', (489-511). Citing Haynes, J. 'An introduction to international relations and religion' (Harlow: Pearson. 2007). 40-41:

The concept of "soft power" refers to the capability of a political body, often but not necessarily a state, to influence what other entities do through direct or indirect, often cultural or ideological,

Noether describes the late 19<sup>th</sup> century as a time when diplomatic relations between the Vatican and the major political powers were at a low point.<sup>268</sup> During that period the Jesuit journal *La Civiltà Cattolica* had begun to debate the question of the value of convening the First Vatican Council and this issue of defining papal infallibility.<sup>269</sup> Noether notes the view of one Italian deputy, who suggested,

[...] the Council [is] not [being] convoked against Luther and Calvin, but against you, sons of the French revolution [...] against the laws, institutions, sciences which you take pride in representing.<sup>270</sup>

Such moves by the Catholic Church had been viewed as a challenge to the much valued rationalism and secularity of the 19<sup>th</sup> century. Noether remarks that in the late 19<sup>th</sup> century, the line of demarcation between the Church and states remained unclear. Papal infallibility could be viewed as in direct collision with state sovereign authority because it would challenge a government's moral and political authority.<sup>271</sup> In a peculiar confluence of events, Papal infallibility was confirmed on 18<sup>th</sup> July, 1870 but by October 20<sup>th</sup>, with war in Europe and Rome overrun by Italian troops, Pope Pius IX was forced to officially suspend Vatican Council I and surrender the temporal power of the papacy. The Church had ascended to a position of infallible moral and spiritual authority but its very temporal sovereignty was all but lost. This turn of events sets the stage for the Catholic Church to emerge in the 20<sup>th</sup> century as a universal institution, relying on soft power and international law.<sup>272</sup> (Noether)(Noether)(Noether)(Noether)(Noether)(Noether)(Noether)(Noether)(Noether)(Noether)(Noether)(Noether)(Noether)(Noether)(Noether)

### 3.4.1 Developing soft power

The development of modern diplomacy is a product of both its past and present structure. The International lawyer Cassese remarks, 'from time immemorial there had been consular and diplomatic relations between different communities, as well as treaties of alliance or of peace'.<sup>273</sup> It has been a product of two interrelated orders which have been interlaced, 'the *pre-Westphalian* diplomatic order with its

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influence and encouragement [...] "Soft" power is a "third way" of achieving objectives; it is not sticks or carrots. [...] [S] often power is more than influence, since influence can therefore rest on the hard power of (military or diplomatic) or threats (economic) payments.

<sup>268</sup> Emiliana P. Noether, 'Vatican Council I: Its Political and Religious Setting', *The Journal of Modern History*, 40/2 (218-33). See also Chamedes, 'The Vatican and the Making of the Atlantic Order, 1920-1960', (33).

<sup>269</sup> Noether, 'Vatican Council I: Its Political and Religious Setting', (228).

<sup>270</sup> Ibid. 227.

<sup>271</sup> Ibid. 232. Noether notes for instance that both France and Austria attempted to influence the council's deliberations.

<sup>272</sup> See further ibid. 233.

<sup>273</sup> Cassese, *International Law*. 22 [italics included].

distinct origin going back to the *medieval* period; and the modern Westphalian order' which is developed by the state based international system.<sup>274</sup> These attributes have given modern diplomacy both its stability and flexibility, where there have been both structural change in the international relations of states and structural continuity with historical antecedents traced back to the medieval period. This dual character has given diplomacy the capacity to further address 'modern elements which have not been products of the Westphalian territoriality'.<sup>275</sup> Modern diplomacy has had a number of positive factors attributed to it because of this history including a 'combination of its ontological elasticity [the inclusion of different types of actors in international relations], adaptive capacity and resilience'.<sup>276</sup> These characteristics allow the inclusion of "fringe players" in international relations which include the Holy See.<sup>277</sup> The Holy See in particular is regarded *sui generis* in the international legal system meaning its characteristics are unique, bearing elements of the statehood while reliant on the expressed diplomatic recognition by other states of those traits.<sup>278</sup> As Bátor and Hynek detail, the historical development of diplomacy began with 'a formal means of privileged communication among entities within hierarchically structured society of the Christendom'.<sup>279</sup> From the 15<sup>th</sup> century functioning embassies began to appear as representatives of legal sovereigns contributing to the professionalization of diplomats. Bátor and Hynek acknowledge the role of the papacy in situating diplomacy at the centre of inter-sovereign discourse.<sup>280</sup> Rather than becoming obsolete within the Westphalian system, this contribution was sustained by the retainment of diplomatic ideals and models of engagement by diplomatic practice.<sup>281</sup> This earlier process utilising "soft power" became institutionalised in the Westphalian discipline of inter-state exchanges.

In an era of non-state actors, and varying 'subjects' of international law today, including inter-state bodies such as the United Nations, both pre-Westphalian and post-Westphalian diplomacy, particularly as it can be attributed to soft norms, remain relevant. International relations can recognise and more importantly help

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<sup>274</sup> Bátor and Hynek, *Fringe Players and the Diplomatic Order: The 'New' Heteronomy*. 66 [italics in text].

<sup>275</sup> Ibid. 67.

<sup>276</sup> Ibid. 67 [italics included in text].

<sup>277</sup> The legal status of the Holy See will be addressed in chapter 3.

<sup>278</sup> See Montevideo Convention on the Rights and Duties of States, 165 LNTS 19; 49 Stat 3097 (December 1933). Article 1: The state as a person of international law should possess the following qualifications: a ) a permanent population; b ) a defined territory; c ) government; and d) capacity to enter into relations with the other states.

<sup>279</sup> Bátor and Hynek, *Fringe Players and the Diplomatic Order: The 'New' Heteronomy*. 71.

<sup>280</sup> For an example of medieval sovereignty and its extra-territorial reach see Ntina Tzouvala, 'The Holy See and Children's Rights: International Human Rights Law and Its Ghosts', *Nordic Journal of International Law*, 84/1 (2015), 59-88.

<sup>281</sup> Bátor and Hynek, *Fringe Players and the Diplomatic Order: The 'New' Heteronomy*. 73-4.

distinguish between the kinds of diplomatic activity belonging to inter-state engagement and that belonging to other non-state entities to which older forms of quasi-diplomatic engagement belong. In situating the Catholic Church, recognising this dual discourse is important because it exists as a religious, and non-state actor in the international system but also includes the juridical entity of the Holy See. The capacity within international relations for ontological elasticity [the inclusion of different types of actors in international relations], while maintaining the Westphalian state system gives it adaptive capacity and resilience.<sup>282</sup> For Bátorá and Hyněk, the existence of “fringe players” which can transverse both state and non-state forms is a positive testimony to the present shape of international relations. It is important for fringe players to be ‘recognised as legitimate participants of the modern diplomatic system’.<sup>283</sup> Fringe players possess the traditional and rigid structures designed by the Westphalian order and for instance described in the Montevideo Convention on the Rights and Duties of States by ‘[a]daptation, strategic realignment and institutional mimicry [...] to look similar to states proper’ yet they ‘further cultivate their distinctness and maintain their traditions’.<sup>284</sup> However, in contrast to formal state practice, a fringe player ‘can also draw on and utilize structures, environments and/or *practices from different institutional orders* in ways in which they can become explicitly different compared to the dominant core players of a particular order’.<sup>285</sup> This latter point is especially relevant to the Holy See as it can draw upon a vast global network of non-state actors from within the Catholic Church, from for instance various national churches, religious congregations and international Catholic non-government organisations. The position of the Holy See not only places it in the legally ambiguous territory of being defined as *sui generis* but also, using Bátorá and Hyněk term, as “strangers” because it functions as a diplomatic fringe player, being neither a state properly conceived or a non-state actor properly conceived. Yet this very conception exposes the Westphalian maladaptation which only proposes a ‘mechanistic understanding of the international system as a self-selecting system of like-units’.<sup>286</sup> Bátorá and Hyněk’s argument is convincing because it reproduces the pluralism present across the international legal and diplomatic horizon as it presents itself today, in contrast to the normative and static Westphalian system. It produces a coherent argument by which to understand the Holy See in its various

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<sup>282</sup> Ibid. 73-4.

<sup>283</sup> Ibid. 77.

<sup>284</sup> Ibid. 77. Montevideo Convention on the Rights and Duties of States, 165 LNTS 19; 49 Stat 3097 (December 1933).

<sup>285</sup> Ibid. 78 [italics added].

<sup>286</sup> Ibid. 78 [italics added].

guises and allows the complex profile of a religion and a state entity to emerge for analysis in both the legal and diplomatic spheres.

The Holy See as a legal and juridical entity has become a liminal subject of international law over its long history, moving from the possession of royal sovereignty to the possession of Westphalian statehood properly understood prior to the loss of the Papal States, to a new more indeterminate legal subject which straddles the space between statehood and a non-state actor, following the Lateran Treaty.<sup>287</sup> The concept “Liminality” further assists in clarifying the sometimes ambiguous position of fringe diplomatic players, such as the Holy See. It is a term drawn from literature in cultural anthropology and concerned with dislocation or in-between situations. Mälksoo suggests, ‘liminality points to in-between situations and conditions where established structures are dislocated, hierarchies reversed, and traditional settings of authority possibly endangered’.<sup>288</sup> The internal coherence of Catholicism also could be described as liminal because it has used the overarching narrative of two kingdoms, Christendom, *societas perfectas* and pilgrim Church, developed at various stages of its ecclesiastical theology which has also emerged in a non-linear and contested process, and which can be used to describe models of the Church’s internal setting.<sup>289</sup> Today ecclesiastical and secular diplomacy is thought to be ‘much more deliberately compartmentalised’.<sup>290</sup> However, the Holy See retains its distinctive liminal quality which ‘does not parallel the diplomacy of other states’.<sup>291</sup> The Holy See displays not alone a different institutional framework (or orders, as we described fringe diplomatic players) but also different institutional objectives which are not evident in secular foreign policy or priorities. Kent and Pollard offer the example of Papal nuncio’s who have a dual role as accredited to representing the Holy See to secular

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<sup>287</sup> Ibid. 79. Liminality is taken from *limen*, which signifies “threshold” in Latin. See I. B. Neumann, 'Introduction to the Forum on Liminality', *Review of International Studies*, (2012). M. Mälksoo, 'The Challenge of Liminality for International Relations Theory', *ibid.* ( 481: 'liminal entities are neither here nor there; they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremonial' [footnote omitted]. Therefore it becomes a useful term for the study of complex religious, legal and political entities found on the horizon of international law and international relations, and does not allow for simple categorisations or binary opposition between states and non-state actors. Mälksoo further claims, 'liminality takes an active interest in the boundary zones and peripheries (traditionally conceived) rather than the established centres of international politics'. It thereby retains a broader scope in evaluating non-traditional and non-static states which might not fit the standard Westphalian form (482-3).

<sup>288</sup> Mälksoo, 'The Challenge of Liminality for International Relations Theory', (481).

<sup>289</sup> These descriptions avoid the more technical and theological nuanced language of the ecclesiology of the Church found in the documents of the Second Vatican Council. See Dulles, *Models of the Church*.

<sup>290</sup> P.C. Kent and J.F. Pollard, 'A Diplomacy Unlike Any Other: Papal Diplomacy in the Nineteenth and Twentieth Centuries', in P.C. Kent and J.F. Pollard (eds.), *Papal Diplomacy in the Modern Age* (Westport, CT.: Praeger, 1994). 11.

<sup>291</sup> Ibid. 11.

national governments but also are representatives of the Pope and Curia of the Catholic Church to the 'national' church in constituent countries and territories.<sup>292</sup>

### 3.4.2 Treaty Formation and Concordats

In Penelope Simons view it was Hegel's philosophy, his theory of man, society and State, which marked 'the beginning of the self-satisfaction of the modern State, of a notion which was to become an underlying assumption of the contemporary international order'.<sup>293</sup> There was a sense of uninterrupted progress and modernisation, including the relegation of religion to the periphery, not alone of the nation state but of the international order itself. The position of Catholic Church, had enjoyed historical prestige but now had to struggle to regain its moral and political position. However, following the Great War, 'the Vatican successfully made use of new legal and diplomatic instruments to regain political and territorial sovereignty', extending its diplomatic relations and increasingly concluding concordats.<sup>294</sup> This process of seeking the reintegration of the Catholic Church from the periphery of the international order to secure the influence of its religious mission challenged the perceived role of religion in relation to the state. Gong writes that over the course of the 19th century, 'the European powers enforced 'unequal treaty', 'capitulation', and 'protectorate' regimes in the Levant, Asia, and Africa, thereby drawing these non-European countries into the framework of what became the first global international system in history'<sup>295</sup> This piece of history relates to the external relations of states with non-European nations. Internal to the political landscape of the European international order was the provision made for the relationship of a new model of sovereignty with historical allies. Oppenheim suggested there were only state actors and therefore subjects of treaties but did admit to the corollary that non-states have historically participated in treaties.<sup>296</sup> One facet of this was the renegotiation of the place of the Catholic

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<sup>292</sup> Ibid. 11.

<sup>293</sup> Penelope Simons, 'The Emergence of the Idea of the Individualized State in the International Legal System', *Journal of the History of International Law*, 5/2 (2003), 293-335. 334. See also Heiner Bielefeldt, "'Western' Versus 'Islamic' Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights", *Political Theory*, 28/1 (2000), 90-121. 99. Bielefeldt cautions that when we look back to the past, 'we easily become "Hegelians" who regard the chain of historic events as entailing a concealed plan of history, a plan according to which antiquity harbours the "cultural genes" of what later ripened and finally culminated in the modern era'. However he also cautions, 'Down to the present day, the Christian churches have a tendency not to pay sufficient attention to the changes they had to undergo to be able to endorse human rights and religious liberty'.

<sup>294</sup> G. Chamedes, 'The Vatican and the Reshaping of the European International Order after the First World War', *The Historical Journal*, 56/4 (2013a). 956.

<sup>295</sup> Gong, *The Standard of Civilization in International Society*. 4.

<sup>296</sup> Jordan Paust, 'Nonstate Actor Participation in International Law and the Pretense of Exclusion', *Virginia Journal of International Law*, 51/4 (2011), 977-1004. 985

Church in the legal system.<sup>297</sup> The Catholic Church had found itself in the precarious position of no longer being considered a sovereign equal among European states in the 19<sup>th</sup> century and particularly from 1870, with the loss of the Papal States by the Holy See.

The issue of territorial control as grounds to establish statehood under international law implies according to Ntina Tzouvala, 'the annexation of the former Papal States brought them to an end as a sovereign state'.<sup>298</sup> Therefore, the vexing problem of establishing sovereign statehood in the absence of control of a territory complicated the issue of a claim of legal personhood in international law. As Tzouvala proposes, the legal scholar Oppenheim 'negated the assertion that the Holy See was an international legal person in the absence of a sovereign state to operate as the locus for its power and only assigned a 'quasi-international position' to it'.<sup>299</sup> Tzouvala therefore proposes that 'the international legal consequences of this quasi-personality are unclear'.<sup>300</sup> However, the point made by Oppenheim was to ask how the sovereignty of the Holy See is established following the extinction of the Papal States.<sup>301</sup> Oppenheim suggests that even though 'the Holy See and the Pope have no longer any international position whatever according to the Law of Nations, since States only and exclusively are International Persons' the practice of international community must be taken into account,<sup>302</sup> 'the facts of international life and the actual condition of things in every-day practice are taken into

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<sup>297</sup> See Scupin, 'History of International Law, 1815 to World War I'. Hans-Ulrich Scupin remarks, [...] the attempt at codification of considerable parts of international law shows that for statesmen the rules governing relations between States, their sovereigns, republics, and also the Holy See bore the character of law to a higher degree than previously.

Further he notes, the 'fact that papal nuncios and legates were recognized as enjoying the highest precedence, and on occasions acted as doyen even in non-Catholic States, shows how the assessment of the importance of the Holy See had changed'.

<sup>298</sup> Tzouvala, 'The Holy See and Children's Rights: International Human Rights Law and Its Ghosts', ( 63-64. Cismas, *Religious Actors and International Law*. 158. Cismas argues the following:

'the Holy See and the Vatican form a construct and thereby share a single international personality, which nevertheless derives from two different sources: historic recognition of the religious legitimacy of the Holy See; and the state-like resemblance conferred upon the construct by the Lateran Treaty in 1929'.

<sup>299</sup> Tzouvala, 'The Holy See and Children's Rights: International Human Rights Law and Its Ghosts', ( 64. See also L. Oppenheim, *International Law: A Treatise*, 3rd edition (Longmans, Green and Co, London, 1920) p. 185.

<sup>300</sup> Ibid. 64.

<sup>301</sup> Oppenheim states the following, which clarifies some concerns following the demise of the Papal States:

It seemed *impossible* that the Pope should become an Italian subject and that the Holy See should be an institution under the territorial supremacy of Italy. For many reasons no alteration was desirable in the administration by the Holy See of the affairs of the Roman Catholic Church or in the position of the Pope as the inviolable head of that Church. For that purpose the Italian Parliament passed an Act regarding the guaranties granted to the Pope and the Holy See, which is commonly called the "Law of Guaranty." [Emphasis added].

<sup>302</sup> Lassa Oppenheim, *International Law, a Treatise*, 2 vols. (London/ New York: Longmans, Green, and co., 1905) 1309. Kindle Locations 3367-3368.



consideration, this opinion has no basis to stand upon'.<sup>303</sup> The fact that states continue to recognise the Holy See by sending diplomatic envoys on the same footing as other states and the same privileges are granted to the Pope as other foreign heads of state, provide a basis to grant that 'the Holy See is actually treated *as though she were an International Person*, and the Pope is treated actually in every point *as though he were the head of a monarchical State*'.<sup>304</sup> Oppenheim is therefore able to state it 'must therefore be maintained that by custom, by tacit consent of the members of the Family of Nations, the Holy See has a quasi-international position'.<sup>305</sup>

One response to the emerging international order by the Catholic Church was the creation of bilateral treaties called Concordats and the development of its diplomatic role in the international order.<sup>306</sup> Concordats were an important part of restoring Church-state relations in the period following the Congress of Vienna, after the upheaval of the French Revolution and by Napoleonic rule but in the latter 19<sup>th</sup> century again fell into disuse.<sup>307</sup> The changing relationship between religion and the nation state, marked by anti-clericalism that sought to engender a

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<sup>303</sup> Ibid. Kindle Locations 3368-3369.

<sup>304</sup> Ibid. Kindle Locations 3377-3378.

<sup>305</sup> Ibid. Kindle Locations 3378-3379.

<sup>306</sup> On papal negotiations by Cardinal Consalvi during the Congress of Vienna see Alan J. Reinerman, 'Papacy and Papal State in the Restoration (1814-1846): Studies since 1939', *The Catholic Historical Review*, 64/1 (1978), 36-46. 39. See further Ferrari, 'Concordats'. Ferrari note that one of the first concordats recorded was the Concordat of Worms of 1122. In §B.4. Ferrari remarks, the legal character of concordats 'has been the subject of profound debate among legal experts, who from time to time have supported different positions'. However, this very ambiguous position of concordats with the Holy See because of its *sui generis* status, curiously mirrors the place of non-European states in the evolving international order.

An interesting parallel to this is the status of the Palestinian Authority, which sought to follow the Holy See towards a position of being an Observer State. The Holy See concluded a concordat with the Palestinian Authority even though it was not recognised as a state. In 2012 the Palestinian Authority changed from a permanent observer entity to that of a non-member observer State, and therefore equivalent to the Holy See (General Assembly Resolution A/67/L.28 on the *Status of Palestine at the United Nations* was adopted on November 29, 2012 by a vote of 138 in favour to nine against and forty one abstentions). Further to this, a Bilateral Commission of the Holy See and the State of Palestine, worked on a Comprehensive Agreement on 13<sup>th</sup> May, 2015. This followed the Basic Agreement, signed on 15 February 2000 between both parties. Both parties held a Plenary Session in the Vatican to acknowledge the work done at an informal level by the joint technical group. This had followed the last official meeting held in Ramallah at the Ministry of Foreign Affairs of the State of Palestine on 6 February 2014. See Vatican website '*Joint Statement of the Bilateral Commission of the Holy See and the State of Palestine at the conclusion of the Plenary Meeting*' (13.05.2015) [00805-EN.01] at "<http://www.news.va/en/news/253815>". See also Cedric Ryngaert, 'The Legal Status of the Holy See', *Goettingen Journal of International Law*, 3/3 (829-59. 844-849).

<sup>307</sup> Ferrari, 'Concordats'.. § A.3. The Congress of Vienna (September 1814- June 1815). See Scupin, 'History of International Law, 1815 to World War I'. Hans-Ulrich Scupin remarks, that in the 19<sup>th</sup> century 'the attempt at codification of considerable parts of international law shows that for statesmen the rules governing relations between States, their sovereigns, republics, and also the Holy See bore the character of law to a higher degree than previously'. Further he notes, the 'fact that papal nuncios and legates were recognized as enjoying the highest precedence, and on occasions acted as doyen even in non-Catholic States, shows how the assessment of the importance of the Holy See had changed'.

complete separation between church and state drove this process. Ferrari suggests that liberal states in the 19<sup>th</sup> century preferred to regulate church state relations by means of domestic law, treating the Catholic Church by the same standard as a private association.<sup>308</sup>

Chamedes proposes that the Catholic Church began to recognise the value of concordats in order to reaffirm their bilateral relationships and secure the Church's standing in the international order.<sup>309</sup> Chamedes suggests that Eugenio Pacelli had,

[...] influentially argued that concordats should be defined not as privileges, but as bilateral treaties to which two sovereign entities, the Vatican and the signatory state, were party. He further contended that in legal terms, concordats were valid not only before canon law, but before civil and international law as well.<sup>310</sup>

Pacelli had been part of a new generation that saw the professionalization of the Catholic Church's diplomatic services and he was also an important contributory factor in the change.<sup>311</sup> The turn by the Catholic Church to concordats, under Pacelli's influence, 'was intimately connected to the Vatican's interest in using the tools of law to assert influence in European affairs'.<sup>312</sup> Vatican diplomacy used this new instrument as a means of participation in the international order of states, re-establishing its position and identity as a sovereign state. Kent and Pollard suggest that following the end of the first World War the Holy See began to reverse its fortunes by developing this form of concordat creating diplomacy.<sup>313</sup> This period followed with the gradual formation of new nation-states, particularly as a consequence of Woodrow Wilson's principle of national self-determination which also 'gave papal diplomacy a new lease of life'.<sup>314</sup> These new states 'sought

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<sup>308</sup> Ferrari, 'Concordats'. § A.3. See for example H. J. Miller, 'Conservative and Liberal Concordats in Nineteenth-Century Guatemala: Who Won?', *Journal of Church and State*, (1991).

<sup>309</sup> Chamedes, 'The Vatican and the Reshaping of the European International Order after the First World War', ( 964.

<sup>310</sup> Chamedes, 'The Vatican and the Making of the Atlantic Order, 1920-1960', (66. In February 1930, Cardinal Eugenio Pacelli had become the Vatican's Secretary of State, equivalent to a secular government's Foreign Ministry. He would later be Pope Pius XII (1939 – 1958). On Pacelli's life and influence see further, Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*.

<sup>311</sup> D. Alvarez, 'The Professionalization of the Papal Diplomatic Service, 1909-1967', *The Professionalization of the Papal Diplomatic Service, 1909-1967*, (1989). See also Chamedes, 'The Vatican and the Making of the Atlantic Order, 1920-1960', (964.

<sup>312</sup> Chamedes, 'The Vatican and the Reshaping of the European International Order after the First World War', ( 964.

<sup>313</sup> Kent and Pollard, 'A Diplomacy Unlike Any Other: Papal Diplomacy in the Nineteenth and Twentieth Centuries'. 18.

<sup>314</sup> Ibid. 18. On the competition between the Peace Plan of the Vatican and the Holy See, Chamedes, 'The Vatican and the Reshaping of the European International Order after the First World War', ( 958-963. Chamedes suggests the Papal policy of concordat diplomacy and to further the exercise of soft power lay

recognition of their independence from one of Europe's oldest powers, and the "successor states" to the Austro-Hungarian Empire were equally anxious to establish relations with the Holy See'.<sup>315</sup> After World War I, concordats became a significant means of diplomatic negotiation, particularly with totalitarian states or authoritarian regimes, for them to 'legitimise their existence in the eyes of the international community'.<sup>316</sup> Brownlie notes that the prominent treaty and concordat between Italy and the Holy See in 1929 provided recognition of 'the Sovereignty of the Holy See in the international domain'.<sup>317</sup> While acknowledgement of the loss of the Papal States seemed like a failure for the Catholic Church, the effect of recognition of its sovereignty among nations in international law, even with Fascist states, spurred further concordat promulgation as a means of diplomatic policy. Kent and Pollard also observed that European democracies following the Second World War renegotiated their concordats with the Holy See, and countries from central East Europe contracted new concordats. In regions where Catholicism was a minority, concordats became an important milestone in developing Church-state relationships.<sup>318</sup> The use of concordats as a means of diplomacy by the Holy See became an effective way to affirm sovereign equality in international law, reestablishing an age old legal personality, and secure

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behind 'decision to enter the contest between Woodrow Wilson and Vladimir Lenin, so as to disseminate an attractive vision of peace at the height of war'.

<sup>315</sup> Kent and Pollard, 'A Diplomacy Unlike Any Other: Papal Diplomacy in the Nineteenth and Twentieth Centuries'. 18.

<sup>316</sup> Ferrari, 'Concordats'. § A.3. Ferrari notes in particular, Italy, 1929; Germany, 1933; Austria, 1933; Portugal, 1940; and Spain, 1953. See further Chamedes, 'The Vatican and the Reshaping of the European International Order after the First World War', (964.

<sup>317</sup> Brownlie, *Principles of Public International Law*. 64. In international law the Holy See has been regard as a *sui generis* entity. According to Brownlie, the Holy See 'maintain some sort of existence on the international plane in spite of there anomalous character'. Within the sphere of legal personality, Brownlie remarks, 'provided that no rule of *jus cogens* in broken, acquiescence, recognition, and the incidence of voluntary bilateral relations can do much to obviate the more negative consequences of anomaly'. The 1929 Conciliation Treaty stipulated in Article 12 that 'Italy recognizes the right of the Holy See to passive and active legation, according to the general rules of International Law'.

<sup>318</sup> Ferrari, 'Concordats'. Ferrari notes the older concordats provided for the Catholic Church's integration (Austria, 1960), reformation (Italy, 1984) or stipulated new concordats: Spain, 1979; Portugal, 2004. Similarly, central East European states concluded concordats upon coming out of the experience of communism: Hungary, 1990–97; Poland, 1993; Croatia, 1996–98; Estonia, 1999; Lithuania, 2000; Latvia, 2000; Slovak Republic, 2000–02; Slovenia, 2001; Czech Republic, 2002; Albania, 2002. In countries where the Catholic Church is a very small minority there are concordats with Israel, 1993; Kazakhstan, 1998; Palestinian Liberation Organization, 2000. See further Silvio Ferrari, 'The Vatican, Israel and the Jerusalem Question (1943-1984)', *The Middle East Journal*, (1985). Lewy Mordechay, 'From Denial to Acceptance: Holy See - Israel Relations', *Studies in Christian-Jewish Relations*, (2011). Concordats have been challenged on grounds of human rights concerns. See Ryngaert, 'The Legal Status of the Holy See', ( 844-849. 845. On the Slovakian concordat with the Holy See, see E.U. Network Of Independent Experts On Fundamental Rights, OPINION N° 4-2005: *The Right to Conscientious Objection and the Conclusion by EU Member States of Concordats with the Holy See*, (14 December 2005, Ref.: CFR-CDF Opinion 4-2005.doc), pp. 6–14 [available on the website of the European Commission]. See also Bireley S.J., 'Early-Modern Catholicism as a Response to the Changing World of the Long Sixteenth Century', (219-239.

the interests of the Catholic Church with consenting states. This effectively challenged the fixed and static idea developed in the 19<sup>th</sup> century, that states would enclose a secular international order, relegating religion to the periphery.

### 3.4.3. An Arbitrator of Peaceful Diplomacy

The idea of building European unity through peaceful diplomacy became a prominent strategy in Catholic Church in the early 20<sup>th</sup> century, during the pontificate of Benedict XV.<sup>319</sup> In the encyclicals *Ad Beatissimi Apostolorum* (Appealing For Peace [Latin Trans. The Holy Apostles]) in 1914 and *Pacem, Dei Munus Pulcherrimum* (Peace, the beautiful gift of God) in 1920 the papacy promoted the “politics of peace” from which ‘it has not since departed’.<sup>320</sup> Even though the nineteenth century has been viewed as an “Indian Summer” in contrast to the two World Wars of the following century, it was also dominated by both growing nationalism and imperialism, each ideological perspective leaving its imprint on the diplomatic engagement of the Catholic Church.<sup>321</sup> De Valk suggests that as the European nations made claim to significant portions of Africa and Asia, this expansion was accompanied with an ever growing arms race.<sup>322</sup> Concern about this development gave rise to a desire for the preservation of international trade and economic links to sustain the growth of the Great Powers in Europe, and ‘for which peace was an essential condition’.<sup>323</sup> In parallel, Scupin explains that with expansive international communication, there was also a greater concern for peace

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<sup>319</sup> Giacomo Paolo Giovanni Battista della Chiesa, was Pope from 3 September 1914 - January 22, 1922, a papacy that spanned the First World War. See John Pollard, 'Papal Diplomacy and the Great War', *New Blackfriars*, 96/1062 (2015), 147-57. 149 Pope Benedict XV peace making and humanitarian efforts 'were motivated by a deep revulsion at the "useless slaughter", as he described it in his Peace Note of 1917' [footnote omitted].

<sup>320</sup> This diplomacy of peace has been continued by the Holy See since this period as an integral dimension to its work. See Lucian N. Leustean, 'Roman Catholicism, Diplomacy, and the European Communities, 1958-1964', *Journal of Cold War Studies*, 15/1 (53-77) See also Blandine Chelini-Pont, 'Papal Thought on Europe and the European Union in the Twentieth Century', *Religion, State and Society*, 37/1-2 (2009), 131-46. 132. Edward J. Gratsch, *The Holy See and the United Nations, 1945-1995* (1st edn.; New York: Vantage Press, 1997) xiii, 305 p. Joseph Joblin, 'L'Église Et La Construction De L'ordre International', *Gregorianum*, 87/2 (2006), 284-99. 120-128. Joblin argues that the uniqueness of the church is due to its exclusive focus on charity. See more broadly on papal diplomatic history Araujo and Lucal, *Papal Diplomacy and the Quest for Peace: The Vatican and International Organizations from the Early Years to the League of Nations*. And Robert John Araujo and John A. Lucal, 'A Forerunner for International Organizations: The Holy See and the Community of Christendom: With Special Emphasis on the Medieval Papacy', *Journal of Law and Religion*, 20/2 (2004b), 305-50. See also R.J. Araujo and J.A. Lucal, *Papal Diplomacy and the Quest for Peace: The United Nations from Pius XII to Paul VI* (Saint Joseph's University Press).

<sup>321</sup> Hans De Valk, 'A Diplomatic Disaster: The Exclusion of the Holy See for the 1899 Hague Peace Conference', in Vincent Viaene (ed.), *The Papacy and the New World Order. Vatican Diplomacy, Catholic Opinion and International Politics at the Time of Leo XII 198-1903*. (Kadoc Studies on Religion, Culture and Society; Belgium: Leuven Uni Press, 2005). 437.

<sup>322</sup> Ibid. 438.

<sup>323</sup> Scupin, 'History of International Law, 1815 to World War I'. § I.1.91.

in public opinion, similarly international law saw the evolving use of new legal terms including “considerations of humanity”, “moral law” and “the laws of humanity”.<sup>324</sup> This greater sensitivity to peace manifest itself specifically in the organisation of international congresses that sought to establish an international legal order and an arbitration system between states.<sup>325</sup> The Peace Congresses had hoped ‘to remove discord by elimination of uncertainties and correcting deficiencies in positive international law’.<sup>326</sup> An August 1898 proposal to convene an international peace conference in The Hague to respond to the mood of the time, and though motivated out of concern for the burgeoning arms race, was greeted by international surprise.<sup>327</sup>

Pope Leo XIII had viewed the First Hague Peace Congress as an opportunity to advance his ‘policy to make the Holy See a powerful mediating force in international politics’.<sup>328</sup> This positioning of the Holy See within the international order reaffirmed its own recognition of the Church’s peripheral position but also to take advantage of its liminal quality to renegotiate its role both as a sovereign state with a unique moral compass among nations. The Holy See had publicly sought to further the cause of disarmament and arbitration, but, as De Valk points out, there was that secondary motivation, the further recognition of the sovereignty of the Holy See, that underpinned its interest in attending the Conference.<sup>329</sup> The Papacy had viewed itself as a natural inheritor of the role of dispute resolution and peace

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<sup>324</sup> Ibid. § A.1.3. See also § E. 57 ‘Many states were induced by public opinion to make agreements for humanitarian reasons to alleviate hardships caused by war’ this movement of public opinion including for example the founding of the International Committee of the Red Cross in Geneva (1863).

<sup>325</sup> Hans De Valk, ‘A Diplomatic Disaster’. 438. James Brown Scott sought to present to the assembled member of the Hague Conference a reflection on the historical antecedents of the international community to bolster its commitment. See James Brown Scott, *The United States of America: A Study in International Organization* (Oxford U. Press 1920). As noted in Araujo and Lucal, ‘A Forerunner for International Organizations: The Holy See and the Community of Christendom: With Special Emphasis on the Medieval Papacy’, ( 305. See also Scott, *The Catholic Conception of International Law: Francisco De Vitoria, Founder of the Modern Law of Nations, Francisco Suárez, Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations : A Critical Examination and a Justified Appreciation*.

<sup>326</sup> Scupin, ‘History of International Law, 1815 to World War I’. § I.1.91.

<sup>327</sup> Hans De Valk, ‘A Diplomatic Disaster’. 439. The first Hague Peace Congress (1899) with three conventions and three declarations, dealt with the law of land and naval warfare and the peaceful settlement on international disputes. The second Hague Peace Conference (1907) included 13 conventions and a declaration and a resolution adopted, that reiterated the themes and concerns of the first conference. See further A. Roberts and R. Guelff, *Documents on the Laws of War* (Oxford: Oxford University Press, 2000). On Pope Leo XIII concerns see Holland, *Modern Catholic Social Teaching: The Popes Confront the Industrial Age, 1740-1958*. 1-2. Regarding the Papal concern about its tentative place within the international community see also Pope Leo XIII, ‘Ass 18 (1885)’, (§ 12.

It cannot be called in question that in the making of treaties, in the transaction of business matters, in the sending and receiving ambassadors, and in the interchange of other kinds of official dealings they have been wont to treat with the Church as with a supreme and legitimate power.

<sup>328</sup> Hans De Valk, ‘A Diplomatic Disaster’. 441.

<sup>329</sup> Ibid. 442. See further Scupin, ‘History of International Law, 1815 to World War I’. § I.1. 91.

making among states and, therefore, its failure to gain entry to the Conference was a significant setback of the public image of the Church.<sup>330</sup> The failure to gain recognition as a sovereign state among equals on the international stage gave a further impression that governments 'did not need to be unduly afraid of the influence the Pope could wield in their domestic politics'.<sup>331</sup> This was a complex test for the Holy See to reaffirm its own argument for diplomatic and sovereign recognition against its older peripheral status in the international order. Despite the setbacks of rejection from entry to the Hague Peace Conferences, the Holy See continued to develop a complex network of diplomacy even as its territorial claim had all but vanished.

Pope Benedict XV had continued the strategy of renegotiating its place among states as a peacemaker and moral arbitrator by suggested a peace plan on 1<sup>st</sup> August 1917 to resolve World War I, which was rejected.<sup>332</sup> He criticised the fact both the Treaty of Versailles and the League of Nations had failed to erase the sources of rivalry between states and, 'foresaw the possibility of another war as a result of continuing hatred and the absence of a true brotherly society of nations'.<sup>333</sup> Pollard notes that Benedict XV often talked about the "suicide of

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<sup>330</sup> The Catholic Church had a long history of mediation and dispute resolution between states, and felt this was its natural vocation. Eppstein catalogues thirty instances of historical dispute resolution and mediation, see J. Eppstein, *The Catholic Tradition of the Law of Nations* (London: Catholic Council for International Relations). See also Chamedes, 'The Vatican and the Making of the Atlantic Order, 1920-1960', ( 87. Chamedes notes that by the 1920's 'the Vatican for instance played a leading role in helping settle a territorial dispute between the Dominican Republic and the Republic of Haiti, via a Treaty of Arbitration'. See also Jr Henry T. King and Marc A. Le Forestier, 'Papal Arbitration', *Dispute Resolution Journal*, 52/3 (Summer97 1997), 74-80. 78. Most recently Cardinal Pietro Parolin of Catholic Church has sought to reposition itself as a broker of peace between the United States and Cuba. For an early apologetic defence of the papal role in peace making see J. K. Cartwright, 'Contributions of the Papacy to International Peace', *The Catholic Historical Review*, 14/1 (1928), 157-68. 166.

<sup>331</sup> Hans De Valk, 'A Diplomatic Disaster'. 450. de Valk notes this failure occurred despite the mobilisation of strong opposition by the Holy See of Catholic laity to its rejection.

<sup>332</sup> Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 58. Pollard notes this process began as early as 1915 from a sense 'that it was clear the belligerent powers were unable or unwilling to initiate peace moves themselves'. Benedict XV had issued an Apostolic Exhortation, 'To the Belligerent Peoples, and their Rulers', 28 July 1915. The 1915 text remarked [as noted in Pollard],

Nor let it be said that the immense conflict cannot be settled without the violence of war. Lay aside your mutual purpose of destruction; remember that Nations do not die; humbled and oppressed, they chafe under the yoke imposed upon them, preparing a renewal of the combat, and passing down from generation to generation a mournful heritage of hatred and revenge.

See further King and Le Forestier, 'Papal Arbitration', ( King and Le Forestier suggest Articles X and XVI of the Covenant of the League of Nations 'embody the substance of Pope Benedict XV's 1917 proposals to the warring powers, suggesting a basis for an end to World War I, and a lasting peace'. Those proposals consisted of: reduction and limitation of arms; establishment of international arbitration; and restriction of the use of military force to the defence of the international order. See also Chelini-Pont, 'Papal Thought on Europe and the European Union in the Twentieth Century', (133. Chelini-Pont proposes that the improved success of Benedict XV's papal diplomacy inspired his successors, especially with his encyclical *Pacem Dei Munus*, to 'address some of the most significant questions at the time: How to avoid war between Europeans? How to reduce the strength of the rival nationalisms? And how to build peace in Europe?'

<sup>333</sup> Pollard, 'Pius XI's Promotion of the Italian Model of Catholic Action in the World-Wide Church', ( 133

civilised Europe”, which he feared would result from the war. But the papal encyclical *Ad Beatissimi Apostolorum* also made the astute observation that “Race hatred has reached its climax”.<sup>334</sup> In this encyclical Benedict XV further asked, ‘Surely there are other ways and means whereby violated rights can be rectified?’ The neutrality of the Holy See was tested as it became the ‘recipient of dozens of complaints from both sides against “war crimes” allegedly committed by the others’.<sup>335</sup>

Papal diplomacy had sought to adapt to a transforming international order, making inroads into what had been an unwelcoming environment. The dual strategy, of presenting itself at the domestic level through concordats and at the international level through becoming an arbiter of peace, became the further means of renegotiating its peripheral status to international polity and law. In that process there were of course compromises to be made by the Holy See. Chamedes proposes that ‘despite papal qualms, the League covenant and the subsequent Minority Protection Treaties enshrined the principle of religious liberty’.<sup>336</sup> The papacy had feared that ‘religious liberty provisions would effectively displace the Catholic Church from occupying its proper place in European affairs and would therefore foster discord rather than peace’.<sup>337</sup> The Catholic Church had been forging ahead with the idea of confessional states, which would apply the “thesis” of Bishop Dupanloup and earlier papal encyclicals. Religious pluralism was considered a compromise to the Catholic Church’s hope to re-christen Europe’s new political and legal order according to the programme of political Catholicism, it would therefore continue its efforts to shape the United Nations, through its diplomatic efforts, and shape its foundational texts.

### 3.5. Political Catholicism and International Human Rights

After the establishment of the United Nations, the Catholic Church began to prioritise the role of the Holy See as an observer state at the United Nations,

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<sup>334</sup> Pollard, ‘Papal Diplomacy and the Great War’, ( 150. See the papal encyclical *Ad Beatissimi Apostolorum* (Appealing For Peace [Latin Trans. The Holy Apostles]) 1914.

<sup>335</sup> Ibid. 150. Pollard notes the Pope did protest about the massacres of the Armenians to the Ottomans, and its allies, the emperors of Austria-Hungary and Germany. On the peace settlement concluded as the Lausanne Treaty (1923), the culmination of the Paris Peace Conference, and the consequence of forced deportation of minorities see E. D. Weitz, ‘From the Vienna to the Paris System: International Politics and the Entangled Histories of Human Rights, Forced Deportations, and Civilizing Missions’, *American Historical Review*, 115/5 (2008), 1313-43.

<sup>336</sup> Chamedes, ‘The Vatican and the Reshaping of the European International Order after the First World War’, (962.

<sup>337</sup> Ibid. 963. See Benedict XV

participating in the formation of future human rights treaties. Its status within the United Nations was confirmed in a resolution adopted by the General Assembly on 1<sup>st</sup> July 2003.<sup>338</sup> The Holy See had been granted Permanent Observer status at the United Nations in 1964 but the Catholic Church had requested membership of the UN in 1945. The US State department took the position to discourage states 'too small to be able to undertake the responsibilities that the members of the UN would be obliged to honour'.<sup>339</sup> However, this process of negotiation continued with an invitation to a number of small nations to serve as a member of an Advisory Committee on Refugees.<sup>340</sup> This commenced admission to a number of UN meetings, including the World Health Organisation (1951) and UNESCO (1951).<sup>341</sup>

The US Catholic Church had sought to establish 'some kind of observing and reporting office' at the United Nations headquarters in 1946.<sup>342</sup> The organisation the National Catholic Welfare Conference in the United States had proposed providing an office to follow developments at the UN and provide updates to the Catholic Church in the US. Interestingly, the Catholic Church was represented at many of the major human rights conferences by women delegates.<sup>343</sup> For

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<sup>338</sup> Resolution adopted by the General Assembly on 1 July 2003, 'Participation of the Holy See in the work of the United Nations', A/RES/58/314. The resolution restated the fact that the Holy See became a Permanent Observer State at the United Nations on 6 April 1964. The Resolution then listed the numerous number of international instruments to which the Holy See is now a party. See also *LAW OF TREATIES, DOCUMENT A/CN.4/101, Vol. II. COMMENTARY ON THE ARTICLES*. Yearbook of the International Law Commission (1956) 118. Fitzmaurice, the Special Rapporteur explains the meaning of "...entities recognized as being States on special grounds..." commenting that 'this would include the Vatican State'.

<sup>339</sup> Araujo and Lucal, 'A Forerunner for International Organizations: The Holy See and the Community of Christendom: With Special Emphasis on the Medieval Papacy', ( 320 [footnote omitted]. Araujo notes that one concern was the ability of small states to participate in peacekeeping missions and contribute military means. However, it was concluded that an important factor in obtaining Permanent Observer status was "international (political) standing".

<sup>340</sup> Ibid. 320. See United Nations Yearbook (1951). 36 and 527.

<sup>341</sup> Ibid. 320. The list of affiliations of the Holy See from this period is contained in Resolution adopted by the General Assembly on 1 July 2003, 'Participation of the Holy See in the work of the United Nations', A/RES/58/314.

<sup>342</sup> Joseph S. Rossi S.J., *Unchartered Territory. The American Catholic Church at the United Nations, 1946-1972*. 3. See also Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires*. Mention of the Holy See is given once attending as observers at Draft report of the commission on Human rights submitted to the Economic and Social council E/CN.4/77 (16 December 1947).

<sup>343</sup> Joseph S. Rossi, "'The Status of Women": Two American Catholic Women at the Un, 1947-1972', *The Catholic Historical Review*, 93/2 (300). The official record shows that within Catholic NGO's, female representatives were more commonly present than as the official representation of the Catholic Church at various early United Nations committees. See E/CN.4/SR.27 (3rd December 1947). While there is significant emphasis today on the role played by men such as Maritain and Malik in the formation and shaping of the Universal Declaration, women like de Romer have been overlooked from a Catholic historical account or indeed the record of the formation of the Universal Declaration, and its consequent interpretation. Although much has been written about the philosophical training of Maritain and Malik in personalism and Thomistic theology, little is known about the philosophy of de Romer and like-minded Catholic women who contributed so actively in the formation of the United Nations. See further Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires*. Mlle. E. de Romer was the representative for the Catholic International Union for Social Services & International Union of Catholic Women's Leagues. For example of those attending the drafting of the



instance, Catherine Schaefer was appointed by National Catholic Welfare Conference as their representative and also as representative of the International Union of Catholic Women's Leagues. She attended many of the significant conferences on women's rights speaking at both the Inter-American Commission of Women and the establishment in 1946 of the UN Commission on the Status of Women. Though their contribution to the conferences at Bogota and Buenos Aires and at the various UN sessions during the drafting of the Convention on Civil and Political rights, they shaped the view of women's rights.<sup>344</sup> This role would be taken over by the Holy See's permanent representations both at Geneva and New York. Mary Ann Glendon represented the Catholic Church at the Forth Conference on Women.<sup>345</sup>

The historian Rossi notes that Pope John XXIII (Roncalli) began to take a more direct diplomatic interest in shaping the Catholic Church's approach to the United Nations due to his personal experience of the development of the human rights regime.<sup>346</sup> Roncalli had been then papal nuncio in Paris and had been an advisor to Rene Cassin, one of the drafters of the Universal Declaration of Human Rights.<sup>347</sup> Rene Cassin, in his speech of acceptance for the Nobel Prize in 1968, appealed to the authority of the testimony of Pope John XXIII (Roncalli) for the new human rights regime and found in the papal Encyclical *Pacem in terris*.<sup>348</sup> What make this appeal

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International Convent for Civil and Political Rights, included R. P. Marie Martin Cottier, Mr. Jules Gagnon, Mr. Michel Norman for International Catholic Child Bureau; Miss M. Schnyder de Wartensee for International Catholic Migration Commission; R. P. Marie Martin Cottier for the International Catholic Press Union; Mrs. J. Eder-Schwyzler, Miss Louise C. A. van, Eeghen, Dr. Renée Girod for the International Council of Women; Miss Isabelle Archinard, Mr. Georges Borgeaud, Mr. Jean de la Croix Kaelin for Pax Romana; Miss Isabelle Archinard, Mrs. G. Hamilton Colket, Mrs. Y. Darbre, Miss R. de Lucy-Fossarieu, Miss J. de Romer for the World Union of Catholic Women's Organizations.

<sup>344</sup> Rossi, "'The Status of Women': Two American Catholic Women at the Un, 1947-1972', (316)

<sup>345</sup> Gratsch, *The Holy See and the United Nations, 1945-1995*. 119. Declaration and platform for action, Beijing (1995) UN Doc A/Conf. 177/ 20 para 213.

<sup>346</sup> Joseph S. Rossi, 'The Relation of the Apostolic Delegation to the United Nations: 1945-1964', *U.S. Catholic Historian*, 12/2, The Apostolic Delegation/Nunciature 1893-1993 (Spring 1994), 91-105. 95.

<sup>347</sup> Drew Christiansen, *Commentary on Pacem in terris* (Peace on Earth) in Shannon, 'Commentary on Rerum Novarum (the Condition of Labour)'. 235-236. See also Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. 132. "On several occasions," wrote Cassin, "I received discreet personal encouragements from the Papal Nuncio Roncalli."

<sup>348</sup> In Cassin speech of acceptance for the Nobel Prize in 1968, appealed to the authority of the testimony of Pope John XXIII to the new human rights regime located in the Encyclical *Pacem in terris*. Pope John XXIII, 'Pacem in Terris, AAS 55 (1963)', (§ 144:

We think the document [UDHR] should be considered a step in the right direction, an approach toward the establishment of a juridical and political ordering of the world community. It is a solemn recognition of the personal dignity of every human being; an assertion of everyone's right to be free to seek out the truth, to follow moral principles, discharge the duties imposed by justice, and lead a fully human life.

§ 145 May the day be not long delayed when every human being can find in this organization [United Nations] an effective safeguard of his personal rights; those rights, that is, which derive directly from his dignity as a human person, and which are therefore universal, inviolable and inalienable.

interesting is both the relationship between Pope John Paul XXIII and René Cassin and the nature of the Encyclical *Pacem in terris*.<sup>349</sup> Consequently, Pope John XXIII (Roncalli) began to use the language of rights more frequently, particularly in the encyclicals, *Mater et Magistra* (1961) and *Pacem et Terris* (1963).<sup>350</sup> This era of papal encyclicals began to emphasise the importance of solidarity with the modern project of progress and development and also the growth of civil society, returning to the tasks outlined in *Rerum Novarum* (1892).<sup>351</sup> In *Mater et Magistra* there is a strong continuation of the importance of the human dignity of workers and their rights and a concern for economic injustice which impinges on human rights.

That interest can be further observed in Pope John XXIII (Roncalli) approach to the role of the National Catholic Welfare Conference (NCWC), an office at the UN established by the US Bishops, which had been left from 1946 up to 1958 unencumbered by the Holy See.<sup>352</sup> Archbishop Egidio Vagnozzi, who had been at the Vatican secretariat of state and has served under Roncalli from 1945 to 1947 in Paris, began to take a keen interest in the United Nations activities when appointed as the new apostolic delegate to the United States. Vagnozzi pursued a more vigorous information gathering process about the activities of the UN requesting ‘specific information about certain operations of particular UN entities’.<sup>353</sup> Catherine Schafer of the NCWC had become ‘the “eyes and ears” of the apostolic delegation, and therefore of the Holy See’ at the behest of Vagnozzi.<sup>354</sup> This activity came from recognition that the Catholic Church could pursue its diplomatic

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See also Courtney Murray, 'The Peace That Comes of Order: Reflections Upon the Encyclical 'Pacem in Terris'', (§1. Murray emphasises the uniquely inclusive sense of the encyclical which is addressed to ‘all men of good will’ and was equally well received because of the themes it addressed, that of understanding and peace.

In his Nobel Prize speech, Cassin had sought to clarify the changed nature of state sovereignty as a result of the two Conventions on Human Rights in 1977. He emphasised the manner in which complaints against states may now be transferred to agencies which perform on behalf of ‘the whole of juridically organised mankind’. By implication he indicates two consequences, that all human beings are elevated ‘to the rank of subject of international law’ and secondly, ‘that states consent to exercise their sovereignty under the authority of international law [...]’.

<sup>349</sup> René Cassin, 'The Charter of Human Rights, December 11, 1968', in Frederick W. Haberman (ed.), *Nobel Lectures, Peace 1951-1970* (Elsevier Publishing Company: Elsevier Publishing Company, 1972 ). *ibid.* 1.

Two consequences Cassin had sought to clarify the changed nature of state sovereignty as a result of the two Conventions on Human Rights. He emphasised the manner in which complaints against states may now be transferred to agencies which perform on behalf of ‘the whole of juridically organised mankind’. By implication he indicates, that all human beings are elevated ‘to the rank of subject of international law’ and secondly ‘that states consent to exercise their sovereignty under the authority of international law...’

<sup>350</sup> Pope John XXIII, 'Mater Et Magistra, (on Christianity and Social Progress)', (§21. Pope John XXIII, 'AAS 55', (§143.

<sup>351</sup> Pope Leo XIII, 'Encyclical Letter Rerum Novarum ', (§1.

<sup>352</sup> Rossi, 'The Relation of the Apostolic Delegation to the United Nations: 1945-1964', (95.

<sup>353</sup> *Ibid.* 95 [italics in text]

<sup>354</sup> *Ibid.* 95.

and cultural mission in a new international environment with an interest in the direction and interpretation of human rights ideas found in Catholic thought.

John P. Humphrey, UN Secretariat's Human Rights Director, emphasised the place of the individual in the emerging discipline of international law and 'the effort either to find or to create a law which is higher than the law of the State and which will hold governments in check when they are tempted to violate the fundamental rights of the individual'.<sup>355</sup> Humphrey sources this higher law in "the great literature on this subject" from three different directions, the teachings of the great religious leaders, the doctrine of the natural law and the development of a positive international law.<sup>356</sup> The turn to natural law was unexpected in an environment shaped by legal positivism.<sup>357</sup> Woodcock proposes that the Universal Declaration was written at a time when,

Natural Law was the dominant approach to legal drafting, as the events of the Second World War had left legislators and law-makers with a distaste for the positivism which had allowed the Nazis free reign for twelve years.<sup>358</sup>

The Catholic Personalist philosophy has been highlighted as a recurrent theme in the Declaration because it reflected the contention that a broader philosophical basis for rights than liberal individualism ought to be considered.<sup>359</sup> Reclaiming the natural law tradition during the War years, and with a desire to build a basis for international order appealed to those who drafted the texts of the United Nations foundational documents.<sup>360</sup> It was not necessarily a return to religion but more so

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<sup>355</sup> John P. Humphrey, 'The Universal Declaration of Human Rights', *International Journal*, 4/4 (351-61. 353. 351. From 1946 to 1966 Humphrey was appointed the UN Secretariat's Human Rights Director. See also in Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. 28-29. Johannes Morsink remarks that Humphrey was,

[...] by all accounts to be reckoned the *primus inter pares* of the drafters, even though he was not a voting member of the commission nor of its drafting subsidiary.

Morsink's investigation of the sources shifts this emphasis from Cassin to Humphrey, remarking, that he borrowed 'freely from the drafts he had collected' and 'there is no gainsaying the fact that Humphrey wrote the crucial – because inclusive – first draft of the Declaration'. In a speech delivered at the Canadian Institute of International Affairs, in Montreal, on June 4, 1949 Humphrey stated that,

[...] while history shows that there has been a constant evolution in the direction of greater freedom and greater liberty, it is nevertheless a fact, paradoxical as it may seem, that the whole question of freedom and liberty becomes more controversial as the evolution towards their achievement progresses.

<sup>356</sup> Humphrey, 'The Universal Declaration of Human Rights', (353).

<sup>357</sup> Andrew Woodcock, 'Jacques Maritain, Natural Law and the Universal Declaration of Human Rights', *Journal of the History of International Law*, 8/2 (245-66. 266.

<sup>358</sup> *Ibid.* 266.

<sup>359</sup> See in particular Moyn, *Christian Human Rights*. See also Moyn, 'Jacques Maritain, Christian New Order, and the Birth of Human Rights.', (1

<sup>360</sup> Woodcock, 'Jacques Maritain, Natural Law and the Universal Declaration of Human Rights', (266.

a recalibration of the resources for political and legal order in the aftermath of “total” war and totalitarian systems.<sup>361</sup> Further, Woodcock proposes that Jacques Maritain played a significant role at this early stage.<sup>362</sup> Moyn observes that in,

[...] different ways, Christianity primarily defined the worldviews of all three of the main framers of the Universal Declaration: John Humphrey (the lawyer who directed the UN's Human Rights Division for two decades and assembled the first draft of the list of rights), Charles Malik, and Roosevelt herself.<sup>363</sup>

But this does not suggest that the UDHR is an exclusively Christian document, only that such an influence is not excluded. Christian Malik, a Lebanese Maronite, had taken up the personalist philosophy developed by Maritain, which Moyn suggests led to the Personalist concept of the human person to ‘became the central protagonist of the Universal Declaration's text’.<sup>364</sup>

Human rights had been on the agenda of the United Nations from its inception. There was an expectation that the Economic and Social Council would create a commission to promote human rights, and this was enacted with the meeting of the Nuclear Committee and the proposal of general recommendations on the composition of the future Commission on Human Rights.<sup>365</sup> The resulting agreement on the purpose of the Commission ‘coalesced around a method that Cassin defined as “tryptique”’.<sup>366</sup> This implied the creation of a manifesto in the form of a declaration while simultaneously working on the draft of a Convention

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<sup>361</sup> See Duranti, 'The Holocaust, the Legacy of 1789 and the Birth of International Human Rights Law: Revisiting the Foundation Myth', ( Duranti argues that the development of a human rights regime and the new International order was not a response to the Holocaust. He suggests that the relative silence about the Holocaust in the early years of the United Nations and Europe allowed for integration and a consolidation of an earlier consensus on international order. Duranti proposes that Conservative and counter-revolutionary political arguments for oversight of parliamentary democracy, based on human rights language, gave rise to the creation of the European Court of human rights.

<sup>362</sup> Woodcock, 'Jacques Maritain, Natural Law and the Universal Declaration of Human Rights', (247. See also Mary Ann Glendon, 'Knowing the Universal Declaration of Human Rights', *Notre Dame Law Review*, 73/5 (

<sup>363</sup> Moyn, *The Last Utopia: Human Rights in History*. 64-65. See further Moyn, *Christian Human Rights*. See however, McCrudden, 'Human Rights Histories', ( 8. McCrudden offers a summary of Moyn's negative thesis about the growth of human rights. Moyn proposes that,

[...]the idea of human rights as a minimalist utopian project succeeded because it filled a vacuum left after the collapse of previous universalistic, utopian movements, including Christianity, socialism, and anti-colonialism.

<sup>364</sup> Moyn, *The Last Utopia: Human Rights in History*.65.

<sup>365</sup> Roberto Fornasier, 'The Influence of NGO's on the Universal Declaration of Human Rights', in Luigi Bonanate, Roberto Papini, and William Sweet (eds.), *Intercultural Dialogue and Human Rights* (Cultural Heritage and Contemporary Change. Culture and Values,, 41; Washington, D.C.: The Council for Research in Values and Philosophy, 2011), 89 - 111.

<sup>366</sup> Ibid. 89. On some of the drafting process see Roberto Papini, 'The Debate About the Principles of the Declaration of 1948: Questions of Yesterday and Questions of Today', *ibid.*, 1-31.

which might be later implemented.<sup>367</sup> Mary Ann Glendon has begun the work to uncover the extensive relationship between Catholicism and the drafting of the Universal Declaration of Human Rights.<sup>368</sup> Mary Ann Glendon believes that the Encyclical *Quadragesimo anno* (1932) was formative in the Catholic contribution to the drafting of Universal Declaration, particularly through the influence of the Latin American delegations.<sup>369</sup> Glendon suggests the diplomatic agenda of the Latin American states, particularly Cuba, 'was to bring the new declaration into conformity with the American Declaration of the Rights and Duties of Man, passed in Bogota, Colombia in spring 1948'.<sup>370</sup> According to Moyn the influence of the Latin American states led Humphrey to complain,

[...] the speeches were laced with Roman Catholic social philosophy, and it seemed at times that the chief protagonists in the conference room were the Roman Catholics and the communists, with the latter a poor second.<sup>371</sup>

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<sup>367</sup> Susan Eileen Waltz, 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights', *Human Rights Quarterly*, 24 (2001). Waltz proposes, the UDHR 'never had a single author-at any stage. This observation is most significant for those who, fifty years later, either claim or question ownership of the document'. See further Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*.

<sup>368</sup> Mary Ann Glendon, 'The Sources of 'Rights Talk.' (Cover Story)', *Commonweal*, 128/17 (10/12/), 11. See also Glendon, 'Knowing the Universal Declaration of Human Rights', (1155. And also Prof. Hans F. Zacher et al., 'Democracy in Debate: The Contribution of the Pontifical Academy of Social Sciences', in Prof. Hans F. Zacher (ed.), *Miscellanea* (5; Vactian City: The Pontifical Academy of Social Sciences, 2005).

<sup>369</sup> See Mary Ann Glendon, 'The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea', *Harvard Human Rights Journal*, 16/Spring (2003), 27 - 39. See also E.L. Cleary, *Mobilizing for Human Rights in Latin America* (Kumarian Press, 2007). and Wright-Carozza, 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights', ( Paolo Wright-Carozza notes that at the San Francisco conference, founding the United Nations in 1945, 'Latin American countries represented the largest single regional group, accounting for twenty-one of the fifty nations'. See also Pope Pius XI, 'Quadragesimo Anno AAS 23 (1931)', (§1. See generally, Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires*. 3026. A/P.V.180. See Journal of Economic and Social Council, First Year, No. 12, resolution (5). Malik emphasised that the Human Rights Division,

[...] had begun a study of various drafts submitted by the delegations of Panama, Chile and Cuba and by the American Federation of Labour, as well as private drafts, especially those of Dr. Lauterpacht of Cambridge University, Dr. Alvarez of the American Institute of International Law, the Rev. Parsons of the Catholic Association for International Peace, Mr McNitt of the Faculty of Law of South Western University, and Mr. H. G. Wells.

<sup>370</sup> See Glendon, 'The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea', (27. See also Claudia Dangond Gibsone, 'The Influence of the Declaration of Bogotá on the Universal Declaration of Human Rights', in Luigi Bonanate, Roberto Papini, and William Sweet (eds.), *Intercultural Dialogue and Human Rights* (Cultural Heritage and Contemporary Change. Culture and Values,, 41; Washington, D.C.: The Council for Research in Values and Philosophy, 2011), 77-89. See also Roberto Fornasier, 'The Influence of NGO's on the Universal Declaration of Human Rights', *ibid.*, 89 - 111. Fornasier points out that there were many sources of influences on the Universal declaration during its drafting process, which included national governments, particular individuals who produced persuasive texts which appeared during World War II, and a number of confessional organisations. Fornasier cites the works of Jacques Maritain, *Christianity and Democracy, the Rights of Man and Natural Law.*, Gurvitch *The Bill of Social Rights*, (New York, 1946) and Prof. J.J. Shotwell, *The Great Decision* (New York, 1944).

<sup>371</sup> Moyn, *The Last Utopia: Human Rights in History*. 66.

Maritain had acknowledged the influence Catholic social thought and political philosophy on Latin America, and had in fact visited many prominent jurists in these countries.<sup>372</sup> Their contribution to the formation of the United Nations principle human rights text came as these Latin American nations had begun to develop their own national constitutions often shaped by political Catholicism, which had been so prominent in Europe.<sup>373</sup>

In a similar way, Catholic non-governmental organisations sought to establish themselves in the international community, as a reflection of their transnational growth prior to their contact with the United Nations but they approached the United Nations with little knowledge of the human rights debates occurring there.<sup>374</sup> They had, by in large, come from the same political *milieu* as Catholic Action and Christian Democratic movements, with similar moral investments in a new political order, which had evolved from Catholic political thought. Lehmann assessment of the Pax Romana (founded in 1921 as a student organisation to promote peace), shows that it began to promote human rights discourse within the United Nations context and among its members.<sup>375</sup> This early advocacy of human rights, from the 1940's onwards, reveals that it had to construct its own approach to human right as it developed from within their work at the United Nations. Pax Romana representatives attended the Human Rights Commission in 1947 and began to steadily increase work on human rights.<sup>376</sup>

The drafting of the Universal Declaration of Human Rights (hereinafter UDHR) seems to have been an important opportunity for Catholics to apply their European experience of Church-state relations, and their formative learning when developing a Christian democracy movement. The rights identified by those new Catholic democrats drew from a tradition at variance with those expressed in liberal Enlightenment thought. However, it would seem there was a fusion of those two very different traditions in the development of the UDHR, one from a liberal enlightenment tradition and another from a conservative Christian rights based tradition. This is a point taken up and developed in the next chapter.

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<sup>372</sup> Sigmund, 'The Catholic Tradition and Modern Democracy', (541).

<sup>373</sup> Glendon, 'The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea', (28).

<sup>374</sup> Karsten Lehmann, 'Shifting Boundaries between the Religious and the Secular: Religious Organizations in Global Public Space', *Journal of Religion in Europe*, 6/2 (201-28). See further Fornasier, 'The Influence of NGO's on the Universal Declaration of Human Rights'. For example Fornasier stresses, 'most of the member states of the UN were at that time countries from South and Central America that were in large part Catholic and shared various positions expressed by Christian NGOs, especially on economic-social rights' (91).

<sup>375</sup> Lehmann, 'Shifting Boundaries between the Religious and the Secular: Religious Organizations in Global Public Space', ( 16 [footnote omitted]).

<sup>376</sup> Notes from material available from Pax Romana history, page 7 [website < [www.icmica-miic.org](http://www.icmica-miic.org)>]

## 4.5 Conclusion

The Catholic Church had to respond to the development of international law in the 19<sup>th</sup> century, which was based on a new understanding of state sovereignty that saw religion, consigned to its periphery. The model of international order, which had become the basis for imperialism, exported its ideas about religion through colonialism, a model it had acquired from the internal religious politics of Europe. The place of religion in the autonomous, self-regulating modern state implied a restructuring of its relationship, including the place of the Catholic Church. From that point of the secularising of international law and the restraint placed on the role of religion on European and international relations as part of its civilisational project, the Catholic Church applied new strategies. As outlined in this chapter, that seemed to include prioritising the civil sphere as a place of influence, and articulating the rights of the Church rooted in a natural law understanding of civil and political rights. Natural law rather than positivism, and a distinct understanding of sovereignty rooted in the concept of subsidiarity, together with a corporatist theory of voluntary forms of solidarity as a basis for national constitutions, underlined the future of political Catholicism of the 20<sup>th</sup> century.

However, to use the analogy, it appeared Schmitt acted as the canary in the mine of political Catholicism in Germany. The response to Schmitt was central to the future development of political Catholicism in Germany. The political and legal thought of Schmitt was warning and a turning point in disastrous efforts by Catholicism to reconcile with the German Nazi state. Political Catholicism that had sought to reconcile with the Weimar Republic and democracy, was rejected by the Catholic Right and had become an apology for the turn to Nazi authoritarianism leading to their capitulation and collapse as a political force in Germany prior to World War II. The return of political Catholicism after the war came by way of rejection of the Schmittian and Catholic Right's interpretation of the state. It is striking indeed to think that the natural rights tradition alone in Catholicism was insufficient to reject totalitarian movements. The tendency for political Catholicism to retreat from coalition with a more liberal rights tradition, situated on the Left, weakened the Germany Catholic Church's ability to recognise the value of democracy and its own incomplete understanding of the modern state. Overcoming the sense of alienation to positive and more moderate Enlightenment ideas of liberal rights and democracy was central to the process of developing Christian democracy, and fine tuning its political thought. The fusion of both secular and religious traditions through a process of principled accommodation and

compromise from very different principled positions, especially through the creation of inter-confessional Christian democratic parties, initiated that movement.

The participation of Catholics in the formation of the Universal Declaration of Human Rights, it seems, came from an earlier period of articulating political Catholicism in light of the emerging nation state. The lessons of that encounter between Church and state, and the necessary animation of the concepts of human dignity and human rights in a Catholic idiom to defend Church interests, and drawing from natural law, led to an almost seamless transition into participation in the drafting of the Universal Declaration of Human Rights. The skills acquired by Catholics in constructing inter-war corporatist constitutions in Europe, which had applied Catholic ideas about human rights as natural rights with essentially pre-political foundations, and were applied to the development of human rights as universal project. The activism of Catholicism in European and international politics stimulated an interest in participation at the United Nations, at a time when Christian democracy was in ascendancy. This was a way for the Catholic Church to reaffirm its position as a participant in the international arena of law making by sovereign state.

The Catholic Church's approach had come from the political theory of the *ancien régime*, an understanding of sovereignty as dispersed and decentred. While it had aligned itself with authoritarianism and autocratic states in the past, the new model of sovereignty, developed from the writings of Hobbes and Vattel, and formalised as a positivistic science in the 19<sup>th</sup> century, had demanded a rethink of the Church's political philosophy. This involved a *rapprochement* with the liberal democratic model in the light of the "total" state but not before it had instigated its own regime of Confessional states with Catholic Constitutions. Only in the liberal democratic state could the Catholic Church begin to recognise a role for its own understanding of sovereignty as dispersed and decentred. The alignment of states around the principles of secularism and democracy took root following the Second World War, and resulted in parallel readjustment by the Catholic Church and Catholics to the new landscape.<sup>377</sup> Ferrari has suggested that the churches saw Constitutional secularism as it was then, as an opportunity for European integration, and protection of the rights of Catholics. Secularism was shaped by a pluralistic account of construction of the European and Western project and left

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<sup>377</sup> Alessandro Ferrari, 'Religions, Secularity and Democracy in Europe: For a New Kelsenian Pact', *Jean Monnet Working Papers 03/05* (Jean Monnet Center: NYJ School Of Law, 2005). 3.



the public sphere open to the engagement of religion.<sup>378</sup> This opportunity was embraced by the Catholic Church, to find its place among the effort to reconstruct Europe after war but it was always conscious that sovereignty posed a challenge to religion.

The Catholic Church's recalibration in a changing international landscape would include participating in the development of transnational organisations, such as the United Nations and the European Court of Human Rights. It also included reorganising its diplomatic mission and bilateral and multilateral agreements to rescue and represent itself as a sovereign participant in the new international order, and advocate of peace. On the international plain, both in diplomatic politics and the creation of a modern international law, the Catholic Church followed a similar approach to that of the state. Its political philosophy became one of structuring relationships of power on the basis of consensus and shared sovereignty. It may not have been a return to *Respublica Christiana* as the Pope's of the 19<sup>th</sup> century had wished but the pluralism of international law and international relations, at least had for a time, made room for the Catholic vision of political and religious order.

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<sup>378</sup> Ibid. 4. Ferrari notes a number of interesting movements by the Catholic Church towards secularism. He notes,

With a declaration of 13 December 1945 the Assembly of French bishops recognised the full compatibility with the doctrine of the Roman Catholic Church of a *laïcité* directed at translating the "sovereign autonomy of the State", considering it quite legitimate that "dans un pays divisé de croyance" every citizen should be allowed to practise freely his own religion [footnote omitted].

Similarly, 'In 1949, in an important article published in the review *Esprit*, J. Vialatoux e A. Latreille defined *laïcité* as "expression juridique de l'acte de foi" [footnote omitted]. See further Portier, 'L'église Catholique Face Au Modèle Français De Laïcité', ( 10. 'En novembre, dans une lettre collective où ils exposent les conditions de la reconstruction de la nation, les évêques admettent le principe d'une "juste laïcité ". Indicating the tensions between the Catholic Church and the French state, Portier further remarks: 'Bien sûr, expliquent-ils, l'Église ne peut faire sienne la laïcité persécutrice où l'État "impose à tous une conception matérialiste et athée de la vie humaine et de la société", non plus d'ailleurs que la laïcité positiviste qui entraîne le pouvoir civil à "s'émanciper de toute morale supérieure".

## Chapter 4: Locating a Christian Utopia in a “Secular Democratic Faith”.

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### 4.1 Introduction

Sixteenth century jurist, Thomas More, developed the distinction between a Christian utopia and the political autonomy of the state. More emphasised a common humanism that brought accommodation between temporal and spiritual sovereignty and acknowledged religion’s role in contributing to ethical principles to guide the sovereign, without becoming a justification for a political theology of the state. There is similarity in More’s approach to the writing of Francisco de Vitoria, as well as the contemporary thought of John Courtney-Murray and Jacques Maritain. Catholic theorists recognise a *prisca theologia* or a semblance of the natural law in the expression of the political form the state takes as a basis for a common humanism. In the 20<sup>th</sup> century there is a development in Maritain’s theory of “secular democratic faith” bridging Catholicism with liberal democracy and human rights. However, for the Catholic Church this bridging required a culture open to the idea of religion, and built upon a common idea of human dignity, and human rights. During the Second Vatican Council the Catholic Church recognised that not alone freedom but the search for the truth as was central to political democracy and an open public sphere. To bring about a secular democratic faith in democracy and human rights implies rational and critical openness to the utopias that populates political theories today.

### 4.2 Utopian Humanism and Political Power

Thomas More combined the idea of Seneca’s sense of ethical service to the common good with Cicero’s appeal for egalitarian justice into his understanding of Utopia, a vision paradoxically and satirically combining a movement towards nowhere (*ou-topos*) and a moving towards a good place (*eu-topos*).<sup>1</sup> Both Roman authors, Cicero and Seneca had transmitted Greek thought in the Roman society, and More appeals to these authors hoping to convince his humanist

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<sup>1</sup> See Paul Ricoeur *Lectures on Ideology and Utopia* (Columbia University Press, 1986). Kindle Locations 957-958. Thomas More coined the word "utopia" as a title for his famous book written in 1516. It can be seen as a clever pun *eutopos* from the Greek for happiness *eudaimonia*, and *outopos* considered drawing from Seneca’s work *De otio*. Seneca proposes that ‘if that republic which we dream of can nowhere be found, leisure begins to be a necessity for all of us’. On Seneca see John Michael Parrish, 'A New Source for More's 'Utopia'', *The Historical Journal*, 40/2 (1997), 493-98. Utopia is therefore the paradoxical hope of a just republic, or a nowhere of worldly Epicurean pleasure. Cicero provided a key idea to western thought, which was the notion of the common-wealth. See Cicero and Zetzel, *Cicero: On the Commonwealth and on the Laws*.

contemporaries of the value of Greek philosophical and republican thought.<sup>2</sup> That underlining ambiguity or indeterminacy in More's definition of Utopia was from a sense that the deeply ethical humanist project, committed to a commonwealth of values, was divided on how that project might be advanced.<sup>3</sup> During a trade negotiation with the Netherlands in May 1515, with the representatives of Charles of Habsburg, where More represented the City of London, he wrote *Utopia*.<sup>4</sup> In this context of international diplomacy, trade and discovery, More turned his mind to the idea of *Utopia*.<sup>5</sup> He was focused also on the price of public service as a civic virtue as opposed to a life of retirement from the troubles that a role close to political and legal power might entail.<sup>6</sup>

*Utopia* is often considered a satire, which contrasts the virtuous lives of utopians with the nominally Christian society that had begun to abandon a unified Christendom.<sup>7</sup> Utopia also could be viewed as 'a *prisca theologia* or primitive anticipation of Christianity', rather than a model of the perfect Christian society, as it is focused on the humanist rooted in the Stoic and Epicurean ideas of More's

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<sup>2</sup> See Thomas (Introduced by Dominic Baker-Smith) More, *Utopia*, trans. Dominic Baker-Smith (Kindle edn.; London: Penguin Classics). More's introduction to *Utopia* is satirical because he suggests Hythloday, [...] is far from incompetent in Latin and is especially well versed in Greek. He studied the latter more than Latin because he's devoted himself wholly to philosophy, and he realized that in that field there's nothing of any substance in Latin apart from certain pieces by Seneca and Cicero.

See John Guy, 'Thomas More and Tyranny', *Moreana*, 49/189-190 (157-88.171). More's 'forays into Greek learning became the essence of his being'.

<sup>3</sup> See F. H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* (Cambridge: Cambridge University Press). 13- 18. Hinsley writes, '[...] because the rise of independent states was making that unity increasingly impracticable, they generally sought it [...] by the less traditional imperial means [...]'

D. B. Fenlon, 'England and Europe: Utopia and Its Aftermath', *Transactions of the Royal Historical Society (Fifth Series)*, 25 (115-35.) Fenlon points out that there was a genuine attempt by More in his work to reconcile the active and contemplative life, as idealised in Christian monasticism, with the responsibilities of state and governance. Fenlon further proposes, 'Utopia arises from an imaginary fusion of More's family arrangements and his monastic experience: the two combine to yield the perfect state—a commonwealth of cities'.

<sup>4</sup> *Utopia*, Thomas More, Translated and edited and introduced by Dominic Baker-Smith, Penguin books (Kindle location 149). See also Thomas More *Utopia*, translated by Ralph Robinson with an introduction by Mishtooni Bose (Wordsworth Classics of World literature, Hertfordshire, 2013)

<sup>5</sup> The other title is *On the best state of a commonwealth*. See Quentin Skinner, *Visions of Politics* (Cambridge: Cambridge University Press). 213. The preoccupations of More where those of his contemporaries, with civic poverty and social welfare, with war and peace, power politics and Christian ethics. See further Fenlon, 'England and Europe: Utopia and Its Aftermath', (121).

<sup>6</sup> See Guy, 'Thomas More and Tyranny', (174-175). Guy recognises references to Seneca's 'classic defence of the "middle way" or unambitious life, the passage in which he counterpoints the security of wisdom and moderation with the dangers of hubris and ambition'.

<sup>7</sup> On the historical context of the humanist thought that influenced More see James McConica, 'Thomas More as Humanist', in G.M. Logan (ed.), *The Cambridge Companion to Thomas More* (Cambridge: Cambridge University Press, 2011). McConica notes that in More's thought a classical education provided a richer foundation 'for mastery of the sources of Christianity' and humanism. McConica writes that the city republics south of the Alps valued a humanist education, which included turning to the writing of Cicero and Roman classics. The cry of *ad fontes!* (return to the sources), was a clarion call of the humanists.

contemporaries.<sup>8</sup> More hoped for a renewal of Christendom and reflected on the kind of blend between humanism and Christianity that would be appropriate for such a future.<sup>9</sup> However, in More's presentation of utopia there is recognition of overlapping utopias with a evident distinction between the humanist Utopia and Christian hope.<sup>10</sup> There is restraint in More's Utopia to resolve the ambiguity existent between the given reality and the not yet arrived perfected Christian world.<sup>11</sup> Therefore, this is an important evaluation of Christian contribution to international order, which restrained its political theology, one that could overwhelm and merge the sovereignty of the temporal and spiritual in to one. In this sense, the idea of a commonwealth, located in the title of *Utopia*, becomes a broader vision than a perfect Christian polity and hegemony. This point is valuable for consideration of future articulations of Maritain's "democratic secular faith" in the 20<sup>th</sup> century, and the manner in which we view Christian political thought.<sup>12</sup>

The antithesis of those values is located in Machiavelli's self-interested sovereign state. Machiavelli had established that sovereignty in an Italian and Roman republic would be governed by self-interest and by the supremacy of coercive

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<sup>8</sup> Baker-Smith, Dominic, "Thomas More", The Stanford Encyclopaedia of Philosophy (Spring 2014 Edition), Edward N. Zalta (ed.), [URL = <http://plato.stanford.edu/archives/spr2014/entries/thomas-more/>]. See also Fenlon, 'England and Europe: Utopia and Its Aftermath', (123). Fenlon describes Utopia as, 'not a Christian society. It is the best form of society imaginable without Christian revelation'. It is a satire therefore because the Utopian's natural humanism far excides their actual Christian contemporaries. See also the early 20<sup>th</sup> century jurist, Rommen, *The Natural Law. A Study in Legal and Social History and Philosophy*. Kindle Locations 2637-2639.

As a consequence the internal and external opponents of totalitarianism have had to base their defence and their criticism on the perennial idea of natural law as it has been preserved in the *philosophia perennis*, in common sense, and in the juridical tradition of Western civilization.

<sup>9</sup> Recently international legal scholars appear to have returned this earlier period to situate a principle of universal unity, particularly in the thought of 14<sup>th</sup> century Dante who proposed an underlying universalism rooted in Aristotelianism. See Martti Koskenniemi, 'International Community' from Dante to Vattel', in Vincent Chetail and Peter Haggemacher (eds.), *Vattel's International Law from a Xxist Century Perspective* (Leiden: Brill | Nijhoff), 51-56. See also Rovira, *The Project of Positivism in International Law*. 288-289. Rovira recognised the problems legal positivism confronted on returning to history in examining the legal scholar Kelsen's appeal to Dante because he was obliged to do so in a distinctly different and more secular way.

<sup>10</sup> Strikingly, in the 20<sup>th</sup> century Carl Schmitt had focused his international legal argument around the concept of the "catechon" but had integrated it into a worldly modern defence of the absolute state merging the temporal and sacred. See Martti Koskenniemi, 'International Law as Political Theology: How to Readnomos Der Erde?', *Constellations: An International Journal of Critical & Democratic Theory*, 11/4 (492-511. 493) Koskenniemi sees in Schmitt an emphatic concern directed towards 'the importance of the turn from religious medieval "unity" to the secular system of territorially-limited sovereignty under the treaties of Münster and Osnabrück [...]'. See also Maritain, *Integral Humanism; Temporal and Spiritual Problems of a New Christendom*. 100. Maritain had identified how the Schmittian *Sacrum Imperium* had given rise to the Nazi understanding of *politische Theologie*, which anticipated its realisation in history. Maritain points to Erik Peterson's writing which went to 'criticise the theology of *Sacrum Imperium* in the most penetrating and remarkable way' (101).

<sup>11</sup> See Rovira, *The Project of Positivism in International Law*. 288. The problem modern positivism confronted is 'when the reasoning starts from the philosophical foundation of atomism and a refusal to theorize on the sociability of human beings, the cohesion of law becomes problematic'.

<sup>12</sup> Maritain, *Man and the State*. This point will be pursued further in this Chapter.

power rather than a Ciceronian idealism of the Christian humanists with whom Thomas More studied.<sup>13</sup> More had followed the thought of Augustine who held the view of the Roman republic as ‘the *civitas terrena*, the city of this world, whose institutions perpetuate the transmission of injustice from generation to generation’.<sup>14</sup> More recognised that law required a substantive philosophical ethic to mitigate and restrain coercive power, both by civil and religious actors, which he located in the civic ethic of Seneca, and in the humanist philosophy of Greece and Christianity.<sup>15</sup>

The historian Mark Mazower proposed that Machiavelli had ‘argued that Europe’s very multiplicity of states encouraged civic virtue’.<sup>16</sup> Machiavelli’s argument had been, ‘that Europe’s heterogeneity was a strength not a weakness, Enlightenment intellectuals such as Montesquieu, Gibbon, and Hume contrasted the supposed stagnation of despotic Asian empires with the vitality of a continent whose multiple states traded goods and ideas with one another’.<sup>17</sup> This proposition of sovereign heterogeneity was a break from the idealistic humanist commonwealth that thinkers like Thomas More and Francisco de Vitoria had imagined, governed by a common natural law of states.<sup>18</sup> In this setting, *Utopia* was written during a period of great uncertainty for Europe, where the ‘most pervasive fear was that Christendom would be overwhelmed’ and ‘which would see the attempted

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<sup>13</sup> Machiavelli *The Prince*, 1513. See generally on this turn to self-interest and positivist law from the 16<sup>th</sup> century, Rovira, *The Project of Positivism in International Law*. 302. See Hans J. Morgenthau, ‘The Machiavellian Utopia’, *Ethics*, 55/2 (1945), 145-47. See also John D. Blanco and Ivonne Del Valle, ‘Reorienting Schmitt’s Nomos: Political Theology, and Colonial (and Other) Exceptions in the Creation of Modern and Global Worlds’, *Política Común*, 5/20160718 (2014). They write, ‘Machiavelli’s transposition of politics from a moral to technical (or in Kahn’s case, rhetorical) sphere in the sixteenth century, allowed for the conceptualization of politics as an autonomous domain of analysis and evaluation’.

<sup>14</sup> More, *Utopia*. Kindle Locations 414-415.

<sup>15</sup> Dominic Baker-Smith suggests *Utopia* reflected More’s personal dilemma of advising Henry VIII, who was becoming tyrannical, and so there was a ‘semi-humorous allusion in *Utopia* to the clash between the Emperor Nero and his counsellor Seneca in the tragedy *Octavia* shows that he knew all too well the frustrations and dangers of advising the powerful’. See *ibid.* Kindle Locations 202-203. See also Guy, ‘Thomas More and Tyranny’, (166 - 168). Satirically, the main character of *Utopia* Raphael proposes, ‘[p]hilosophy has no place among princes’. See More, *Utopia*. Kindle Locations 202-203. The ethos More propose is famously,

That’s exactly how things are in public affairs and in the councils of princes. Even if you can’t eradicate harmful ideas or remedy established evils, that’s no reason to turn your back on the body politic: you mustn’t abandon ship simply because you can’t direct the winds [Kindle Locations 1180-1182].

<sup>16</sup> Mark Mazower, *Governing the World: The History of an Idea* ( Kindle edn.; London: Allen Lane/ Penguin Books ). 14.

<sup>17</sup> *Ibid.* 14.

<sup>18</sup> See Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* 16-18. Hinsley traces the replacement of the Christian commonwealth with the modern state system, doing so via Dante, Pierre Dubois, Marsilius of Padua, and Machiavelli. He notes that despite international plans for unity during the fifteenth, sixteenth and seventeenth centuries ‘[...] the rise of independent states was making that unity increasingly impracticable [...]’.

Ottoman conquest of Vienna (1529)'.<sup>19</sup> Instead of healing 'Christendom's divisions' Mazower writes, in the following centuries 'the *philosophes* embraced the existence of political difference and the clash of competing self-interests: all would naturally work out through some cosmic harmony [...]'.<sup>20</sup> If More's utopia had imagined a new commonwealth, to replace the older order that had passed away, it was to no avail as his humanist vision of unity in Europe vanished in century of bloody sectarian violence, following the Protestant Reformation, and inter-state rivalry.

More further proposed in his satire "an indirect approach" in keeping with Christian idea of the restraint of sovereign powers, a view evident among More's contemporaries such as in the thought of de Vitoria and the scholastics of the 16<sup>th</sup> century.<sup>21</sup> For example, Francesco de Vitoria presented an argument for the realisation of the commonwealth, which restrained both papal and monarchic power when natural rights are recognised in the inhabitants of the conquered Americas, with rights to territorial sovereignty. Van Liere has noted that Francisco de Vitoria 'stood at a particular juncture in the history of political thought'.<sup>22</sup> The 'position he carefully defined in the 1530's was characterised by a strong emphasis on the distinction between secular and spiritual governments, a feature that distinguishes modern from medieval political theory'.<sup>23</sup> This particular political theory in Catholicism promoted a negotiated unity between the temporal and spiritual sovereigns, emphasising the latter's indirect power, in times of exception. This is a tradition can be identified in de Vitoria, when he commented during the period preceding the announcement of the divorce of Henry VIII of England, and the Act of Succession.<sup>24</sup> He wrote:

However, I do not mean to say that temporal power is entirely or even ordinarily subject to spiritual power. Indeed, nothing is farther from my

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<sup>19</sup> See Greengrass, Mark (2014-07-03). *Christendom Destroyed: Europe 1517-1648: Europe 1500-1650* Bk. 5 (Allen Lane History) (p. xxix). Penguin Books Ltd. Kindle Edition.

The Ottoman conquest of Egypt and Syria (1517) and the capture of Rhodes (1522) were the prelude to Ottoman attempts to establish their predominance over the African coast dominating the narrows in the middle of the Mediterranean (xxix).

<sup>20</sup> Mazower, *Governing the World: The History of an Idea* 14. Mazower continues, '[...] rivalry was beneficial because it promoted innovation, challenged the status quo, and led to progress. If conflict was integral to the life of nations, most Enlightenment theorists did not regard this as a bad thing' (15).

<sup>21</sup> More, *Utopia*. Kindle Locations 1183-1186. On how an "indirect approach" might be interpreted today, see Sutton, 'Political Realism and Roman Catholic Faith in the Construction of Europe: Konrad Adenauer, Robert Schuman and Charles De Gaul'.

<sup>22</sup> Liere, 'Vitoria, Cajetan, and the Conciliarists', (599).

<sup>23</sup> *Ibid.* 599.

<sup>24</sup> De Vitoria, *De Indis Et De Ivre Belli. De potestate civili*, (1529) and *De Indis*, (1532) are his more famous works on the power of the state and the conquests in the New World.

mind that to suppose that princes are, so to speak, vicars of the Church, or of the Popes; on the contrary, I believe that they have received juridical power from God, even as the Popes themselves have received such power, and that spiritual power cannot interfere with the exercise of this temporal jurisdiction, *except in special cases*.<sup>25</sup>

Brown writes in explanation, ‘the classification of the two powers drawn from Aristotle, followed by a recognition of the existence and jurisdiction of the temporal power, as well as the spiritual, each in its appropriate domain’.<sup>26</sup> The emphasis on “special cases” by de Vitoria is carried on by Bellarmine and later into 19<sup>th</sup> century catholic political thought, to indicate when the Catholic Church believed it had a sovereign right to participate directly in the affairs of the temporal sovereign, including the modern nation state on the occasion of “special cases”. In de Vitoria’s time the special case was the issue of the marriage of Henry VIII to the Spanish Catherine of Aragon, when it was considered that competency to regulate the definition of marriage was outside the jurisdiction of the temporal sovereign.

Similarly, this sense of sovereignty as a spiritual and moral authority influenced de Vitoria’s comments on the rights non-European’s in newly discovered lands, by proposing limits to *dominium* (jurisdiction) and the proposition of a *jus gentium* (a law of nations). Unrestrained papal power, driven by a sense of spiritual hegemony had been complemented by the unrestrained temporal sovereignty of monarchy. Each had endorsed a belief in the possession of *plenitudo potestatis* in their own sphere, which included the uninhibited right to declare war and conquer uninhabited wilderness (*terra nullius*).<sup>27</sup> The gradual transformation of these claims came from a greater sense of obligation on behalf of jurists to theorise new forms of sovereignty, in response to the collapse of the idea of Christendom but compatible with some foundational legal norms, that in turn this was sought in nature, reason or a metaphysical divine order but also self-interest, the will of the

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<sup>25</sup> See Scott, *The Catholic Conception of International Law: Francisco De Vitoria, Founder of the Modern Law of Nations*, Francisco Suárez, *Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations : A Critical Examination and a Justified Appreciation*. 242 – 252. De matrimonio (on Marriage, 1531) emphasis added.

<sup>26</sup> Ibid. 250.

<sup>27</sup> On this conception of sovereignty that held *penitudio potestas* see Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*. W. Ockham and Annabel S. Brett, *On Power of Emperors and Pope* (Bloomsbury). On the right to wage war see Alex J. Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge: Polity). 50-56. Bellamy notes that ‘in popular modern renderings of the natural law approach to the Just War tradition, virtually all of Vitoria’s ideas remain intact in one form or another’ (50). Vitoria had ‘expressly ruled out the idea that the church or empire had a universal right to wage war (a pivotal idea in the crusades), the claim that wars of conversion were just, and the argument that non-believers had fewer rights than believers’. See further De Vitoria, *Francisco De Vitoria: Political Writings*. 270-275.

sovereign or *raison d'etat*.<sup>28</sup> More's *Utopia* and his *History of King Richard the Third*, brought More international acclaim, yet his history is 'rooted in his preoccupation with the uses of power in promotion of the welfare of the commonweal, especially in the England of his day [...]'.<sup>29</sup> It was a close study on the question of tyranny and power as it was exercised in England.<sup>30</sup>

More's claim was the legislation before the British parliament (the Submission of the Clergy in 1532, and to sign the Oath attached to the Succession Act in 1534) 'contravened the traditional status of the Church as *regnum* co-ordinated with rather than subordinated to the secular authorities'.<sup>31</sup> Thomas More had been willing to concede 'the right of the king in Parliament to be obeyed in all temporal affairs' but 'to recognise the Submission of 1532 was to jeopardise the Church's jurisdictional rights, and to swear the oath of 1534 was to suppose the King's right to dispense with the authority of the Pope'.<sup>32</sup> Therefore, 'the sticking-point for More and Fisher was thus that, in their religious and political outlook, they treated

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<sup>28</sup> On the phases of international law see Kennedy, 'Primitive Legal Scholarship', (1). See also Rovira, *The Project of Positivism in International Law*. 129. Rovira proposes that even as the scholastics found a unifying principle of religion as the foundation of law, Grotius 'discovered a replacement for divine wisdom in the combination of self-interest, sociability, and reason' (footnote omitted). See for example Richard Tuck, *The Sleeping Sovereign. The Invention of Modern Democracy* (Cambridge: Cambridge University Press). 56-57. Tuck proposed that the French theorist Bodin had made four central claims about the limits of sovereignty in his publication, *Methodus*. Tuck writes,

Bodin believed that coronation oaths bind non-tyrannical kings to govern in accordance with law; the second that the king of France could not over-turn fundamental laws, what he termed '*leges totius imperii proprias*' without the consent of the Three Estates; the third that the king has no general rights over the private property of the citizens; and the fourth that he is bound by his own laws [footnote omitted].

See especially Eric Nelson, 'Utopia through Italian Eyes: Thomas More and the Critics of Civic Humanism', *Renaissance Quarterly*, 59/4 (2006), 1029-57. Nelson records how Bodin drew attention to More's *Utopia*, emphasising a Greek republican tradition (in Plato and Aristotle) of distributive justice, living according to our rational nature and *eudaimonia* in More's *Utopia*, and this contrasted starkly with the Roman republican tradition of liberty, the individual's sovereign will as the source of civic virtue, the imperative of private property and wealth, and the state's highest goal of glory and greatness. Nelson suggests that the writing of More (and Erasmus) was an attack on neo-Roman humanism of the 16<sup>th</sup> century, in preference for a Greek (and Catholic) humanism.

<sup>29</sup> Mcconica, 'Thomas More as Humanist'. 37.

<sup>30</sup> Ibid. 38. Similarly, there may also be undertones of Augustine's writing. Augustine asks, '[f]or when can that lust for power in arrogant hearts come to rest until, after passing from one office to another, it arrives at sovereignty?' See Saint Augustine (2003) *City of God* (Penguin Classics) (Kindle Locations 1987-1988). Penguin Books Ltd. Kindle Edition. In Augustine's view the existence of a *libido dominandi*, the lust for domination, critically cut through the heart of claims for power. Augustine further believed that vice lay at the heart the problems of governorship,

With those vices kept under restraint, the morality which supports a country flourished and increased, and permanence was given to the liberty which goes hand-in-hand with such morality.

<sup>31</sup> Skinner, *The Foundations of Modern Political Thought*. Vol. 2. 92.

<sup>32</sup> Ibid. Vol 2. 92.



*the independence of the Church as inviolable: the essence of their conservatism was simply that they were Catholics in the fullest sense*'.<sup>33</sup>

The collapse of the Holy Roman Empire and the end of papal power as a papal monarchy spelt a slow end to the theory of two powers, an outline of which has been developed in the previous chapters. Its demise was hastened by the sectarian division of Europe as a consequence of the Reformation and completed with the end of the Papal States. Over a period of centuries the reversal of the temporal with the spiritual occurred as ecclesiastical power became restrained to territorial nation states.<sup>34</sup> Confessional and religious divisions sharply divided Europe and the prospect for rediscovering a *jus gentium* and an *ius inter gentes* ['law between the peoples'] became a central motif of the proceeding centuries.<sup>35</sup> Catholic political thought has looked to the example of Thomas More retrospectively to understand the relationship of the Church to the State, particularly a tyrannical one. It has been an opportunity to emphasis an understanding of conscience, even though it had not been a pronounced concern until the 20<sup>th</sup> century.<sup>36</sup> The context of the canonisation of Thomas More in 1935 placed those priorities, of concern about tyranny and the inviolability of conscience into focus, leading to the development

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<sup>33</sup> Ibid. Vol 2. 92 [italics included].

<sup>34</sup> On the development of the theory of "*cuius regio, eius religio*" [whose realm, his religion] See Evans, *Religious Liberty and International Law in Europe*.

<sup>35</sup> Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press). 94. Stein explains, Vitoria argued that the *ius gentium* of the Roman texts, in which it mean the law shared by all peoples, should be understood as *ius inter gentes*, that is, a set of rules governing the relations between one peoples and another. This was law was based not on a sharing of religious belief but on the nature of mankind. For *ius gentium* in defined, in Institutes 1.21, as what natural reason has laid down among all peoples.

See further De Vitoria, *Francisco De Vitoria: Political Writings*. This was the application of Roman law, Aristotelianism and Christian humanism. See also Reinhard Zimmerman, 'Roman Law in the Modern World, in *The Cambridge Companion to Roman Law*, Cambridge University Press (ed David Johnston, 16 Feb. 2015). 463. Roman law was considered to be the basis for the *ius commune*, and profoundly influential. It was a written law that was rational, and reasonable, and also 'was an expression of, and stimulated the quest for, a law that was rational and scholarly, intellectually coherent, and systematic'.

<sup>36</sup> In chapter 2, the relationship between the *forum internum* and *forum externum* is surveyed, to show how the Catholic Church viewed the role of conscience from an early period. On the contemporary history, and the tension between freedom and truth, see Lusvardi, 'The Law of Conscience: Catholic Teaching on Conscience from Leo XIII to John Paul II', ( See also Guy, 'Thomas More and Tyranny', (180). Guy writes:

Once the Acts of Succession and Supremacy were passed and the power to exact oaths firmly on the statute book, Henry began demanding to look inside his subjects' heads to see what they were thinking. Like the great classical tyrants, he sought to punish crimes of the mind and events could only go in one direction.

Thomas More had stated in his papers,

My purpose was not to put any fault either in the Act or any man that made it, or in the oath of any man that swore it, nor to condemn the conscience of any other man.

But as for myself in good faith my conscience so moved me in the matter, that though I would not deny to swear to the succession, yet unto the oath that there was offered me, I could not swear without the jeopard[iz]ing of my soul to perpetual damnation [footnote omitted].

of an emphasis on the religious freedom of the Catholic Church.<sup>37</sup> The early 20<sup>th</sup> century, when Thomas More was canonised, was an occasion when Catholic political thought was expressly concerned with the Church's relationship to the form of polity, authoritarian, democratic or totalitarian, the state would take.<sup>38</sup>

In the early 20<sup>th</sup> century Jacques Maritain saw the protection of the civil and public sphere in the liberal democratic state as a new environment for Christians, and for Christian social and political activism. Uniquely, he saw the role of Catholic laity in fulfilling the mission of a long term project he titled a "New Christendom", something that was quite distinct from what had gone before. The guarantee that the civil and public sphere would be protected by democracy and human rights, particularly freedom of religion and secular pluralism open to religious persuasion. It was an imaginative leap that influenced global Catholicism in the 20<sup>th</sup> century, it did however lead to profound questioning from Maritain's later critics because the neo-Thomistic foundations in natural law or even a *prisca theologia* seemed remote and alien as the process of modernisation, secularisation and globalisation took hold.<sup>39</sup>

#### 4.2.1 Courtney-Murray on Modern Culture

The theologian John Courtney Murray wrote extensively in an attempt to resolve the complex problem of how the Catholic Church might co-operate with the state in the modern age.<sup>40</sup> Courtney Murray had recognised in the writing of Pope Leo

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<sup>37</sup> This is a position that is distinctly different from modern claims of an individual secular conscience before the liberal democratic state. Thomas More defended not alone his own position but also a communitarian perspective, of his religion on the nature of marriage and the limits of sovereign power that might be seen as an early version of a pre-emptory norm. See Terrence Merrigan, 'Conscience and Selfhood: Thomas More, John Henry Newman, and the Crisis of the Postmodern Subject', *Theological Studies*, 73/4 (841-69. 845-847).

<sup>38</sup> In other words, rule by "the one, the few or the many". See Aristotle, *Politics. Translated, with Introduction and Notes, by C.D.C. Reeve*. See also for example, the early 20<sup>th</sup> century jurist who was part of this turn to natural law, Rommen, *The Natural Law. A Study in Legal and Social History and Philosophy*. Kindle Locations 2600-2604.

But modern totalitarianism has provided the *reductio ad absurdum* of the axiom, *Voluntas facit legem*; indeed, it has revitalized in its victims and adversaries the idea of natural law. For resistance to totalitarianism, in which the end results of positivism appear as ethical and intellectual nihilism, had to look for support beyond any mere national tradition or *status quo ante* and base itself on something superior to history, race, class, scientific method, and the like.

[my translation of "*non ratio sed voluntas facit legem*": (it is) not reason, but will (which) makes the law"/"Not arguments, but will, make the law"]. On the nature of the rule of law Rommen writes:

It is a social norm which has become juridical in virtue of the fact that the mass of individual consciences has come to understand that the material sanction of this norm can be socially organized [Kindle Locations 2462-2463].

<sup>39</sup> For a clear exposition of the contours of this process see Moyn, *Christian Human Rights*.

<sup>40</sup> See for instance, John Courtney Murray, 'Leo XIII and Pius XII: Government and the Order of Religion', in J. Leon Hooper S.J. (ed.), *Religious Liberty: Catholic Struggles with Pluralism* (Louisville, KY: Westminster/John Knox), 49–125. Courtney Murray, 'Leo XIII: Separation of Church and State', (145-214. Courtney Murray, 'Leo

XIII a broadly cultural interpretation of the Constitutionalisation of the state.<sup>41</sup> In Courtney Murray's view a Constitution stemmed from 'its broader and more ancient sense, visible in Aristotle, of "a common way of living"'.<sup>42</sup> The Constitution of the state became 'a total complex of institutions, customs, conventions, mores, social usages and attitudes, traditions, habits of thought and action'.<sup>43</sup> This came from the conviction that culture could not be made but discovered, as 'the product of an inner form, the development of an entelechy, a dynamism operating from within, which shapes the thinking, the behaviour, the climate, and all the creative activity of a society and of its members'.<sup>44</sup>

This inner form or dynamism came prior to the legal Constitutional make-up of a state, and is emphasised to reveal a sense of continuity Courtney Murray sought to detect in the writing of Pope Leo XIII. This idealised and utopian vision of a society transformed internally by the Christian gospel and only later manifest in the legal Constitution of the state, was characteristic of the ambition of early 20<sup>th</sup> century Catholicism. How this dynamic could be translated into a new vocabulary of Church–state polity in the mid-late 20<sup>th</sup> century, in response to the secularising and liberal state was of paramount concern for Catholic theologians, jurists and philosophers. Courtney-Murray had described liberalism of the 19<sup>th</sup> century to which Pope Leo XIII addressed and criticised as "sectarian" liberalism.<sup>45</sup> Its perceived consequence was to institute freedom of religion and the separation of the church from the state, in a manner that suppressed religion's place in society.

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XIII and Pius XII: Government and the Order of Religion'. Courtney Murray and Hooper, *Religious Liberty: Catholic Struggles with Pluralism*.

<sup>41</sup> Pope Leo XIII, 'Ass 18 (1885)', (§14)

<sup>42</sup> Courtney Murray, 'Leo XIII and Pius XII: Government and the Order of Religion'. 57.

<sup>43</sup> *Ibid.* 57.

<sup>44</sup> *Ibid.* 57. See the much later Vatican Council II, 'Gaudium Et Spes, AAS 58 (1966)', (§59):

Culture, because it flows immediately from the spiritual and social character of man, has constant need of a just liberty in order to develop; it needs also the legitimate possibility of exercising its autonomy according to its own principles. It therefore rightly demands respect and *enjoys a certain inviolability within the limits of the common good*, as long, of course, as it preserves the rights of the individual and the community, whether particular or universal [emphasis added].

<sup>45</sup> Courtney Murray, 'Leo XIII and Pius XII: Government and the Order of Religion'. 57. See Philip Gleason, 'American Catholics and Liberalism, 1989-1960', in R.B. Douglass and D. Hollenbach (eds.), *Catholicism and Liberalism: Contributions to American Public Policy* (Cambridge: Cambridge University Press, 2002), 45. 45-46. Gleason notes that the Catholic historian Carlton J. H. Hayes had distinguished between "ecumenical or general liberalism" and "sectarian liberalism". The former indicated a progressive liberalism, which promoted representative government, free trade, freedom of conscience and individual liberty. According to Hayes, the latter "sectarian liberalism" had become prominent in the later 19<sup>th</sup> century, and transformed into a doctrinaire ideology, born from scientific materialism and was deeply anti-clerical and anti-Christian. It was also marked by a rejection of *laissez-faire* economics and endorsed an activist state. Hayes had been an historian of European history, and also been a prominent American diplomat, and in the 1930's a member of the Catholic Association for International Peace. He had focused his study on the causes of nationalism and totalitarianism. See for example J. H. Hayes Carlton, 'The Novelty of Totalitarianism in the History of Western Civilization', *Proceedings of the American Philosophical Society*, 82/1 (1940), 91-102.

Courtney-Murray defined the first element, a liberal theory of freedom of religion as ‘a piece of religious philosophy, the theory of *conscientia ex lex*, the absolutely autonomous individual conscience which recognized no law higher than its own subjective imperatives’.<sup>46</sup> In this very critical interpretation of freedom of religion the ‘conscious and deliberate purpose was to effect a complete divorce between society and traditional religion’.<sup>47</sup> This version of freedom of religion relegated religion to a subjective and private matter of the conscience alone.<sup>48</sup> The second element was a separation of the Church from the state to such an extent that it would all but leave the role of conscience relegated to the private sphere, defined by ‘the theory of *principatus sine modo, sine lege*, government as subject to no law higher than the will, itself lawless, of the Sovereign People’.<sup>49</sup> “Sectarian” liberalism had a goal, it was believed, to encourage the state’s separation from religion in all areas of public life, including areas of concern to the Catholic Church, such as the provision of social, educational and health institutions, and its participation in civil society.

This relegation of religion to the periphery was driven by ‘a radically new idea about the whole purpose of human life; it was also a new concept of law (*novumius*), a new kind of state (*genus id rei publicae*)’, which Courtney-Murray recognised had been diagnosed by Leo XIII in his encyclical *Immortale Dei*.<sup>50</sup> In the 20<sup>th</sup> century the legal regime of the modern state had neglected the operation of divine law and natural law, as an influence and guide of the juridical order of the state.<sup>51</sup> Courtney-Murray sees this neglect as central to the problem of the modern state, which he proposes is ‘the distinction between the order of divine law, natural and revealed, and the order of human law; between ethical and theological

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<sup>46</sup> Courtney Murray, 'Leo XIII and Pius XII: Government and the Order of Religion'. 52. See also the polemical discussion of this topic in Courtney Murray, 'The Church and Totalitarian Democracy', ( 553-55).

<sup>47</sup> Courtney Murray, 'Leo XIII and Pius XII: Government and the Order of Religion'. 52.

<sup>48</sup> Ibid. 52. Murray further explains the protest of the Church against this understanding of freedom of religion to be ‘that all religions are inherently equal in value; that religious faith and worship are "alien and of no interest" (*Immortale Dei*) to society; that, whatever private value the name of "God" might or might not have for the individual, for society God does not exist’.

<sup>49</sup> Ibid. 52. See Pope Leo XIII, 'Ass 18 (1885)', (§ 31) ‘The sovereignty of the people, however, and this without any reference to God, is held to reside in the multitude; which is doubtless a doctrine exceedingly well calculated to flatter and to inflame many passions, but which lacks all reasonable proof, and all power of insuring public safety and preserving order.’

<sup>50</sup> Courtney Murray, 'Leo XIII and Pius XII: Government and the Order of Religion'. 53. See Pope Leo XIII, 'Ass 18 (1885)', (§ 31). See also Courtney Murray, 'Leo XIII: Separation of Church and State', (562). In considering freedom of religion and the separation of church and state in the late 19<sup>th</sup> century, Murray wrote:

Leo XIII could not but have constantly in mind the fact that these institutions were not advocated in the new polity as genuine expressions of the principle and method of freedom, but as engines of war upon the Catholic Church. They were concretely part of the whole dynamism of a Jacobin movement.

As such, they were “of the enemy,” and hence as damnable as he.

<sup>51</sup> Courtney Murray, 'Leo XIII and Pius XII: Government and the Order of Religion'. 53.

principle and legal rules; or, if you will, between principles and their application'.<sup>52</sup> Can legal rules make individuals and society virtuous according the Christian vision of a moral and spiritual order? Courtney-Murray recognised in the encyclical of Leo XIII, a 'distinction between the Church and state, between the Christian community and the political community, between the spiritual authority of the Church and the secular authority of government, between the Christian law and the civil law'.<sup>53</sup> Murray had confidence that the American tradition of secular democracy could help resolve the problems located in the European democratic experience, and lead to a greater integration of natural and human rights into democracy.<sup>54</sup> Courtney-Murray's recognised an enduring presence of a *philosophia perennis*, identifiable during the Enlightenment's use of a natural law theory.<sup>55</sup> He suggests that the 19<sup>th</sup> century created confusion between the Enlightenment's uses of a "law of nature" with the *ius naturale* of the earlier Scholastic theologians.<sup>56</sup> The contemporary "law of nature", was a creature of the Enlightenment,

[...] as fragile, time-conditioned, and transitory a phenomenon as the Enlightenment itself. But the ancient idea of the natural law is as inherently perennial as the *philosophia perennis* of which it is an integral part. Its

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<sup>52</sup> Ibid. 59.

<sup>53</sup> Ibid. 59. See also Courtney Murray, 'Leo XIII: Separation of Church and State', (562). Murray had acknowledged a new post-War polity that had begun to reinterpret the enlightenment idea of freedom of religion, and liberty in the modern democratic state. In that context Courtney-Murray had been working out the implications of the Catholic tradition of church and state, in the American but also the European tradition of democracy.

The fact that the principle of government by the people, radiated in the Christian democratic tradition, and altogether different in its resonances from the Jacobin "sovereignty of the people," somehow requires a polity characterized by "free institutions," as they are now called.

<sup>54</sup> B. Hudock and D. Christiansen, *Struggle, Condemnation, Vindication: John Courtney Murray's Journey toward Vatican II* (Minnesota: Liturgical Press). Kindle Locations 1490-1491. See Courtney Murray, 'The Church and Totalitarian Democracy ', (551). Courtney Murray wrote of how the European experience of the French revolution had coloured the perception of democracy, especially in Leo XII's papal encyclical *Immortale Dei*. Murray commented:

[...] it is simply concerned with the iniquitous historical situation evoked in the Latin, and traditionally Catholic, countries of Europe, notably France, by the religious, political, and social ideology of the Revolution. [...] The Roman advisers of Leo XIII knew their Rousseau, they had probably never heard of the Federalist papers.

<sup>55</sup> John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (Rowman & Littlefield Publishers, Incorporated). 270. See further Francesca Cadeddu, 'A Call to Action: John Courtney Murray, S.J., and the Renewal of American Democracy ', *The Catholic Historical Review*, 101/3 (2015 ), 530-53. 536-537. Cadeddu describes Murray's belief 'that Americans held some undeniable truths, which preceded any form of public consensus yet composed its substance'. The *philosophia perennis* or natural law, would be the basis for the "public consensus" for a pluralist democratic state in the United States. John F. Quinn, 'The Enduring Influence of We Hold These Truths', *The Catholic Social Science Review*, 16 (2011), 73-84.

<sup>56</sup> Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition*. 270.

reappearance after its widely attended funeral is one of the interesting intellectual phenomena of our generation.<sup>57</sup>

In the late-1950's Courtney-Murray noted that, 'it would seem the ancient tradition of the natural law is beginning to climb out of the footnotes of the learned books into the very text of our time [...]'.<sup>58</sup> The revision of the natural law, to include more ancient sources provided an opportunity to re-present a Christian conception of the state to those engaged in reconstruction legal theory during the post-War years of the 20<sup>th</sup> century.<sup>59</sup> In Courtney-Murray we find a reflection of the conclusions located in Maritain (and Thomas More), that a *philosophia perennis* could provide society with the basis for an integral humanism and unite many discordant philosophies around a common foundation for democracy.<sup>60</sup> For human rights to be sustainable, its secular foundation would have to draw upon that common lexicon, which embraced both religious and enlightenment sources. In Courtney-Murray's view, the state was no longer the "secular arm" of the Church and the medieval 'notion of the instrumentality of political power to the proper spiritual ends of the supernatural society' had ended.<sup>61</sup> Further he observes,

[...] in virtue of the distinct, and to that extent autonomous, character of the state as a society, the political problem is committed to the civic conscience, and not to the ecclesiastical power; by *the* political problem I mean the primary question of the constitution, the fundamental law that defines the scope of the political obligation, giving legal guarantee to the natural and civic rights of the citizen as citizen (who is such regardless of his religious condition), and setting limits to the exercise of governmental power.<sup>62</sup>

Setting limits on the state also included acknowledging natural limits to the realm of religion, a position that required some mediating instrument of political power.

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<sup>57</sup> Ibid. 270.

<sup>58</sup> Ibid. 271.

<sup>59</sup> Moyn, *Christian Human Rights*. Kindle Locations 1212-1216. Courtney-Murray had 'argued that the human rights turn showed that the modern world had finally imbibed Catholicism's message rather than vice versa:

The growing conviction of the old attempts to solve the problem of human liberty and social order in purely secularistic, positivist terms had created a new openness to the world of metaphysical and religious values. [The Christian human rights idea provides] such a basis because it is metaphysical in its foundations, because it is asserted within a religious framework, and because it is realist (not nominalist), societal (not individualist), and integrally human (not rationalist) in its outlook on man and society.

See further Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition*. 320.

<sup>60</sup> Moyn, *Christian Human Rights*. Kindle Locations 1212-1214.

<sup>61</sup> Courtney Murray, 'The Church and Totalitarian Democracy', (558).

<sup>62</sup> Ibid.558 -559. Courtney-Murray clarifies further, 'Leo XIII's distinction of the two societies lies at the root of one of his major emphases, upon the transcendence of the Church to political forms'.

This could be located in culture, as it might be also associated with a *philosophia perennis* that affirmed human dignity and the associated rights within the state.

#### 4.2.2 Dignitatis Humanae: The Juridical Concept of Human Dignity

During the Second Vatican Council, Courtney-Murray had argued for a juridical approach to human dignity, and the importance of law, which he believed was abstract but more suited to the legal context of the modern political form.<sup>63</sup> This was proposed in comparison to the ontological approach (philosophical Personalism) by European academics like Archbishop Karol Wojtyla (later Pope Paul II) and many French bishops. Both positions presented two main approaches to religious freedom by the Catholic Church, which had to be unified in the concept of human dignity.<sup>64</sup> Schindler notes that 'the main argument of the fifth and final texts [of the encyclical *Dignitatis humanae*] was grounded on the human right to search after the truth and to embrace the truth once found'.<sup>65</sup> Courtney-Murray's 'principle line of argument entered the text [of *Dignitatis humanae*] and was added as an addendum'.<sup>66</sup> This implied a duty to follow ones conscience to seek the truth without interference of the state, and was rooted in a juridical understanding of human dignity.<sup>67</sup> The text of the papal encyclical *Dignitatis humanae* finally declared,

The right to religious freedom is based on the very dignity of the human person know through the revealed Word of God and by reason itself.<sup>68</sup>

This statement in *Dignitatis humanae* is very close to the text of the Universal Declaration of Human rights (hereafter UDHR), which recognised, 'the inherent dignity and of the equal and inalienable rights of all members of the human family

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<sup>63</sup> See David L. Schindler, 'Freedom, Truth, and Human Dignity: An Interpretation of Dignitatis Humanae on the Right to Religious Liberty', *Communio: International Catholic Review*, 40/Summer–Fall (211-212). 214.

<sup>64</sup> See *ibid.* 211-212). 214. Schindler proposes the Catholic Church had signalled 'a development in her understanding of the inherent unity of truth with freedom and freedom with truth'.

<sup>65</sup> *Ibid.* 214.

<sup>66</sup> *Ibid.* 214.

<sup>67</sup> See further Courtney Murray and Hooper, *Religious Liberty: Catholic Struggles with Pluralism*. 127. See Hudock and Christiansen, *Struggle, Condemnation, Vindication: John Courtney Murray's Journey toward Vatican II*. Kindle Locations 2965-2967.

Human dignity (rather than "right conscience") was identified more clearly as the foundation of the right to religious freedom, and emphasis now was heavily on religious freedom as a juridical concept.

See also Kindle Locations 3328-3330: For Courtney-Murray, *Dignitatis Humanae* would offer three doctrinal tenets:

[...] the ethical doctrine of religious freedom as a human right (personal and collective); a political doctrine with regard to the functions and limits of government in matters religious; and the theological doctrine of the freedom of the Church as the fundamental principle in what concerns the relations between the Church and the socio-political order [footnote omitted].

<sup>68</sup> Vatican Council II, 'Dignitatis Humanae, AAS 58 (1966)', (§ 2).

is the foundation of freedom, justice and peace in the world'.<sup>69</sup> This understanding of dignity in both texts underlined the possibility for cooperation and collaboration between Christians and others.<sup>70</sup>

John Courtney Murray influence on the early Council's debate contributed to a decision 'to start out from the modern judicial concept of religious freedom and then base this on the dignity of the human person'.<sup>71</sup> While there emerged various voices of opposition to understanding religious freedom in this way, Kasper emphasised that it was in the contribution of Archbishop Karol Wojtyla that the interconnection between freedom and truth was developed.<sup>72</sup> The liberty emphasised by Courtney-Murray to seek the truth, was countered by Wojtyla who 'pointed out that truth can only be recognized and accepted in freedom; the recognition of truth thus presupposes the recognition of religious freedom'.<sup>73</sup> In the attempt to reach a synthesis between the subjective aspect (freedom) and the objective aspect (truth), Kasper reveals this 'programmatic statement [by Wojtyla] provides us with the hermeneutic key for the interpretation of the conciliar text'.<sup>74</sup> The Catholic Church would proclaim the truth to the conscience of man but do so respecting religious freedom, a significant move by the church that had once insisted "error has no rights".<sup>75</sup>

This new emphasis on religious freedom removed the dimension of coercion in religion and offered a new openness to the political autonomy of the state. If the

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<sup>69</sup> United Nations, 'Universal Declaration of Human Rights', *G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)* (Paris). See also Glendon, 'Knowing the Universal Declaration of Human Rights', (1172). Glendon notes that human dignity 'enjoys pride of place in the Declaration; it is accorded priority [...]'.  
<sup>70</sup> Alex Bruce, 'Cognitive Dissonance in the Contribution of the Catholic Church to International Human Rights Law Discourse', *Adelaide Law Review*, 30 (149).

<sup>71</sup> Kasper, 'The Theological Foundations of Human Rights', (155)  
<sup>72</sup> Ibid. 155. [Notes from Kasper on Wojtyla's contribution: *Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II* (Vatican City: Typis Polyglottis Vaticanis, 1974), 3/2: 530-532; cf. 4/1: 11-13].  
<sup>73</sup> Ibid. 156 'Conversely, freedom is based on the truth by which it is presupposed; freedom exists for the sake of truth, and is fulfilled in the recognition of the truth'. See *Acta Synodalia*, 4/5:100-102. See also Vatican Council II, 'Dignitatis Humanae, AAS 58 (1966)', (§ 2) 'the right to religious freedom has its foundation not in the subjective disposition of the person, but in his very nature'.

<sup>74</sup> Kasper, 'The Theological Foundations of Human Rights', (156). Kasper continues, from this point 'the council adopted a positive attitude toward the modern conception of human rights and human dignity; but it did not simply take it over. The council's method can be characterized as the reconciliation of contradictions'

<sup>75</sup> See Schindler, 'Freedom, Truth, and Human Dignity: An Interpretation of Dignitatis Humanae on the Right to Religious Liberty', (209-210). Schindler notes during the drafting process, 'the discussion moved away from the earlier focus on whether error as such has rights to a focus rather on the person as the subject of rights'. The difficult question of religious pluralism in the modern state also led to questions about the 'connection that exists between the obligation to seek the truth and religious freedom [...]'. The shift in the declaration from the notion of truth (as an ontological reality defined and defended by the Catholic Church) to the notion of the rights of the human person, remains a deeply contested question of the effectiveness of *Dignitatis Humanae* to adequately explain religious freedom in a Catholic context. For instance Schindler remarks '[...] the Council thus affirmed, not that error has rights, but that the person has rights even when he errs', a point not acknowledged in previous centuries (211).



Church did not emphasize truth over freedom but sought to balance that relationship, then the state need not limit the freedoms of citizens to adhere to a religious belief because the state could not assume a monopoly on the truth. This shift would imply another strategic manoeuvre in the Church's relationship with governments and recognition of a changed world moving towards liberal democracy. It is interesting that bishops attending the Second Vatican Council were able to 'reach a synthesis between the subjective aspects, the safeguarding of freedom, and the objective aspect, the recognition of truth' while avoiding the problem that has bedevilled religion, the contemporary relativism of truth.<sup>76</sup> Kasper emphasises that through this strategy the Council was able to retain its theological argument for the religious dimension of truth while 'adopting a positive attitude toward the modern conception of human rights and human dignity'.<sup>77</sup> This was an important reinterpretation of the Enlightenment emphasis on the relationship of liberty to truth because the Catholic Church had accepted political pluralism, and thereby an array of political and civil rights but also reaffirmed the need for objective truth. At the Council, both concepts were developed as theological categories and offered in response to the 'long and complex process of humanity's move towards an autonomous, reasonable and "authentic" individual'.<sup>78</sup> The wounds caused during the Enlightenment leading to both anti-clericalism and Church distrust, appeared temporarily healed by this new anthropology based on a reassessment of the Enlightenment's belief in liberty.<sup>79</sup>

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<sup>76</sup> Kasper, 'The Theological Foundations of Human Rights', ( See *Gaudium et Spes* 21; cf. 41.

<sup>77</sup> *Ibid.* 156 However, Kasper cautions that this understanding of human rights is rooted in the following:

They are innate rights, given to men and women with their very being. These rights antecede and transcend the State and society, and yet must be recognized and transferred into positive law by them. Since they are founded in the God-given being of men and women, they are exempt from all discretionary or arbitrary whim. The recognition of the transcendence of God is thus the foundation of the transcendence of the human person (156-157) (see *Gaudium et Spes* 76).

<sup>78</sup> Loic Moureau and Johan De Tavernier, 'The Politics of Authenticity', *Bijdragen: International Journal for Philosophy and Theology*, 72/4 (2011/01/01 2011), 432-55. 433: 'The (western) modern self-formed itself over a long period of time through a changed concept of the inner self, the empowerment of everyday life and a renewed relationship with nature and language'. See Kasper, 'The Theological Foundations of Human Rights', (158). Kasper shows that a development in the catholic theological understanding of human rights that came to the fore in post-conciliar documents. It begins with creation theology as a source for human dignity with human beings made in the image of God, and is common to all humanity. Kasper points to a further Christological foundation, located in Christ, which situates each person in a unique relationship with God.

<sup>79</sup> Kasper, 'The Theological Foundations of Human Rights', (162). Kasper proposes, with 'the theological foundation of human dignity, theology defends both ancient and Christian humanism from the attempts of modern humanitarianism to discredit it'. And 'Unviolable human rights are a modern expression of this humanism of the Christian West'. See also Brian Tierney, 'The Idea of Natural Rights - Origins and Persistence', *Northwestern Journal of International Human Rights*, 2/1 (2004). See also Pope Pius XII's broadcast message, Christmas 1942, AAS 35 (1943) 21: "In consequence of that juridical order willed by God, man has his own inalienable right to juridical security. To him is assigned a certain, well-defined sphere of law, *immune from arbitrary attack.*" (Italics are my own).

### 4.2.3 Relationship of Morality to Law

The historical distinctions that Courtney-Murray made to show the contribution of Christian political theology led to the reiteration of the vexing question of the relationship of morality to law, including the larger proposition of the application of human rights.<sup>80</sup> Interestingly, Courtney-Murray also approached the place of catholic morality to national law in a somewhat similar way to Jacques Maritain.<sup>81</sup> For democracy to be a plural environment, Catholic morality would need to show restraint, a position Courtney-Murray not only articulated but advised to Catholic bishops in the United States, when they were faced with complex moral challenges. In the mid-1960's Courtney-Murray had offered advice to Cardinal Cushing to assist in responding to the decriminalisation of contraceptives in Massachusetts, and responded to emphasize the limits on extending Christian morality into a pluralist society and its laws.<sup>82</sup> Courtney-Murray offers a considerate balance of differing arguments and suggests in light of the encyclical *Dignitatis Humanae* that conscience and a right to privacy may demand the Catholic Church refrains from supporting laws that clash with the moral pluralism of the modern state. Nevertheless, Courtney-Murray argued as following:

First, a man may not be coercively constrained to act against his conscience. Second, a man may not be coercively restrained from acting according to his conscience, unless the action involves a civil offense against the public peace, against public morality, or against the rights of others.<sup>83</sup>

This form of argumentation to support liberty of conscience in a pluralist democracy led to the proposal that 'Catholics repudiate in principle a resort to the coercive instrument of law to enforce upon the whole community moral standards that the community itself does not commonly accept'.<sup>84</sup> This position was obviously controversial, and yet is consistent with the view that the exercise of

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<sup>80</sup> For a text from the classical debate during the period see H. L. A. Hart, 'Are There Any Natural Rights?', *The Philosophical Review*, (1955). Hart had argued, 'if there are any moral rights at all, it follows that there is at least one natural right, the right for all men to be free'. However, that argument for liberty would not be "absolute", "indefeasible" or "imprescriptible" or that that an defined "ontological status" might provide a more complete list of moral rights.

<sup>81</sup> It is not clear if Courtney-Murray was influenced by Maritain, and there is no direct link yet established between the two authors. It may be possible to speculate because of Maritain's contacts with the Jesuits at Woodstock Theological College, while in America.

<sup>82</sup> John Courtney Murray, S.J., "Memo to Cushing on Contraception Legislation," Murray Archives, file 1-43 [available at <<http://www.library.georgetown.edu/woodstock/murray/1965f>>]. See further Seth Meehan, 'From Patriotism to Pluralism: How Catholics Initiated the Repeal of Birth Control Restrictions in Massachusetts', *The Catholic Historical Review* 96/3 (2010 ), 470-98 .

<sup>83</sup> Murray Archives, file 1-43. 85. [available <<http://www.library.georgetown.edu/woodstock/murray/1965f>>].

<sup>84</sup> Murray Archives, file 1-43. 86-87.

Church influence in a democracy could only be appropriate under certain conditions, where the state acted 'against the public peace, against public morality, or against the rights of others'.<sup>85</sup> For Courtney-Murray, not all morality could be revealed or codified in law, and justice could only be realised progressively. The relationship between first principles (of the natural law) and their application, with respect for a common *philosophia perennis*, lent itself to recognition of a proper distinction between church and state, in which morality generally belonged to a different sphere to law.<sup>86</sup>

Law seeks to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order. It does not look to what is morally desirable or attempt to remove every moral taint from the atmosphere of society.<sup>87</sup>

Maritain offered his own ideas about the separation of law and morality.<sup>88</sup> Turning to the writing of Thomas Aquinas, he contrasts divine law, 'which is called immaculate, *lex Domini immaculata*, because it permits no sin of whatsoever kind, and which is ordered to the common good', with human positive law, which 'cannot forbid and punish every kind of evil'.<sup>89</sup> Human law is 'ordered to the temporal common good' and thereby operates analogically to the divine law and is therefore law that occurs proportionately according to the culture and conditions of the society.<sup>90</sup> In the thought of Maritain and Courtney-Murray, their presentation of the Church in democracy implies a level of restraint out of respect for the politically autonomous sphere of the state, which impacted on the debate

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<sup>85</sup> Courtney-Murray's position provoked enormous controversy, and it is well explained in Hudock and Christiansen, *Struggle, Condemnation, Vindication: John Courtney Murray's Journey toward Vatican II*. It is also worth noting that this language would later be located in human rights conventions, though not directly attributable to Courtney-Murray.

<sup>86</sup> Courtney Murray, 'Leo XIII and Pius XII: Government and the Order of Religion'. 59.

<sup>87</sup> Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition*. 161.

See further Quinn, 'The Enduring Influence of We Hold These Truths', (78-80). Courtney-Murray's arguments have been used to support the decriminalisation of contraceptives and abortion in limited cases in the US. Quinn also notes New York Governor Mario Cuomo's famous speech at Notre Dame University, in which he opposed abortion but did not want to restrict it in a pluralist society. See also the very interesting discussion of President John F. Kennedy and Catholicism, in Mark S. Massa, 'A Catholic for President?: John F. Kennedy and the "Secular" Theology of the Houston Speech, 1960', *Journal of Church and State*, 39/2 (March 31, 1997), 297-317.

<sup>88</sup> Maritain, *Integral Humanism; Temporal and Spiritual Problems of a New Christendom*. 183-184. One the development of Maritain's thought see Moyn, *The Last Utopia: Human Rights in History*. 53. Moyn notes that Maritain 'had helped remind Western Christianity that human rights, far from being a dangerous outgrowth of modern secular liberalism, recalled the moral community of Christendom through its emphasis on the human person' (75).

<sup>89</sup> Maritain, *Integral Humanism; Temporal and Spiritual Problems of a New Christendom*. 183-184. See *Summa Theologica* I-II, 96, 2; 2.

<sup>90</sup> *Ibid.* 183-184. See *Summa Theologica* II-II, 61, 2.

on the relationship of morality and the law.<sup>91</sup> The relationship between Church and state made room for debate on law and morality but also showed that restraint was expected, except in the context of issues that worked 'against the public peace, against public morality, or against the rights of others'.<sup>92</sup>

#### 4.3.4 Maritain's Model of Church and State

The philosopher Thomas Pink proposes that in the Catholic Church the Leoine model of Church - State relationship dominated its political theory in the early 20<sup>th</sup> century.<sup>93</sup> That position as articulated by Pope Leo XIII in the encyclical letter *Immortale Dei*, viewed the Church and state relationship as a soul-body union.<sup>94</sup> This model viewed each entity or sphere as sovereign within their own competencies, keeping their position in the spiritual or temporal realm. However,

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<sup>91</sup> See also Pope Pius XII, 'Allocution "Ci Riesce" (Discourse to the National Convention of Italian Catholic Jurists),' *Acta Apostolicae Sedis*, 45 (December 6th, 1953). In this Address, Pius XII discusses the relationship between law and morality both on the national and international level. Pius XII gives some indication of the difficulty of imposing religious morality, against the consciences of those who disagree, into law.

Hence the affirmation: religious and moral error must always be impeded, when it is possible, because toleration of them is in itself immoral, is not valid "absolutely and unconditionally".

[...] The duty of repressing moral and religious error cannot therefore be an ultimate norm of action. It must be subordinate to "higher and more general" norms, which "in some circumstances" permit, and even perhaps seem to indicate as the better policy, toleration of error in order to promote a "greater good".

<sup>92</sup> This position taken by John Courtney Murray does not mean surrender to cultural relativism under the guise of liberal neutrality. See Bielefeldt, 'Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Countercriticism', ( 72. Bielefeldt writes,

Modern liberalism differs from premodern political thought in that it requires that freedom must not be confined to a privileged minority but, rather, constitutes a universal claim; freedom and equality therefore necessarily belong together.' Further, given that freedom and equality together constitute the basic principle of the entire political and legal order, they must also find expression within the realm of politics itself. Hence the inherent connection of human rights and modern participatory democracy.

[...] It is only within this normative framework of equal freedom and participation that the concept of neutrality can make sense. Neutrality is not a principle that stands on its own, as Carl Schmitt seems to assume, and liberal neutrality should by no means provide a pretext for remaining neutral between good and evil, right and wrong, or between justice and injustice. Rather, neutrality serves as an antidote to all sorts of biases and discrimination.

<sup>93</sup> Thomas Pink, 'Jacques Maritain and the Problem of Church and State', *THOMIST*, 79/1 (2015), 1-42. 1. Courtney Murray suggests the encyclicals of Leo XIII as following:

It is no derogation of the authority of Leo XIII's encyclicals to say that they were, rather importantly, tracts for the times. And in situating his teaching within the historical conditions of its utterance one is not diminishing its import.

See also Courtney Murray, 'Leo XIII and Pius XII: Government and the Order of Religion'. 51. Courtney Murray identifies the challenges for the Pope had been "freedom of Religion" and "separation of the Church" from the state. This was founded upon,

'*conscientia ex lex*, the absolutely autonomous individual conscience which recognized no law higher than its own subjective imperatives', and secondly, 'government as subject to no law higher than the will, itself lawless, of the Sovereign People. This concept of government as "a master whose power knows no limits" [...].'

<sup>94</sup> Pope Leo XIII, 'Ass 18 (1885) ', (§ 14. There 'exist between these two powers a certain orderly connection, which may be compared to the union of the soul and body in man'.

this separation of powers also included the state 'lending it coercive powers to the Church, acting as the Church's agent and on her authority'.<sup>95</sup> As noted in chapter three, this promoted the idea of a confessional state, and gave rise to a theory that this confessional arrangement was the preferred solution (or thesis) to Church and state arrangements.<sup>96</sup> Pink suggests in the writing of Pope Leo XIII the natural law, through the exercise of reason, there is a need for the state to uphold revealed religion once it can be recognised as such.<sup>97</sup> Where a religion is recognised as the truth then the state must defend religion through the protection of its laws.<sup>98</sup> This approach by Leo XIII presumed the state had an interest in the truth of revealed religion, and was not susceptible to the scepticism of the modern age. Optimistically, Leo XIII 'carefully distinguished the directive competences of Church and state, the two sovereign powers (*potestates*) with authority to legislate and punish'.<sup>99</sup>

As Pink points out, this organic model of Church-state relationship is taken up by Maritain but in his case 'a soul-body union of Church and state was simply not feasible in the modern age, so that it could no longer be proposed, even as an idea'.<sup>100</sup> Maritain had been directing Church policy towards 'a new religiously pluralistic ideal of Church-state relations'.<sup>101</sup> Maritain had distinguished a number of immutable principles, rooted in Christian humanism. That humanism is viewed teleologically, and argued 'the human person is both part of the body politic and superior to it through what is supra-temporal, or eternal, in him, in his spiritual interests and his final destination'.<sup>102</sup> From that perspective we find a natural separation of the concerns of religion from politics, a politics which may also be ordered to the fulfilment of more ultimate concerns, but will generally be concerned with temporal things. The immutable principles Maritain lays out emphasises the superiority of the spiritual over the temporal, and therefore the superiority of the religious to the civil authority. Maritain expresses it 'in one single

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<sup>95</sup> Pink, 'Jacques Maritain and the Problem of Church and State', (2).

<sup>96</sup> See 3.3 page 191. See Pope Leo XIII, 'Ass 18 (1885)', (§ 13-14).

<sup>97</sup> Pink, 'Jacques Maritain and the Problem of Church and State', (2). Pink notes that even if this is the case, it is for the church to legislate in matters of religion, defining morality and church teaching on the Christian faith.

<sup>98</sup> Ibid. 2. Pope Leo XIII, 'Ass 18 (1885)', (§ 6).

<sup>99</sup> Pink, 'Jacques Maritain and the Problem of Church and State', (2 -3). On the history of the necessity and duty of state's defence of religious truth see Thomas Pink, 'The Interpretation of Dignitatis Humanae', *Nova et Vetera*, 11/1 (1 2013), 77. Pink notes how the state would become the secular arm (*bracchium saeculare*) of the Church. This proposition is found in the Medieval Church, During the Catholic Councils of Lateran IV, Constance and Trent. Similarly it can be located in the 1917 Code of Canon law, canon 2198. See also on Bellarmine's classical theological defence of this position see Tutino, *Empire of Souls: Robert Bellarmine and the Christian Commonwealth*

<sup>100</sup> Pink, 'Jacques Maritain and the Problem of Church and State', (3).

<sup>101</sup> Ibid. 4).

<sup>102</sup> Maritain, *Man and the State*. 148.

expression, let us say that the law we are faced with here is the law of *the primacy of the spiritual*'.<sup>103</sup>

Adjacent to this principle of 'the primacy of the spiritual' is the normative value of the *right to freedom* of religion, of that 'which constitute the moral heritage of mankind, the spiritual common good of civilisation or of the community of minds'.<sup>104</sup> Maritain recognises a number of significant rights that flow from this freedom, and adds not alone of 'the right to free association naturally belonging to the human person, but with the right freely to believe the truth recognised by one's conscience, that is, with the most basic and inalienable of all human rights'.<sup>105</sup> Maritain further emphasises the autonomy of the modern state, in keeping with the thought of Pope Leo XIII, and is thereby 'under the command of no superior authority in its own order'.<sup>106</sup> It is in this sense that the Church could view the modern state as secular rather than theocratic, and can be democratically organised rather than autocratic, without the need for an anointed sovereign. However, because of the primacy of the spiritual, the Church becomes a necessary aid to the state, and Maritain adds the principle of '*the necessary cooperation between the Church and the body politic of the State*'.<sup>107</sup> The state cannot exist unaided in this view because it is both a secular and religious body, in need of the pastoral care of the Church.<sup>108</sup>

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<sup>103</sup> Ibid. 150 [italics included, footnote omitted]. Maritain goes to lengths to insist that we 'remove from the word "superiority" an accidental connotation of domination and hegemony; let us understand this word in its pure sense; it means a higher place in the scale of values, a higher dignity' (153). This expression of primacy properly summarises the biblical injunction to "Render unto Caesar..." See further in this thesis, Chapter 2, page 3 -4 on Pope Gelasius I (492-496) and the Church theory of "two swords".

<sup>104</sup> Ibid. 150 [italicisation of *right to freedom* is included in Maritain's text].

<sup>105</sup> Ibid. 150.

<sup>106</sup> Ibid. 153.

<sup>107</sup> Ibid. 154 [Italics in text].

<sup>108</sup> Essentially, the state must act for the common good in civil society to guide citizens towards their natural good but it then must leave competency over matters touching on religious concerns to religious authority, wherein the state cannot regulate the spiritual good of society (*summum bonum*). In contrast see Griffin, *On Human Rights*. 11. Griffin presents John Locke as a Deist and of course rejecting the idea of a common *summum bonum* (supreme end to human nature).

In the course of this reasoning, we need not—indeed, cannot successfully—appeal to any views about the ends of human life; rational persons, he thought, will disagree about them, so a belief about the *summum bonum*, though at the heart of classical and medieval thought, is at best of peripheral interest here, because it is incapable of commanding universal assent and thus of effectively guiding the heterogeneous members of a society.

See further footnote 11 in Griffin, 279. John Locke (Translation by Jonathan Bennett), 'An Essay Concerning Human Understanding Book II: Ideas', in Peter Millican and Amyas Merivale (eds.), (Hertford College, Oxford: www.earlymoderntexts.com, 2007). XXI, 55.

As pleasant tastes depend not on the things themselves but on how they suit this or that particular palate (and palates vary greatly), so also the greatest happiness consists in having the things that produce the greatest pleasure and not having any that cause disturbance or pain. Now these, to

Pink points out that the Christian understanding of fallen human nature, which impacted on ‘the life of human communities in all their forms’ may require the coercion of the state in both spheres, the natural and supernatural, to guide humanity toward their natural and supranational ends.<sup>109</sup> This form of coercion was accepted as a rational demand made on the conscience of the citizen and Christian. Yet according to Pink, *Dignitatis Humanae* leaves open the possibility of the state being the secular arm (*bracchium saeculare*) of religion, with the capacity to use its secular coercive power to religious ends, with Church and state acting organically as envisaged in Leo XIII’s encyclical *Immortale Dei*.<sup>110</sup> Pink notes therefore:

*Dignitatis Humanae* bases the right to religious liberty on a claim that religion transcends the authority of the state, and *presents this claim as if it were rationally available to all persons of good will*, as something that a mere appeal to reason could establish. *But this is not obviously true*. This particular conception of a right to religious liberty against the state is largely absent from contemporary secular political thought. And that is because it involves a distinctively religious view of religion, and indeed a specifically Catholic one.<sup>111</sup>

The problem that confronted the Catholic Church, is that the state often does not see religion as a transcendent authority, or ‘a higher place in the scale of values, a higher dignity’.<sup>112</sup> During the Second Vatican Council, and when the draft documents of *Dignitatis Humanae* were being discussed, the problem of how religious freedom might be preserved in civil society, without the coercive power of the state, was a problem that required resolution.<sup>113</sup> Pink observes that,

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different men, are very different things. [...] men pursue different ends even though the desires of all of them are bent on happiness.

<sup>109</sup> Pink 2016 Leo XIII and *Dignitatis Humanae* 25. Mention of the fallen man, implies the theological proposition that human pride caused a rupture in the natural relationship between the human and the divine, namely original sin.

We can recognise the state using its coercive power in civil society towards the common good, for instance in health policy or educational policy.

<sup>110</sup> Pink 2016 Leo XIII and *Dignitatis Humanae* 22.

<sup>111</sup> Pink 2016 Leo XIII and *Dignitatis Humanae* 22. [Emphasis added]

<sup>112</sup> Maritain, *Man and the State*. 153.

<sup>113</sup> Pink cites the following point:

Has the doctrine of the secular arm been abandoned? Reply: The Church, according to *Dignitatis Humanae*, commits herself to not calling on the state to use coercion except in cases where just public order is in danger. And we think we have shown that this was the principle followed in the Constantinian era [in Basile Valuet, *Le Droit à la Liberté Religieuse dans la Tradition de l'Église* (Le Barroux: Éditions Sainte-Madeleine 2005), 520]

[s]upporters of the Declaration [*Dignitatis Humanae*] such as Maritain and Cardinal Journet thought that in the modern world Church-state harmony no longer required a juridical privileging of Catholicism by the state. States would still respect religion as a higher good lying beyond their authority to direct even if they no longer publicly recognized and privileged Catholicism as true.<sup>114</sup>

The tradition of state support for religion had become one that would rely on the argument of reason rather than solely by legal coercion, and as Cardinal Journet remarked, 'by battling errors with the forces of light, not by force of arms'.<sup>115</sup> The force of light would be carried out through advocacy for the dignity of the human person as a necessary element of the common good (and receiving juridical privilege). This approach reaffirmed Maritain's optimistic reading of how human rights could calibrate the democratic state, while at the same time preserving the sovereignty of religion in its own sphere. An emphasis, in the official records of the drafting of *Dignitatis Humanae*, on 'the duty of respecting the demands of the dignity of the human person as a necessary element of the common good' attempted to complement the "Leonine thesis".<sup>116</sup> That complementing of an older form of political Catholicism was extended to the new polity of the liberal democratic form of the state that had begun to turn to rights based distinctions between citizens and the state.<sup>117</sup> A clause added by Pope Paul VI to *Dignitatis*

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<sup>114</sup> Pink 2016 Leo XIII and *Dignitatis Humanae* 21. See also Pink, 'Jacques Maritain and the Problem of Church and State', (1-42). See further Alberigo and Komonchak, *History of Vatican II*.

<sup>115</sup> Pink, 'Jacques Maritain and the Problem of Church and State', (1-42). [citation from Charles Cardinal Journet, *Acta Conc. Vatican II*, vol 4.1 (Vatican 1976) p 425]

<sup>116</sup> Pink 2016 Leo XIII and *Dignitatis Humanae* 17. [Emphases by Pink]. Citation is from Vatican II *Acta Synodalia* 4.6, p 719:

Some Fathers maintain that the declaration does not sufficiently show how our doctrine is not opposed to ecclesiastical documents up to the Supreme Pontiff Leo XIII. As I already said in the last *relatio*, this material must be fully explained in future theological and historical studies. As regards the substance of the problem these things must be said: while pontifical documents up to Leo XIII emphasised the moral duties of the public power to the true religion, the last supreme pontiffs, while retaining this doctrine, complete it by expounding another duty of the public power, namely the duty of respecting the demands of the dignity of the human person as a necessary element of the common good. The text presented to you today recalls more clearly the duties of the public power towards the true religion; from which it is clear that this part of the doctrine is not omitted.

<sup>117</sup> Pink 2016 Leo XIII and *Dignitatis Humanae* 14. See Vatican II *Acta Synodalia* 3.8. 464.

Neither does it give up old things, but rather adds to them, perfecting the doctrine of Leo XIII in respect of its meaning and content.

Pink also cites the following from debates on *Dignitatis Humanae* in a written *relatio* of 15th September, 1965: For the schema rests on the traditional doctrine between a double order of human life, that is sacred and profane, civil and religious. In modern times Leo XIII has wonderfully expounded and developed this doctrine, teaching more clearly than ever before that there are two societies, and so two legal orders, and two powers (*potestates*), each divinely constituted but in a different way, that is by natural law and by the positive law of Christ. As the nature of religious liberty rests on this distinction of orders, so the distinction provides a means to preserving it against the confusions which history has frequently produced [Vatican II *Acta Synodalia* §4.1. 193 (emphasis by Pink)].



*Humanae*, just before the final vote to be made by Bishops attending the Second Vatican Council stated:

Religious freedom, in turn, which men demand as necessary to fulfil their duty to worship God, has to do with immunity from coercion *in civil society*. Therefore it leaves intact (*integer*) traditional Catholic doctrine on the moral duty of individuals and societies toward the true religion and toward the one Church of Christ.<sup>118</sup>

The public power of the state to coerce its citizens, in defending the autonomy of religion and the good of religious truth through law, extended into the modern conception of civil society. The Church is anticipating the modern state, where the “Leonine model” preserved the model of two spheres and two powers, there would be this additional civil society environment as a consequence, in which each power, religious or state, would be competent to act, without undue interference. In this context, religious liberty, would provide a unique sphere of autonomy for the person from the state in the civil sphere.<sup>119</sup> It was conceived that where pluralism dominates the political philosophy of the state, rather than a Confessional state envisaged by the “Leonine model”, the same standards are expected by *Immortale Dei*, and latterly by *Dignitatis Humanae*, and would apply even in these new circumstances.<sup>120</sup> Therefore, where possible the state would function as the secular arm of the Church using the states lawful authority to protect not alone the rights of the church but also of the lay Christian in civil society, but where unfeasible the

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<sup>118</sup> *Dignitatis Humanae* §1 (emphasis in Pink) See Pink 2016 Leo XIII and *Dignitatis Humanae* 17.

<sup>119</sup> See further Pink 2016 Leo XIII and *Dignitatis Humanae* 23. Pink notes that while the state might recognise the natural good of religion and thereby protect and defend it, the ‘direction of worship and the sacred as such – direction of a specifically religious good, by criteria specific to religion - is not within the competence of the state. But what makes this true is a particular kind of revelation, not reason’.

See Pope Leo XIII, 'Ass 18 (1885)', (§14)

*Whatever, therefore, in things human is in any way of a sacred character, whatever belongs either of its own nature or by reason of the end to which it is referred, to the salvation of souls or to the worship of God, falls wholly within the power of the Church and is wholly subject to her judgment. Whatever is to be ranged under the civil and political order is rightly subject to the civil authority. Jesus Christ has Himself given command that what is Caesar's is to be rendered to Caesar, and that what belongs to God is to be rendered to God [emphasis added].*

See also Maritain, *Man and the State*. 152. '[F]rom the advent of Christianity on, religion has been taken out of the hands of the state'. Yet Maritain also remarks,

The kingdom of God is essentially spiritual, and by the very fact that its own order is not of this world, it in no way threatens the kingdoms and republics of the earth. *Non eripit mortalia, qui regna dat caelestia*, [this comes from an old Latin hymn by 5<sup>th</sup> century poet Sedulius: 'He seizes not earthly things who gives heavenly kingdoms'].

See also Pope Pius XI, 'AAS, 17 (1925)', (§15; and §31, the Church 'as a perfect society, has a natural and inalienable right to perfect freedom and immunity from the power of the state; and that in fulfilling the task committed to her by God of teaching, ruling, and guiding to eternal bliss those who belong to the kingdom of Christ, she cannot be subject to any external power'.

<sup>120</sup> Pope Leo XIII, 'Ass 18 (1885)', (§8) and Vatican Council II, '*Dignitatis Humanae*, AAS 58 (1966)', (§1

state would at least guarantee religious freedom ‘as Leonine political teaching clearly implied, [the state] would have to respect a moral right to religious liberty on the part of [the states] citizens. The state would entirely lack the required authority to do otherwise’.<sup>121</sup>

However, beyond Pink’s concerns about Maritain and indeed about Pope Paul VI’s optimistic pursuit of a new political Catholicism within the modern state, there were other practical and often difficult consequences for the position of the Church in relation to the state. While the question of the Church claiming the right to use the state’s temporal power to coerce seems unfamiliar, it is easier to consider the relationship between morality and law, and to consider how the state might decide what the common good requires. The question of who decides the use of the coercive power of the state, and how it is used, where religious authority is subsumed beneath the power of the state, presented Catholicism with a significantly difficult problem.<sup>122</sup> As Pink notes Maritain’s theory assumed acceptance of “*the primacy of the spiritual*” and the necessity of the pastoral guidance of Christianity, but the ‘problem for Maritain is that political secularization has not taken the benign form that he predicted’.<sup>123</sup> Pink evaluated that in Maritain’s thought:

A fully secular state would lead to a better understanding of, and clearer respect for, the distinction between the spiritual and the temporal, between what is proper to the state and what is proper to the Church. But in fact with political secularization the very reverse has happened. The modern state and the political theory that provides its ideology are altogether abandoning the very distinction between the spiritual and the temporal.<sup>124</sup>

The state could exploit its position and create laws and policies in direct contradiction to Catholic political and moral thought, and reject the natural law basis upon which Catholic political thought in the 20<sup>th</sup> century had developed. From

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<sup>121</sup> Pink 2016 Leo XIII and *Dignitatis Humanae* 13. Pink points out that in 1964 early drafting of the encyclical *Dignitatis Humanae* ‘was seen by that eminent admirer of Maritain, Pope Paul VI, and by his progressive allies, as urgently required to situate the Church and her mission within the modern world’.

<sup>122</sup> Pink, ‘Jacques Maritain and the Problem of Church and State’, (9. See also Pink, ‘The Interpretation of *Dignitatis Humanae*’, (35-38).

<sup>123</sup> Pink, ‘Jacques Maritain and the Problem of Church and State’, (9). On secularisation see José Casanova, ‘Rethinking Secularization: A Global Comparative Perspective’, *The Hedgehog Review*, /Spring & Summer ( and also Casanova, ‘The Secular and Secularisms’, ( Martin, *The Future of Christianity: Reflections on Violence and Democracy, Religion and Secularization*. David Martin, *Religion and Power: No Logos without Mythos* (Kindle edn.; Farnham: Ashgate Publishing Ltd).

<sup>124</sup> Pink, ‘Jacques Maritain and the Problem of Church and State’, (9

that position, secularisation had reshaped a more optimistic interpretation of the relationship between religion and the state developed in during the period of the Vatican Council, and had reconfigured the fundamental understanding of human rights.<sup>125</sup> There was no recognisable *philosophia perennis* or a *prisca theologia* that might bridge the relationship between the Church and state.

Pointedly, Pink suggests, ‘the secularized state’s own conception of religious liberty, and of religion, has become detached from that held by any particular religion, and especially from that held by Catholicism’.<sup>126</sup> A secularized view of the human person involves the denial of any pre-political or religious or cultural identity, and is instead subsumed to the defining powers of the state.<sup>127</sup> Similarly, the distinctiveness of religion, and the recognition of a public religion by the state that may be beneficial, is rejected though the secularization of the state.<sup>128</sup> These problems of a “secular democratic faith” presented by Pink are not insignificant. Maritain presumed the attractiveness of his theory, and this was reiterated in papal encyclicals but not wholly embraced by the state.<sup>129</sup> However, where the credibility of the state’s relationship to religion is brought into question this leads to the problem of how that common democratic project might be sustained.

#### 4.4 Maritain’s “Democratic Secular Faith”

In a Radio Message on December 25, 1944, Pius XII anticipated a role for Christianity in the future democratic order of society. He wrote, ‘[i]f the future is to belong to democracy, an essential part in its achievement will have to belong to the religion of Christ and to the Church [...]’ and concluded, the Church would assist ‘to actuate the divinely-established order of beings and ends which is the ultimate

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<sup>125</sup> Evans, *Religious Liberty and International Law in Europe*. 183. For instance, commentators on the Drafting of Article 18 had described religious liberty as an “easy case” in the catalogue of human rights definitions. It was perceived to have drawn less controversy than other provisions of the declaration. The belief had been that the relationship between religion and the state was uncontentious.

<sup>126</sup> Pink, ‘Jacques Maritain and the Problem of Church and State’, (17).

<sup>127</sup> This is a position defined more often by Rawls and Habermas see John Rawls, *The Law of Peoples* (Cambridge: Harvard Univ Press). and also Jürgen Habermas, *Between Naturalism and Religion: Philosophical Essays*, trans. Ciaran Cronin (Cambridge: Polity Press).

<sup>128</sup> Pink, ‘Jacques Maritain and the Problem of Church and State’, (19-23).

<sup>129</sup> *ibid.* 30. In Pink’s view there is a,

[...] very compelling reason for detaching *Dignitatis Humanae* from Maritain’s theology. The theology, with its sunny optimism about political secularization and its consequences, is by now quite unbelievable. It is increasingly obvious that the secular state will never be respectful of the Church’s mission on the terms required by *Immortale Dei* and *Dignitatis Humanae* alike. The more the state is secular, the less the possibility of a shared vision of religion as a distinctive good transcending state authority, a vision that leaves a politically undisputed public space for the Church’s mission. Without that shared understanding of the good of religion, an understanding that depends on some form of political recognition of the truth of revealed religion, there can no mutually acceptable articles of peace between Church and state [emphasis added].

foundation and directive norm of every democracy'.<sup>130</sup> The idea that the future might belong to democracy remained precarious during World War II, and it required a philosophical as well as a political foundation. The working out of the project was to include political Catholicism, rooted in its own understanding of rights, human dignity and the established order. Those who had witnessed the capitulation of a European democracy in the mid-1930's interpreted it as a crisis in the political project of democracy. Previously, the 1918 Weimar republic had 'established one of the most democratic regimes in Europe', but also produced a fundamental paradox in German political thought.<sup>131</sup> The effect of World War I 'undermined the belief that political conflicts could be resolved through peaceful elections and open discussion'.<sup>132</sup> This led to a situation wherein 'the arrival of democracy was marked by constant political violence, assassinations, and attempts at violent coups from both right and left had a profound effect on German political thought'.<sup>133</sup> Democracy was viewed as a fragile and vulnerable political project and therefore 'required constant spiritual and intellectual mobilization'.<sup>134</sup> The inheritance of that legacy the fragility of democracy in Europe left the sense that democracy would require an appeal to new resources because of the apparent failure to combat the appeal of totalitarian ideology.<sup>135</sup>

Jacques Maritain was a unique voice within that debate on democracy that resonated across the Catholic world and beyond. It is his thought that further provides the kernel that unlocks political Catholicism's understanding of the Church and State relationship in the 20<sup>th</sup> century. In his writing it is possible to locate the position of human rights within political Catholicism. The uniqueness of Maritain's

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<sup>130</sup> Pius XII 'Democracy and Lasting Peace' Radio Message on December 25, 1944. See also Michael Novak 'Democracy And Catholic Social Thought' in Zacher et al., 'Democracy in Debate: The Contribution of the Pontifical Academy of Social Sciences'. 58. Novak restates the fact that the bitter experience of the 20<sup>th</sup> century for the Catholic Church taught it that it was democracy beyond all other regimes which protected human rights, and what is more, the rights of Christians. See John P. Langan, 'The Christmas Messages of Pius XII (1939-1945): Catholic Social Teaching in a Time of Extreme Crisis'. 181-185. It has been proposed that the Christmas messages of Pius XII during WWII are seminal because they germinate the seed of the "Christian Conception of the State", which would be democratic. Langan suggests that his 1944 statement was,

[...] an important step on the road from the classic affirmations of indifference among possible constitutional arrangements that had been characteristic of Neo-Scholasticism and of early papal documents towards the full embrace of the procedures and values of constitutional democracy...' (182).

See also Driessen, 'Religious Democracy and Civilisational Politics: Comparing Political Islam and Political Catholicism'. 22. See Pope John XXIII, 'Pacem in Terris, AAS 55 (1963)', (§ 75-77.

<sup>131</sup> Udi Greenberg, Ofer Ashkenazi, and Noah B. Strote, 'Introduction: From Weimar to the Cold War', *New German Critique*, 42/3 (2015), 126. 5.

<sup>132</sup> Ibid. 5.

<sup>133</sup> Ibid. 5.

<sup>134</sup> Ibid. 5.

<sup>135</sup> See for instance Rommen, *The Natural Law. A Study in Legal and Social History and Philosophy*. Kindle Locations 2600-2604.

thought, drawing on neo-Scholasticism, was to identify the role of history in the political climate of the 20<sup>th</sup> century, and recognise there could be no turning back to other more secure political forms of the state. Against the backdrop of polarising political ideologies in the 1930's, Maritain returned to Thomistic and Aristotelian thought to provide the state with natural foundations that were rationally and practically agreeable. To bridge the ideological divide, he proposed the key foundation of the human person through his philosophy of Personalism, and provided a justification for a pluralist and secular character for the democratic state, which could be acceptable to Catholicism but also other philosophical outlooks. That shift was indeed remarkable given both the considerable contestation within Catholicism over the political theory of the state and that it would become rooted across the Christian democratic movement following World War II. Therefore, it is important to set out his understanding of democracy and human rights from an emerging Catholic political philosophy.

Between the 1930's and 1950's numerous clerical and lay Catholics began to cultivate an understanding of democracy that would address their fears of resurgent ideological threats from communism and still latent fascism in Europe.<sup>136</sup> Indeed Moyn points out Maritain's,

[...] personalist and communitarian recasting of the language as a new option for Christianity helps explain why commitments to human dignity and human rights could become as prominent as they did in the post-war European order.<sup>137</sup>

Democracy and its foundations were debated profoundly during the years of World War II, resulting in the emergence of a new understanding of the place of democracy in Catholic political thought.<sup>138</sup> Although there were critics of Maritain, his theory on democracy and human rights were in the end validated by their inclusion as a source of inspiration in many of the later 20<sup>th</sup> century social

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<sup>136</sup> John Hittinger and Timothy Fuller, 'Maritain and the Reassessment of the Liberal State', in Timothy Fuller and John P. Hittinger (eds.), *Reassessing the Liberal State. Reading Maritain's Man and State* (Washington: Catholic University Press, 2001), 1-9. 1. See also Sigmund, 'The Catholic Tradition and Modern Democracy', (539).

<sup>137</sup> Moyn, ' Jacques Maritain, Christian New Order, and the Birth of Human Rights. ', (12). See also Glendon, 'The Influence of Catholic Social Doctrine on Human Rights', ( Glendon, 'The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea', ( See also Moyn, *The Last Utopia: Human Rights in History*. 66.

<sup>138</sup> Sigmund, 'The Catholic Tradition and Modern Democracy', (539-540). See M. J. Adler and Walter Farrell, 'The Theory of Democracy (Part One)', *Thomist: a Speculative Quarterly Review*, 3 (1941), 397. Also M. J. Adler, 'Future of Democracy', *Proceedings of the American Catholic Philosophical ...*, (1945). also D. A. Gallagher, 'Religion and the Discovery of Democracy', *ibid.* (1

encyclicals of the Catholic Church.<sup>139</sup> His two seminal outputs, *Integral Humanism* (1936) and *Man and the State* (1951) 'played a pivotal role in the development of this social teaching'.<sup>140</sup> Maritain had sought to offer a complete theory of democracy based on a humanism that was a 'merely practical one, not a theoretical or dogmatic one'.<sup>141</sup> Maritain proposed,

A genuine democracy implies a fundamental agreement between minds and wills on the bases of life in common; it is aware of itself and of its principles, and it must be capable of defending and promoting its own conception of social and political life: *it must bear within itself a common human creed, the creed of freedom.*<sup>142</sup>

Momentously, Maritain offered the proposition of a "*secular democratic faith*", which sought to reconcile the democratic and religious dimensions of society with a common good that could be predicated on an understanding of human dignity and a 'proper civil consciousness [...]'.<sup>143</sup> Laying claim to 'this dignity of the human person' was one of the surprising turns of the era that Maritain had helped develop and push forward. Maritain's sense of democratic belonging informed the construction of Christian democracy as an alternative to secular liberalism and communitarian socialism.<sup>144</sup>

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<sup>139</sup>Joseph M. De Torre, 'Maritain's "Integral Humanism" and Catholic Social Teaching', in Timothy Fuller and John P. Hittinger (eds.), *Reassessing the Liberal State. Reading Maritain's Man and State* (Washington: Catholic University Press, 2001), 202-08. 203-204. De Torre point to among others, seminal voices in Catholic neo-Scholasticism who defended Maritain, such as Etienne Gilson, M.D. Chenu and Reginald Garrigou-Lagrange, and the founder of the Italian Christian democrat party Alcide De Gasperi. Maritain had influenced the encyclicals of Pope John XXIII's in Pope John XXIII, 'Mater Et Magistra, (on Christianity and Social Progress)', (§21. See also Pope John XXIII, 'AAS 55', (§28-30), and also Vatican Council document in Vatican Council II, 'Gaudium Et Spes (Pastoral Constitution on the Church in the Modern World)', *ibid.*58 (1025-115 see also Pope Paul VI's encyclical's Pope Paul VI, 'Encyclical Populorum Progressio (on the Development of Peoples)', *ibid.*59 (257-99.), and see Vatican Council II, 'Dignitatis Humanae (Declaration on Religious Freedom)', *ibid.*58 (929-46. also Pope Paul VI, 'Apostolic Exhortation Evangelii Nuntiandi', *ibid.*68 (8 December ). Also John Paul II encyclical Pope John Paul II, 'Encyclical Letter Redemptor Hominis', *ibid.*71/10 (4 March 1979.)

See also Catherine Mccauliff, 'Jacques Maritain's Embrace of Religious Pluralism and the Declaration on Religious Freedom', *Seton Hall Law Review*, 41/2 (2011). 596. Mccauliff '[...] examines the intellectual friendship between Montini (Pope Paul VI) and Maritain in terms of the concept of human dignity underlying both Jacques Maritain's work and *Dignitatis Humanae*'.

<sup>140</sup> De Torre, 'Maritain's "Integral Humanism" and Catholic Social Teaching'. 203.

<sup>141</sup> Joseph M. de Torre 'Maritain's "Integral Humanism" and Catholic Social Teaching' 205.

<sup>142</sup> Maritain, *Man and the State*. 109 [emphasis included].

<sup>143</sup> Maritain, *Integral Humanism; Temporal and Spiritual Problems of a New Christendom*. 202. Maritain contrast's his proposal for a "personalist democracy" with the republican democracy of Rousseau, remarking, [...] our plan for civilisation would surely be opposed to that kind of democracy, for it is not through an abstract freedom, an impersonal freedom, but through concrete and positive freedoms incarnated in social institutions and social bodies that the interior freedom of the person demands to be expressed on the external and social plane (201).

<sup>144</sup> *Ibid.* 201-202.

Martian's thought offers an insightful description of the move within Catholicism towards democracy and its endeavoured contribution to liberal thought where may have lacked a "common faith".<sup>145</sup> Revealing how predominant Christian political thought was, in *Integral Humanism* Maritain had prepared the groundwork for the 'collaboration and participation of non-Christians in the life of a Christian established temporal society', which 'can include unbelievers and believers'.<sup>146</sup> Interestingly, he thought a 'common doctrinal minimum' was 'sheer fiction', alluding to the premise that some comprehensive ideological doctrine from politics or religion could secure the state with a foundation.<sup>147</sup> Rather than a common doctrinal minimum he crucially proposed a 'common practical task', which is 'not a Christian sacral, but a Christian secular, work'.<sup>148</sup> Maritain had used Aristotle's theory of human nature, which viewed the human person as a political animal (*zoon politikon*), and therefore presumes the task of building a democratic state will be a shared political one rather than from an ideological development or derived from a specific religiously inspired or doctrinal project.<sup>149</sup>

Maritain stressed democracy required a *common thought* for the *common good* of the democratic state to be realised, and it would be essentially a *common faith* drawn from its culture or its civilisation.<sup>150</sup> This political project does 'not belong to the order of religious creed and eternal life, but to temporal or secular [...]'.<sup>151</sup> Most importantly Maritain stresses: 'The *faith* in question is a *civic* or *secular* faith, not a

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<sup>145</sup> Maritain, *Man and the State*. 110.

<sup>146</sup> Maritain, *Integral Humanism; Temporal and Spiritual Problems of a New Christendom*. 206.

<sup>147</sup> Ibid. 206. This would seem to be a clear rejection both of the "total" state derived from totalitarian or theocratic ideologies and agreement with Peterson's conclusions and rejection of political theology. See Erik Peterson, *Theological Tractates (Introduction by Michael J. Hollerich)*, eds Mieke Bal and Hent De Vries, trans. Michael J. Hollerich (Cultural Memory in the Present; Stanford: Stanford University Press, 2011). 68-105.

<sup>148</sup> Maritain, *Integral Humanism; Temporal and Spiritual Problems of a New Christendom*. 206.

<sup>149</sup> Ibid. 205. See previous chapter for a fuller discussion on Aristotle and Cicero. See Aristotle, *Politics. Translated, with Introduction and Notes, by C.D.C. Reeve*. This position of Maritain does seem to echo Peterson's rejection of Carl Schmitt's belief in the existence of a political theology. See also in response to Peterson, Carl Schmitt, *Political Theology II. The Myth of the Closure of Any Political Theology (Introduction by Michael Hoelzl and Graham Ward)*, trans. Michael Hoelzl and Graham Ward (Kindle edn., 2; Malden: Polity, 2009).

<sup>150</sup> Maritain, *Man and the State*. 110. The words are emphasised by Maritain in the text of his work. See also Gerald A. McCool, 'Maritain's Defense of Democracy', *Thought*, 54/213 (132-42). 138. In McCool's view, the contribution of Maritain's defence of representative democracy marked 'a definite advance within the scholastic natural law tradition'. While the 16th century neo-scholastic Francisco Suárez had 'argued that civil society was a natural society', Maritain had gone beyond Suárez 'in his more extensive claim that the adult citizen in our advanced Western societies has not fulfilled his obligation as a member of civil society by simply designating the authoritative legislator for his society'. See further Maritain, *Man and the State*. 9-12. Maritain provides a sustained reflection on totalitarianism proposing societies need 'to defend themselves against totalitarian threats from the outside and totalitarian expansion in the world; but the pursuit of those objectives will inevitably involve risks of having too many functions of social life controlled by the state from above' [...].

<sup>151</sup> Maritain, *Man and the State*. 110.

religious one'.<sup>152</sup> Revealingly, it is not a creed belonging to the civic religions of the 18<sup>th</sup> century of Comte and his republican admirers or 'offered by the totalitarian States which lay claim to the faith, the obedience, and the love of the religious man for his God'.<sup>153</sup> Those political projects had 'produced only their effort to impose their creed on the mind of the masses by the power of propaganda, lies, and the police'.<sup>154</sup> Therefore, Maritain proposes this 'civic or secular faith' in essentially practical terms without the pretensions of an ideological or dogmatic doctrine, and returns to the first principles of practical reason, to the natural law.<sup>155</sup> This foundation provides that,

[...] secular faith in question deals with practical tenets which the human mind can try to justify – more or less successfully, that's another affair –

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<sup>152</sup> Ibid. 110 [emphasis included].

<sup>153</sup> See Maritain, *Integral Humanism; Temporal and Spiritual Problems of a New Christendom*. 201-202. Undoubtedly Maritain had been influenced by French republican thought but diverges from that argument. Maritain therefore argues:

Take for example the word "democracy" as the progeny of Jean-Jacques Rousseau understood it, and our plan for civilisation would surely be opposed to that kind of democracy, for it is not though abstract freedom, an impersonal freedom, but through concrete and positive freedoms incarnate in social institutions and social bodies that the interior freedom of the person demands to be expressed on the external and social plane (202).

Maritain reinterpreted French republican thought but only to show that 'one of the essential values included in the very ambiguous world "democracy" is saved in this plan' (201). That essential value was the dignity of the person, which Maritain emphasises against the depersonalised theory found in Enlightenment political philosophy, which had left just the individual and the state. In his view only progress towards a "new Christendom" could salvage the dignity of the person from within the various political forms found in the early 20<sup>th</sup> century, including future approaches to democracy. Importantly, Maritain had further looked at human dignity as problematic because it was liable to be the site of 'the clash between incompatible political philosophies', a theme that surfaced during the authorship of the Universal Declaration of Human Rights. Maritain imagined the rejection of class conflict. There would arise 'a vitally Christian temporal regime would then teach respect for the human person in the individual and in the people, difficult as it would still be'. In Maritain's view, the essential value of human dignity would be found in the rejection of two political distortions firstly of Enlightenment individualism, and secondly a focus on "the people" in Marxism. Two decades later Maritain wrote 'it is no more necessary to be a follower of Rousseau to recognise the rights of the individual than it is to be a Marxist to recognise the economic and social rights'. See Maritain, *Man and the State*. 105. Maritain had departed from French republican thought, and reinterpreted democracy and rights (and its foundation in human dignity) through the lens of neo-Thomism, which was possibly history's reckoning for the eldest daughter of the Church. See Pope Leo XIII, 'Nobilissima Gallorum Gens (on the Religious Question in France)', *Acta Sanctae Sedis*, XVI (February 8, 1884), 241-48. This papal encyclical of Leo XIII describes France as "the eldest daughter of the church" an age old expression. The encyclical again emphasised the doctrine of "two principal societies". Leo XIII had proposed 'for it is impossible that prosperity should follow a State in which the influence of religion is extinguished'. Interestingly, this encyclical had included Ireland because of the revolutionary spirit and anti-clericalism sweeping Europe, but the focus has always been France.

§ 2. [...] the fatherly love We bear to all the nations of the world, and which impelled Us to recall the peoples of Ireland, Spain, and Italy to their duty, when the need arose, by Our letters to their Bishops -- has induced Us to turn Our attention and thought to France.

<sup>154</sup> Maritain, *Man and the State*. 110-111.

<sup>155</sup> Ibid. 111.



from quite different philosophical outlooks, probably because they depend basically on simple, “natural” apperceptions [...].<sup>156</sup>

This optimism is shaped by the expectation of an ambiguous *prisca theologia* and predicated on the presumption that the cultural conditions of society are shaped by Christianity or a similar culture. It is a culture that is ‘obscured in the depths of human history’ and gives rise to practical agreement on civic and secular norms for democracy.<sup>157</sup> Therefore, he proposes a pluralist account of democracy, quite unlike most of his generation defending the Confessional model of Church and state relations proposed by Pope Leo XIII in the 19<sup>th</sup> century. Maritain explains as follows:

Thus it is that men possessing quite different, even opposite metaphysical or religious outlooks, can converge, not by virtue of any identity of doctrine, but by virtue of an analogical similitude in practical principles, toward the same practical conclusions, and can share in the same practical secular faith, providing that they similarly revere, perhaps for quite diverse reasons, truth and intelligence, human dignity, freedom, brotherly love, and the absolute value of moral good.<sup>158</sup>

In Maritain’s view it was wholly possible to find agreement from all people on common principles, believing people could value ‘truth, human dignity, freedom, brotherly love, and the absolute value of moral good’.<sup>159</sup> The pluralism of this common life, which Maritain proposes is an ambitious departure from the kind of incorporation within a Confessional state that earlier Catholic political thought had envisaged. Nevertheless, it reflected the complex animation of a process of philosophical negotiation with the modern democratic state, between contemporary secular liberalism (in contrast to Courtney-Murray’s use of “sectarian liberalism”) and socialist communitarianism.<sup>160</sup>

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<sup>156</sup> Ibid. 111.

<sup>157</sup> Ibid. 111. See also Fanning, ‘George Tyrell, Jacques Maritain and the Challenge of Modernity’, ( 295). Maritain distinguishes this from the over-extension of state autonomy in the temporal sphere with ‘a rule of faith or a conformism of reason, a philosophical or religious creed which would present itself as the only possible justification of the practical charter through which the people’s common secular faith expressed itself’. Maritain had

[...] portrayed the modern secular democratic state as ultimately more faithful to the principles of Christianity and natural law than the hierarchical corporatism espoused by Pius XI’s 1931 encyclical *Quadragesimo Anno* [footnote omitted].

See Pope Pius XI, ‘*Quadragesimo Anno* AAS 23 (1931)’, (§40).

<sup>158</sup> Maritain, *Man and the State*. 111.

<sup>159</sup> Ibid. 111.

<sup>160</sup> Heiner Bielefeldt, ‘Freedom of Religion or Belief—a Human Right under Pressure’, *Oxford Journal of Law and Religion*, Advance Access (January 11, 2012), 1–21. 19. Bielefeldt writes in an almost parallel way to Maritain,

Maritain goes further to build upon his understanding of the relationship between church and state to propose through citizens education, a 'creed on which depends national communion and civil peace'.<sup>161</sup> He proposes the outline for a "moral Charter" or a "fundamental compact" of a society of free men'.<sup>162</sup> This "moral Charter" or a "fundamental compact" is unsurprisingly similar to the UDHR which lists human rights principles, and is analogous to the later papal document *Pacem in Terris*.<sup>163</sup> However, lengthy and utopian Maritain's list of fundamental moral values are, they gave substance to the theory of a "secular democratic faith" as an adjustment in Catholic political thought moving towards pluralist democracy. Even in an international community that would become increasingly polarised in the Cold War era, and secularised, it does reveal how the common goods associated with human rights in a democracy might be compatible with the natural law. If Catholic political thought developed by Maritain could surmise an extensive list of rights and duties, then it could also produce a programme for Christian democratic parties to develop their political agendas.<sup>164</sup> The post-World War II strength of

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and distinguishes between different conceptions of secularism and that state, saying, 'we have to draw a clear line between the various forms of 'doctrinal secularism' on the one hand and 'political secularism' on the other'. These ideas are developed further in Heiner Bielefeldt, 'Misperceptions of Freedom of Religion or Belief', *Human Rights Quarterly*, 35 (33-68.53-56). See also the very helpful essay, Casanova, 'The Secular and Secularisms', (

<sup>161</sup> Maritain, *Man and the State*. 112.

<sup>162</sup> *ibid.* 112. Maritain's extensively lists his moral Charter:

'[...] rights and liberties of the human person, political rights and liberties, social rights and social liberties, corresponding responsibilities; rights and duties of persons who are part of a family society, and liberties and obligations of the latter toward the body politic; mutual rights and duties of groups and the State; government of the people, by the people, and for the people; functions of authority in a political and social democracy, moral obligation, binding in conscience, regarding just laws as we as the Constitution which guarantees the people's liberties; exclusion of the resort to political coups (*coups d'état*) in a society that is truly free and ruled by laws whose change and evolution depend of the popular majority; human equality, justice between persons and the body politic, justice between the body politic and persons, civil friendship and an ideal of fraternity, religious freedom, mutual tolerance and mutual respect between various spiritual communities and schools of thought, civic self-devotion and love of the motherland, reverence for its history and heritage, and understanding of the various traditions that combine to create its unity; obligations of each person towards the common good of the body politics and obligations of each nation towards the common good of civilised society, and the necessity of becoming aware of the unity of the world and of the existence of a community of peoples'.

Maritain's thought comes surprisingly close to the idea found in French republican thought about the need for the state to educate citizens in civic virtue, see *ibid.* 122: 'The conclusion is obvious. The goal aimed at by the educational system and the State is unity – unity in the common adherence to the democratic character'.

<sup>163</sup> Pope John XXIII, 'AAS 55', ( §8-30). This schema of natural rights follows, in a general way, Maritain's moral charter. Unsurprisingly, this encyclical quotes extensively from the Christmas messages of Pius XII during World War II, which emphasises inviolable natural rights and human dignity. See John P. Langan, 'The Christmas Messages of Pius XII (1939-1945): Catholic Social Teaching in a Time of Extreme Crisis'.

<sup>164</sup> See Lönne, 'Germany'. 160-161. Lönne notes a not unfamiliar list of an earlier Christian democrats programme, represented by the Centre Party during the Weimar Republic, in Germany which included:

Belief in parliamentary republicanism; The establishment of equal rights for religious denominations in a secularising state; Concern for issues of freedom of belief and conscience; To prevent a rigid separation of Church and State; The rights of churches to financial support in their social participation

Christian democratic parties in Europe had been to be populist, open and pluralistic, though also socially conservative, while seemingly retaining the characteristic 'secular democratic faith' that Maritain had envisaged.<sup>165</sup>

#### 4.4.1 UNESCO Document and The Universal Declaration of Human Rights

The creation of a Declaration of Human Rights was 'an attempt that was absolutely new in the history of humanity [...]'.<sup>166</sup> Papini proposes 'the contribution of Jacques Maritain, who at that time was ambassador of France to the Holy See, was decisive'.<sup>167</sup> Maritain who had replaced Léon Blum as head of the French delegation to the Second General Conference of UNESCO emphasised in a statement to the delegates:

Because of their shared nature [as human beings] one could establish 'practical principles' (essentially human rights) which were common to different traditions and currents of thought, on the condition, however, that the theoretical justifications that each party could have made but on which there would not have been unanimity [and] were put to one side.<sup>168</sup>

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in education and health provision; The rights of chaplains in various public institutions; Protection of charitable status of Christian institutions; Protection of the legal rights of parents and guardians to have education provided according to their conscience and religious belief; belief that life is sacred; The family – a pre-political community – there are generally speaking no political interventions against a man and women to found a family. This remains the cornerstone of society; The welfare state; Catholic social thought/ principles; Concern for natural human rights; The reconciliation of enlightenment values and political Catholicism.

<sup>165</sup> See generally, Kalyvas, *The Rise of Christian Democracy in Europe*. and also Conway, 'Democracy in Postwar Western Europe: The Triumph of a Political Model', ( See further Martin Conway, 'Left Catholicism in Europe in the 1940's. Elements of an Interpretation', in G.R. Horn and E. Gerard (eds.), *Left Catholicism 1943-1955: Catholics and Society in Western Europe at the Point of Liberation* (Leuven Leuven University Press), 269. 278. Conway proposes Christian democracy had at its heart 'the dynamic energy provided by a new generation of Catholic elites who succeeded in combining a centrist praxis of government with material policies which succeeded in rallying a broad middle-class and rural collation of support'.

<sup>166</sup> Papini, 'The Debate About the Principles of the Declaration of 1948: Questions of Yesterday and Questions of Today'. Papini notes that,

Humphrey's draft was made up of 48 articles (over 400 pages) and was a heterogeneous list even though sufficiently complete as regards proposals, to such an extent, indeed, that it was seen by the members of the committee as an impressive "distillation of nearly two hundred years of efforts to articulate the most basic human values in terms of rights [endnote omitted].

On the history and development of the Universal declaration and influence of Christian thought, see further Moyn, *The Last Utopia: Human Rights in History*. 61-66.

<sup>167</sup> Papini, 'The Debate About the Principles of the Declaration of 1948: Questions of Yesterday and Questions of Today'. 7. See also Ján Figel, 'Foreword: Human Rights and Intercultural Dialogue ', *ibid.*, 77-89. Figel writes of Maritain's legacy,

Together with many others, Maritain was actively involved in the project and drafting of the Universal Declaration of Human Rights. We can consider him as an intellectual, spiritual and political beacon.

<sup>168</sup> Unesco, 'Human Rights: Comments and Interpretations (with Introduction by Jacques Maritain)', (Paris: UNESCO,, 25 July, 1949). See also Samuel Moyn, 'Personalism, Community and the Origins of Human Rights',

Maritain crafted an introduction to the final UNESCO document, and this contained the deliberation of the entire General Conference.<sup>169</sup> This in turn was given to the Commission of Human Rights and would influence the drafting of the UDHR.<sup>170</sup> The theoretical foundation that Maritain had worked out in the 1930's and presented in his later work are identifiable in the UNESCO document.<sup>171</sup> Maritain's proposition of a "secular democratic faith" informed his proposal that the UDHR would provide a set of 'practical principles', common to different traditions and currents of thought.<sup>172</sup> It indicates a recurrence of the idea that there exists a *prisca theologia* (or like Courtney-Murray's *philosophia perennis*), or at least an acknowledgement of a natural law that preceded the establishment of procedural rights in international law, laws that are not alone granted but recognised as common to humanity.<sup>173</sup>

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in Stefan-Ludwig Hoffmann (ed.), *Human Rights in the Twentieth Century* (New York: Cambridge University Press, 2011), 85-107. 98-99.

<sup>169</sup> Unesco, 'Human Rights: Comments and Interpretations (with Introduction by Jacques Maritain)'.

<sup>170</sup> Papini, 'The Debate About the Principles of the Declaration of 1948: Questions of Yesterday and Questions of Today'. 8. Following the acceptance of the UN Declaration of Human Rights on 10th December 1948, the General Assembly requested the Economic and Social Council to request the Commission on Human Rights to continue their work and to prepare a draft covenant of human rights. See A/RES/3/217 UN General Assembly, Resolution adopted by the General Assembly 217 (III) International Bill of Human Rights (10 December 1948). § E. Preparation of a Draft Covenant on Human Rights and Draft Measures of Implementation:

Requests the Economic and Social Council to ask the Commission on Human Rights to continue to give priority in its work to the preparation of a draft Covenant on Human Rights and draft measures of implementation.

The Economic and Social Council transmitted this resolution to the Commission on Human Rights by resolution 191 (VIII) (9 February 1949).

<sup>171</sup> Maritain, *Integral Humanism; Temporal and Spiritual Problems of a New Christendom*. ix. Maritain reports that the work belonged to a series of six lectures delivered in August 1934, at the Summer school of the University of Santander, Spain. On the influence of Maritain see Figel, 'Foreword: Human Rights and Intercultural Dialogue'. xvi. 'We can consider him as an intellectual, spiritual and political beacon'.

<sup>172</sup> See Maritain's Introduction in Unesco, 'Human Rights: Comments and Interpretations (with Introduction by Jacques Maritain)'. Page V:

From the point of view of philosophical doctrine, it may be said, without over-simplification, that, as regards the question of Human Rights, men are today divided – into two antagonistic groups: those who to a greater or lesser extent explicitly accept, and those who to a greater or lesser extent explicitly reject "Natural Law" as the basis for those rights.

<sup>173</sup> On the contrasting viewpoints on the foundation for human rights, see Maritain's Introduction in *ibid*.

In the eyes of the first the requirement of his being endow man with certain fundamental and inalienable rights antecedent in nature, and superior, to society, and are the source whence social life itself, with the duties and rights which that implies, originates and develops. For the second source man's rights are relative to the historical development of society, and are themselves constantly variable and in a state of flux; they are a product of society itself as it advances with the forward march of history (Page V).

See also Papini, 'The Debate About the Principles of the Declaration of 1948: Questions of Yesterday and Questions of Today'. 9. Papini notes the request of Cassin for the Declaration not to be defined as "international" but "universal", indicating the claim to speak for a common humanity. See also Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration*. 24-38. Morsink discusses the metaphysical history of natural rights, and notes the debates during the drafting of the Universal Declaration about the concepts of inalienable and inherent rights, being born with rights, and rights received by nature.

In defence of this position of to define human rights Maritain had proposed the 'same natural law which lays down our most fundamental duties, and by virtue of which every law is binding, is the very law which assigns to us our fundamental rights'.<sup>174</sup> Emphasising duties returned to medieval scholastic jurist's focus in their reading of the natural law as intuitions towards a higher or common good. As Maritain notes, 'in ancient and mediaeval times attention was paid, in natural law, to the *obligations* of man more than to his *rights*'.<sup>175</sup> However, Maritain suggests that human rights are discovered from natural inclinations, and have the same clarity as natural duties,<sup>176</sup> which makes possible the articulation of both rights and duties from the unwritten natural law.<sup>177</sup> This was Maritain's antidote to the positivistic philosophy.<sup>178</sup> Maritain further clarifies that '*natural law* deals with the rights and duties which are connected in a *necessary* manner with the first principle: "Do good and avoid evil"'.<sup>179</sup>

This Natural Law reading of rights and duties influenced Maritain's introduction to the UNESCO document as it pertains to the Law of Nations (*jus gentium*). Maritain had distinguished between the law of nations, natural law and positive law. The former 'differs from natural law because it is *known*, not through inclination, but through the *conceptual exercise of reason*, or through rational knowledge [...]' and deals 'with rights and duties which are connected with the first principle in a *necessary* manner'.<sup>180</sup> In contrast, positive law 'deals with the rights and the duties

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However, Morsink rejects an essentialist reading of human rights, suggesting 'this virus of essentialism is not just theoretically bothersome, it is also practically dangerous' (32).

<sup>174</sup> Maritain, *Man and the State*. 95. See also William Sweet, 'Human Rights in Ethics, Law and Politics', in Luigi Bonanate, Roberto Papini, and William Sweet (eds.), *Intercultural Dialogue and Human Rights* (Cultural Heritage and Contemporary Change. Culture and Values, 41; Washington, D.C.: The Council for Research in Values and Philosophy), 31-53.

<sup>175</sup> Maritain, *Man and the State*. 94 [emphasis included].

<sup>176</sup> Steven J Brust, 'Retrieving a Catholic Tradition of Subjective Natural Rights from the Late Scholastic Francisco Suarez, S.J.', *Ave Maria Law Review*, 10 (347). This idea Maritain proposes takes up the development in scholasticism by Suarez to outline a "subjective" sense, which identified the meaning of a right. Suarez therefore could propose a right as,

[...] properly being called a certain moral faculty which anyone has either over a thing or to a thing due him: For in this way, an owner of a thing is said to have right in a thing (*ius in re*), and the worker is said to have a right to a wage (*ius ad stipendium*), by reason of which he is called worthy of hire [footnote omitted].

Brust suggests, "'*jus*" is used in what can be considered a "subjective" sense: it inheres in the human subject and, as a moral faculty, is distinguished from a mere physical power to control something. Rather, it signifies a rightful moral claim in or to something'. See also Tierney, *The Idea of Natural Rights*. 302-304.

<sup>177</sup> Maritain, *Man and the State*. 94.

<sup>178</sup> *Ibid.* 94. Legal Positivism was 'powerless to establish the existence of rights which are naturally possessed by the human being, prior and superior to written legislation and to agreements between governments, rights which the civil society does not have to *grant* but to *recognise* [...]'. [Emphasis included].

<sup>179</sup> *Ibid.* 94.

<sup>180</sup> *Ibid.* 99. See Maritain's Introduction on the clash of two schools of legal thought, in Unesco, 'Human Rights: Comments and Interpretations (with Introduction by Jacques Maritain)'. Page V:

which are connected with the first principle, but in a *contingent* manner [...]'.<sup>181</sup> .  
Therefore, the Law of Nations and Positive law are,

[...] a prolongation or an extension of the natural law, passing into objective zones which can less and less be sufficiently determined by the essential inclinations of human nature. For it is *natural law itself which requires that whatever it lease undetermined shall subsequently be determined*, either as a right or a duty existing for all men [...].<sup>182</sup>

In Maritain's view this movement involves historically 'imperceptible transitions' as law articulates rights and duties rationally. This understanding allowed Maritain to provide his introduction to the UNESCO document with a theoretical foundation. His theory of law allowed a negotiated agreement and accommodation among conflicting schools of Philosophy to focus on 'practical principles'.<sup>183</sup> Having abandoned the hope of a philosophical agreement Maritain proposes, 'we must not expect too much on an International Declaration of Human Rights'.<sup>184</sup>

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Such an ideological contrast is irreducible and no theoretical reconciliation is possible; it could however be lessened to some extent, insofar as it was possible for the supporters of "Natural Law" to stress that, although certain fundamental rights meet a prime necessity of that law while others meet only a secondary necessity or are merely desirable, nevertheless our knowledge of both is in all circumstances subject to slow and irregular growth, so that those rights only stand forth as acknowledged rules of conduct as moral consciousness progresses and societies evolve; and insofar as it was possible for the opponents of "Natural Law" to stress that though many rights are seen to be conditions on the evolution of society, other more primitive rights stand out as conditions of society's very existence. However, it is by no means certain that the "fundamental rights" of the first group would always coincide with the "more primitive rights" of the second [...].

<sup>181</sup> Maritain, *Man and the State*. 98-99 [Emphasis included].

<sup>182</sup> Ibid. 99.

<sup>183</sup> See Unesco, 'Human Rights: Comments and Interpretations (with Introduction by Jacques Maritain)'.  
If therefore we adopt a practical viewpoint and concern ourselves no longer with seeking the basis and philosophical significance of Human Rights but only their statement and enumeration, we have before us an entirely different picture, where no theoretical simplification is any more in question [...]. In consequence, it cannot be too strongly emphasised that admission of a particular category of rights is not the exclusive possession of any one school of thought: it is no more necessary to belong to the school of Rousseau to recognise the rights of the individual that it is to be a Marxist to recognise the "new rights", as they are called, economic and social rights. The gains of the collective intelligence under the influence of several cross-currents go far beyond the disputations of the schools (Page VI).

Maritain makes a similar observation in Maritain, *Man and the State*. 105.

<sup>184</sup> Unesco, 'Human Rights: Comments and Interpretations (with Introduction by Jacques Maritain)'. Page IX.  
See Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* 23-24.

It is interesting that the historian Hinsley observed that internationalists of the 16<sup>th</sup> century had been seeking agreement but had failed to find a return to the medieval unity found among European nations. Therefore, Hinsley observes the jurist Grotius,

[...] did grasp that progress lay in replacing the theoretical world unity of the Middle Ages by sociability within a community of independent states, envisaging the day when these states would all work within the limits of a Law of Nations based on contract and justice that would regulate war if it did not guarantee peace.

## 4.5 Conclusion

The theologian Eric Peterson had grappled with the question of the theoretical relationship between political power and Christianity to define the relevance of political theology, in wake of a new polity appearing early in the 20<sup>th</sup> century. Peterson reviewed the political theism of antiquity to reveal how those in power began to see 'Christian monotheism politically as "revolt" (*statis*)', against the gods of the Roman Empire.<sup>185</sup> Therefore he recognised, 'the monotheism of the Christians is "revolt" in the metaphysical world, but as such it is at the same time revolt in the political order [...]'.<sup>186</sup> It would appear, by implication, that if Christians could destabilise and transform the political order of the Roman Empire by virtue of Christian monotheism, then those arguments could be pertinent in the new polity of the 20<sup>th</sup> century.<sup>187</sup> Peterson observed, 'not only was monotheism as a political problem resolved and the Christian faith liberated from bondage to the Roman Empire, but a fundamental break was made with every "political theology" that misuses the Christian proclamation for the justification of a political situation'.<sup>188</sup> Instead, Christian monotheism brought an end to a metaphysical understanding of the state, and reemphasised the separate spheres of interests and concerns of religion and the state. Christianity was not politics *per se*, nor could it be instrumentalised for future configurations of the state in the 20<sup>th</sup> century, yet it could be a revolt against wholly theological articulation of the modern state.

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<sup>185</sup> Peterson, *Theological Tractates (Introduction by Michael J. Hollerich)*. 88. Christian monotheism is distinctive because of the dogma of the Trinity. Through this Christian teaching,

[...] in principle the break with every 'political theology' was effected that misuses the Christian Proclamation for the justification of a political situation.

See also Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy, Expanded Edition* (Kindle edn.; Chicago/ London: University of Chicago Press). Kindle Locations 4958-4959. Meier is particularly defensive and critical of Eric Peterson's critique of Schmitt's political theology, commenting on 'Monotheism as a Political Problem': 'Thus it is a highly political treatise, by a political theologian of high rank, as any unbiased reader of his works can see'. See also Scott and Cavanaugh, *The Blackwell Companion to Political Theology*. Kindle Locations 1799-1800. 'Meier's reading proposed a deeply religious Schmitt, driven by his Christian faith to wage lifelong war against secular reason, unbelief, and nihilism'.

<sup>186</sup> Peterson, *Theological Tractates (Introduction by Michael J. Hollerich)*. 88. Peterson wrote 'Whoever destroys the national cults is therefore in the final analysis also destroying ethnic particularities, and at the same time attacking the Roman Empire, in the which there is room for the national cults as well as for ethnic particularities' [footnote omitted].

<sup>187</sup> Ibid. 89. Through Peterson's inquiry into antiquity's distribution of political power, he observes 'the linkage of the problem of Jewish-Christian monotheism with the question of political life, which concretely means: with the political problem of the Roman Empire [footnote omitted].

<sup>188</sup> Ibid. 104 [emphasis added]. Peterson's essay is in response to Schmitt, *The Concept of the Political: Expanded Edition*.

Peterson was among those who had identified Christian monotheism as a form of critical engagement with political power, and of the exercise of state sovereignty.<sup>189</sup> Peterson's thesis did not bring an end to political theology in its totality but political theology's misuse to justify *Reichspolitik* in 1930's Germany.<sup>190</sup> He also usefully distinguished various forms of political theology justified by Christianity, and exposed the necessity to locate alternatives to political authoritarianism.<sup>191</sup> In identifying how the Catholic Church historically participated in the political life of the state, Peterson distinguished his stance from the rejection of liberal democracy in the writing of Carl Schmitt.<sup>192</sup> Therefore, the "revolt" in Peterson observation did not amount to a rejection of the traditional conception of church and state separation or even any proposed organic relationship but acted in contrast to Schmitt's neo-Hobbesian assertions of the total state as a political theology.<sup>193</sup> Christian monotheism's "revolt" would be against a complete identification of religion with the state or in theoretically replacing the state altogether. The stance of Peterson might lack consistency with alternative accounts of the Catholic Church's history of political engagement with the state.<sup>194</sup> However,

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<sup>189</sup> Peterson was among those conservative Catholics who were personally critical of much of the consequences of an influential liberal theology, and liberal political philosophy, of the early 20<sup>th</sup> century. See for instance in Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy, Expanded Edition*. Kindle Locations 3378-3388 [as cited from an unpublished work by Peterson].

<sup>190</sup> Peterson, *Theological Tractates (Introduction by Michael J. Hollerich)*. 102. Peterson revealing shows the difference between Christian monotheism and *Reichspolitik*.

Monotheism is a political imperative, a piece of *Reichspolitik*. At the moment that the concept of divine Monarchy, which was only a mirroring of the earthly monarchy in the Roman Empire, was juxtaposed with the Christian Trinitarian dogma, the controversy over this dogma immediately became an openly political struggle.

<sup>191</sup> These points are developed in Chapter 3 in the description of the relationship between monarchy, authoritarianism and political liberalism.

<sup>192</sup> See Bielefeldt, 'Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Countercriticism', (65). [...] Schmitt systematically undermines the liberal principle of the rule of law. He wants it to be replaced by an authoritarian version of democracy, a democracy based upon the "substantial homogeneity" of the collective unity of the people rather than one resting upon the principles of a participatory republicanism. Although Schmitt until 1933 opposed the Nazi party, *his ardent anti-liberalism entails from the outset the potential for fascism* [emphasis added].

<sup>193</sup> It also allowed a challenge to Hobbesian political theology, See generally, Matthew Rose, 'Hobbes as Political Theologian', *Political Theology*, 14/1 (2013/02/01 2013), 5-31. See also Paul W. Kahn, 'Political Theology: A Response', *ibid.* 13/6 (2012), 751-61. See also Scott and Cavanaugh, *The Blackwell Companion to Political Theology*. Kindle Locations 1936-1939.

Schmitt appeared to endorse the Leviathan's lament over the "typically Judeo-Christian splitting of the original political unity" (Schmitt I 996b: I I) - a splitting that Peterson himself thought was rooted in the very words of Jesus (Nichtweig 1992: 735 n. 118). What Schmitt said of Hobbes in the Glossarium appears to apply to himself as well: Hobbes's displacement of Christianity into marginal domains was accomplished with the intent of "rendering harmless the effect of Christ in the social and political sphere; of de-anarchizing Christianity, while leaving it in the background a certain legitimating mating function" (Nichtweil 1994: 46).

<sup>194</sup> See for instance on one interpretation of the "Great Separation" instigated by Hobbes, that removed theological sources as the basis of the modern liberal state, see M. Lilla, *The Stillborn God: Religion, Politics, and the Modern West* (Knopf, 2007). See also Scott and Cavanaugh, *The Blackwell Companion to Political Theology*.



Peterson's position provided Catholic intellectuals with a definitive break from the political theology of Schmitt, and with the capacity to critique political liberalism without succumbing to an authoritarian rejection of democracy.

This lesson was not lost on the Catholic theorists who sought to reconstruct democracy, and human rights, from within a Christian theological framework.<sup>195</sup> The anti-modern and anti-Enlightenment reaction to modern political thought required a redress that was facilitated by Peterson and built upon by others.<sup>196</sup> In fact, it would seem, this understanding of Christian monotheism liberated them to experiment with the political form of the state and thereby reformulate concepts such as human dignity and human rights, as useful concepts in different political contexts.<sup>197</sup> Those concepts could be part of a political theory of the state but not in the sense of a misuse of 'the Christian proclamation for the justification of a political situation'.<sup>198</sup> Even though the state would not be confessional or be folded into a temporal theological project as expected in the late 19<sup>th</sup> century, future Christian democrats could experiment in articulating concepts of law and politics integrated with Christian values. The debate between Schmitt and Peterson on the nature of political theology and the uses of national sovereignty to exploit the resources of religion offered a new thrust in direction for Catholic political thought. If Catholic political thought had grown stagnant by its reliance on authoritarianism, then the renewal of theological reflection on the nature of the state allowed new possibilities.<sup>199</sup>

One path that led from that intellectual work is located in the writing of Maritain, who had followed a more secure tradition to locate a "secular democratic faith",

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Kindle Locations 1954-1955. The debate on the Augustine is instructive as to the existence of a political theology in the modern state. Cavanaugh notes:

Part of Peterson's argument against the possibility of any Christian political theology had rested on St. Augustine's stripping of the sacral patina given to the Roman Empire by Christian apologists such as Eusebius of Caesarea.

<sup>195</sup> For instance Maritain references Peterson, and acknowledges his debate on political theology with Schmitt. See Maritain, *Integral Humanism; Temporal and Spiritual Problems of a New Christendom*. 100.

<sup>196</sup> Peterson, *Theological Tractates (Introduction by Michael J. Hollerich)*. xxiv. In Hollerich's Introduction, he proposes that Peterson had been responding to the "new Arianism" of National Socialism, and offering a warning to conservative Catholics about the dangers of Nazism. Therefore, Peterson contrasted the victory of Nicene Trinitarian theology in the Early Church with the Arian heresy (the subordination of the Son to God the Father).

<sup>197</sup> In Chapter 2 we looked at Aquinas understanding of mixed constitutionalism, and the idea that the political form of government were evaluated on the basis of other considerations. 'the one, the few, or the many'. Blythe, 'The Mixed Constitution and the Distinction between Regal and Political Power in the Work of Thomas Aquinas', (563).

<sup>198</sup> Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy, Expanded Edition*. 83 [footnote omitted]

<sup>199</sup> See Hollerich, 'Catholic Anti-Liberalism in Weimar. Political Theology and Its Critics'.

and reject a temporal or secular utopia. In the contemporary European context, Maritain's orthodox Catholic thought worked on drawing on universal neo-Thomistic constructs of natural rights to accommodate the Catholic Church to democracy and human rights, and to present human rights as the ideological glue for a common *prisca theologia*.<sup>200</sup> John-Courtney Murray had interpreted the liberal state as culturally open to religion in the public sphere but like Maritain had anticipated that it would demand political restraint and a judicial interpretation of human dignity, to provide religious freedom with an authentic foundation.<sup>201</sup> Following the Second Vatican Council the place of religion in the liberal state would require judicial accommodation of belief and a negotiated humanism located in the concept of human dignity. The relationship between law and religion demanded solutions through the rule of law, which did not always, or necessarily, correspond with the Christian utopia. However, a defence of human dignity also implied respect for the search for truth, including the rejection of religious truth, a point that turned on its head the 19<sup>th</sup> century notion that "error has no rights", leading to acceptance of religious tolerance of competing religious and secular world views.<sup>202</sup> In the mid and later 20<sup>th</sup> century the political philosophy of Catholicism would thereby imply restraint so as to promote participation in the modern liberal project of democracy and human rights. Catholicism became situated within the secular and liberal ordering of the political state, while retaining its historically rich history of being exceptional, and standing outside the temporal political sphere with a commitment to religious truth. Issues such as religious freedom and the right to conscientious exemption, and various legal accommodations to religious autonomy in civil society, reflected the future concerns for the Catholic Church.

In *Man and the State*, Maritain made a bold attempt to formulate a "secular democratic faith".<sup>203</sup> Maritain's approach to his participation in the creation of the UDHR suggested, perhaps, a realisation of a philosophical argument for political

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<sup>200</sup> See Kasper, 'The Theological Foundations of Human Rights', (157 – 158). Kasper speaks of two human rights traditions: 'a natural law foundation ascending "from below," and a theological-or more precisely salvific-christological-foundation descending "from above"' [footnote omitted].

<sup>201</sup> This position seems to flow from earlier interpretations of potestas indirecta, as noted in the writing of de Victoria 'spiritual power cannot interfere with the exercise of this temporal jurisdiction, *except in special cases*'.

<sup>202</sup> See further Bielefeldt, 'Misperceptions of Freedom of Religion or Belief', (51). The kind of liberty human rights imagines is described by Bielefeldt:

Rather than making the world uniform, human rights represent the aspiration to empower human beings—on the basis of equal respect and equal concern for everyone's freedom—to develop and pursue their own specific life plans, to freely express their most diverse opinions and convictions, and to generally enjoy respect for their irreplaceable personal biographies, alone and in community with others.

<sup>203</sup> For a strong critique of this theory see Cavanaugh, *Torture and Eucharist: Theology, Politics, and the Body of Christ*. 186.

restraint, and principled accommodation, a position worked out by Maritain for the future of Catholicism in the new environment of the liberal democratic state. Christian humanism was the basis for the Catholic approach to human rights but is therefore restrained in many of its expectations, so that the complete body of human rights might not be answerable to a Christian utopia. Similar to the era of Thomas More, the political environment could never realise the whole of Christian culture or its values, or realise a Christian utopia. Pragmatically, human rights ideas were to be an approximation to the Christian utopia, often recognised in Augustine's theological description of the City of God.<sup>204</sup> Similar to Augustine, the Christian utopia might in some circumstances not completely overlap with a Christian vision of life, ethics and the common good.<sup>205</sup> Maritain had appealed to practical realities, with no agreed doctrinal foundation, in the development of the UDHR. That position could be trivialised as relativistic but if it is considered within the history of modern political thought, it was an argument for restraint of the political theology of the Catholic Church. Maritain anticipated that the demise of confessional politics both constitutionally and transnationally, would be replaced by a new political justification for freedom of religion, freedom of conscience and participation of religion in the public sphere. Critics of Maritain's proposal believed he had produced 'ambiguity and hesitation' because the common good 'requires a common faith, he [therefore] puts forth his idea of a secular faith in freedom and rights'.<sup>206</sup> Cavanaugh rejects Maritain's assertion that accommodation between the temporal and spiritual spheres in the state can be established on those grounds because,

[...] modern states have *already* replaced, or at least displaced, other religions, including Christianity, either through the privatisation of religion or the hostility of an ever expanding state.<sup>207</sup>

Political secularism that excludes religion, in the development of common structures for a liberal democracy is in Cavanaugh's view problematic because the state is vested in not maintaining restraint or neutrality toward religious matters, and is unwilling to abide by the accommodation that would ensure the cohesiveness of a "secular democratic faith". However, political positions taken by

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<sup>204</sup> Chapter two detailed Augustine's theory of the City of God. See Augustine, *Concerning the City of God against the Pagans*.

<sup>205</sup> This view brings to mind the writing of Rawls and Habermas. See John Rawls, *A Theory of Justice* (Rev. edn.; Cambridge, Mass.: Belknap Press of Harvard University Press) xxii, 538 p. see also Habermas, *Between Naturalism and Religion: Philosophical Essays*.

<sup>206</sup> Cavanaugh, *Torture and Eucharist: Theology, Politics, and the Body of Christ*. 186.

<sup>207</sup> *Ibid.* 187 [emphasis included].

individual Catholics could appear inconsequential compared with the more important value of a clear political theory that found common ground with the modern state across a range of concerns located in a Catholic social justice tradition. As early as 1953, Pius XII had acknowledged that Catholicism, in the modern state and in international law, could not resolve all moral and social questions immediately.<sup>208</sup> The writing of Courtney Murray and Maritain provided Catholicism a way to negotiate the theoretical difficulties confronting the Church, emphasising a 'secular democratic faith', in the modern project of human rights, and to locate value of conscience and religious freedom in catholic doctrine. A challenge remains for Catholicism to defend an open and critical political liberalism as a basis for human rights and democracy that respects the duty to follow ones conscience to seek the truth within the modern state.<sup>209</sup>

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<sup>208</sup> Pope Pius XII, 'AAS 45 (1953),' (V)

Thus the two principles are clarified to which recourse must be had in concrete cases for the answer to the serious question concerning the attitude which the jurist, the statesman and the sovereign Catholic state is to adopt in consideration of the community of nations in regard to a formula of religious and moral toleration as described above. First: that which does not correspond to truth or to the norm of morality objectively has no right to exist, to be spread or to be activated. Secondly: failure to impede this with civil laws and coercive measures can nevertheless be justified in the interests of a higher and more general good.

<sup>209</sup> Ibid. III. Pius XII had set an example for a remarkable pluralism, and respect for inherent rights, within society and international law in the following paragraph:

The jurist, the statesman, the individual state, as well as the community of states should here take account of all the inborn inclinations of individuals and communities in their contracts and reciprocal relations; such as the tendency to adapt or to assimilate, often pushed even to an attempt to absorb; or contrariwise, the tendency to exclude and to destroy anything that appears incapable of assimilation; the tendency to expand, to embrace what is new, as on the contrary, the tendency to retreat and to segregate oneself; the tendency to give oneself entirely, forgetful of self, and its opposite, attachment to oneself, excluding any service of others; the lust for power, the yearning to keep others in subjection, and so on.

## Chapter 5: An Imperfect Project: Civil Society Catholicism In Europe and Latin America

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### 5.1 Introduction

Human rights would become instrumental in trying to resolve the tensions between religion and the modern state. The Irish Constitution exemplified how Catholic political thought would evolve as a civil society project. The use of rights based language within the Irish Constitution was part of the trend to both restrain a newly forming nation state while at the same time, to acknowledge the limits of religion in such a new political polity. During the Cold War the Christian democratic parties consolidated and expanded European cooperation, drawing human rights into the confrontation between East and Western Europe by emphasizing religious freedom. In Latin America, human rights became a distinctively different project, used against state authority and part of a programme of liberation and democratisation. In each of these various contexts Catholicism participated in presenting the value of participating in human rights project with varying degrees of success.

### 5.2 Irish Constitutionalism and Human Dignity

#### 5.2.1 Context of the Irish Constitution

The Irish state had in its earliest years to navigate between competing European totalitarian ideologies, and the national and sectarian politics of 1930's Ireland.<sup>1</sup> While comparatively, the 1937 Irish Constitution departed from the earlier 1922 Constitution's more social democratic direction, the latter 'had proved wholly ineffective as a means of protecting individual rights'.<sup>2</sup> The 1937 Constitution was 'a radical break from classical English Constitutional doctrine', and it has been suggested it was ahead of its time.<sup>3</sup> Hogan argues that the 1937 Constitution had

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<sup>1</sup> Dermot Keogh and Andrew J. Mccarthy, *The Making of the Irish Constitution 1937* (Dublin: Mercier Press, 2007). 14. See also Gerard Hogan, 'Devalera, the Constitution and the Historians', *The Irish Jurist*, 40/1 (2005), 293-320. See Moyn, *The Secret History of Constitutional Dignity*. 109. See also Chief Justice Hon Mrs Justice Susan Denham, 'Some Thoughts on the Constitution of Ireland at 75', in Ucd Constitutional Studies Group (ed.), *he Irish Constitution: Past, Present and Future* (Royal Irish Academy, Dawson Street, Dublin: UCD School of Law, 2012). 4-5.

<sup>2</sup> Hogan, 'Devalera, the Constitution and the Historians', (109).

<sup>3</sup> See Mr. Justice Keane, 'Fundamental Rights in Irish Law: A Note on the Historical Background', in B. Walsh and J. O'reilly (eds.), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Dublin: Round Hall Press, 1992). See, *A. v. Governor of Arbour Hill Prison* [2006] 4 IR 88 at 145-146:

Many of the principles set out in the Constitution of 1937 were ahead of their time. It was a prescient Constitution. Thus, the Constitution protected fundamental rights, fair procedures, and gave to the

for example, strengthened fundamental rights and had enhanced the system of judicial review.<sup>4</sup> The Irish Constitution reveals a number of paradoxical strands of political theory. There was a rejection of the anti-clericalist, Jacobin version of republicanism, in keeping with Wolf Tone's philosophy of an ecumenical stance towards religion.<sup>5</sup> The confessional nature of the Irish Constitution that had recognising the special position of Catholicism, was still unremarkable and restrained if compared with neighbouring countries of the era.<sup>6</sup> Indeed, in terms of fundamental rights, the Constitution also reveals egalitarian and rationalist theory evident in its construction.<sup>7</sup>

The 1937 Constitution was in keeping with the gradual shift in Catholic social thought of the time, and the general tenure found in the catholic *milieu* responding to the spectre of totalitarianism, and the failures of positive law to adequately enact legal foundations to bulwark against such a threat.<sup>8</sup> Hogan's inquiry pursues

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Superior Courts the role of guarding the Constitution to the extent of expressly enabling the courts to determine the validity of a law having regard to the provisions of the Constitution. Over the succeeding decades international instruments, such as the United Nations Charter and the Universal Declaration of Human Rights, proclaimed fundamental rights and fair procedures, and it became established that in a democratic state constitutional courts should have the power to protect fundamental rights, including due process, even to the extent of declaring legislation to be inconsistent with the Constitution and to be null and void.

<sup>4</sup> Hogan, 'Devalera, the Constitution and the Historians', (293-320). Hogan points to the presence of Article 40.3.2. e.g. guaranteeing the right to life, person and good name and property rights. See Moyn, *The Secret History of Constitutional Dignity*. 103. The 1922 document was 'very much in the spirit of the liberal "new constitutionalism"'.

<sup>5</sup> E. Daly and T. Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester: Manchester University Press). 215-215 [footnote omitted]. 'There has never been an appetite in Irish thought, whether on the part of civic republicans or otherwise, either to strictly exclude religion from public life or to create a categorical constitutional barrier between the state and organised religion'. See further Philip Pettit, 'The Tree of Liberty: Republicanism: American, French, and Irish', *Field Day Review*, 1 (29-42). 40). Pettit proposes,

[...] there is *one radically new theme* in the Irish version of republicanism, particularly in the version associated with Wolfe Tone. It consisted in a different, more attitude to religion than was to be found in America, France or Britain (40, emphasis added).

Unlike the anti-Catholic separatism that prevailed in America, and unlike the anti-religious secularism in France, Irish republican separatism of this period was not particularly hostile to Catholics, and its secularism was accepting of religion in general (41).

<sup>6</sup> Hogan, 'Devalera, the Constitution and the Historians', (293-320). Hogan writes, 'the only surprise was that the reference to Catholicism simply reflected the historical facts and that Mr de Valera did not go further'. Irish Constitution Art.44.1.2: The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens. This article, along with Article 44.1.3., was deleted following a referendum on 7<sup>th</sup> December, 1972, and signed into law on 5<sup>th</sup> January, 1973. Arguably, the "special position" had become irrelevant in Catholic political thought, post-Vatican II.

<sup>7</sup> *Ibid.* 293-320.

<sup>8</sup> Evans, 'Jacques Maritain', (180-194). Evans writes that by the early 1930's Maritain's Thomistic philosophy and appeal to fundamental rights was appreciated far beyond France. On the impact of totalitarianism on Catholic academics in Europe and America in 1930's and their turn to natural law and a rights based response see for example, Rommen, *The Natural Law. A Study in Legal and Social History and Philosophy*. See Fortin, 'On the Presumed Medieval Origin of Individual Rights', (55). Fortin relates the histories of natural law and natural rights, revealing their conflicting trajectories, observing the practical consequences created conflicting

the specifically Catholic nature of the fundamental rights in the Irish Constitution, yet more importantly they were not incompatible, which was something specifically new.<sup>9</sup> This indicated a unique point of accommodation between two divergent traditions, functioning competitively in other jurisdictions for dominance, and later in the Irish context across a range of referendum debates on social issues.<sup>10</sup> Catholic political thought had roundly condemned various human rights in the previous century but were now seeking if not fully finding, equilibrium.<sup>11</sup> However, when Hogan relates the presence of fundamental rights, such as the protection of the family (Article 41), and suggests ‘most continental constitutions contain similar provisions’, there requires further recognition that alongside expansive totalitarian regimes in Europe, these legal provision had been part of a wider cultural and religious response to the development of democratic thought.<sup>12</sup> It is possible that the Catholic social thought in the Irish Constitution had envisaged secular interpretations as well, even while Hogan reiterates his general objection to concerns about the presence of Catholic social thought in the Irish Constitution because ‘the case law has long since broken loose of that particular inspirational source’.<sup>13</sup> Secularism and rationalism at the turn of the 19<sup>th</sup> century was much more anti-clerical that it ever could be today, and the cost for a restrained Catholic

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interpretations. See also Zachary R. Calo, 'Catholic Social Thought and Human Rights', *American Journal of Economics and Sociology*, 74/1 (2015), 93-112. 95-97. Calo traces the engagement of Catholicism with the modern era through papal encyclicals, and points to its gradual re-evaluation of Church –State separation, especially through its encounter with US democracy. On US democracy see for example Pope Leo XIII, 'Ass 27 (1895)', (§1).

<sup>9</sup> Hogan, 'Devalera, the Constitution and the Historians', (293-320). Hogan notes that Art.40 is by far the most important: guaranteeing equality before the law; the protection of life, person, good name and property; personal liberty; habeas corpus and habeas corpus procedure; the inviolability of the dwelling and the rights to free speech, assembly and association.

<sup>10</sup> There are other readings of the Irish Constitution, particularly from a feminist perspective. Retrospectively the Constitution has been seen as a recanting of women’s expectations of a more liberal Constitution. Sarah-Anne Buckley observed '[g]endered legislation also cemented the inequality women experienced in education, pay, welfare, marital status, and domestic violence, as well as their continued lack of reproductive rights'. Sarah-Anne Buckley, 'The Catholic Cure for Poverty', *Jacobin magazine* (Jacobin. Reason in Revolt; Brooklyn, NY 11217: Jacobin, 2016). The integration of Catholic morality and national law led in consequence of sending thousands of woman and girls, particularly unmarried mothers into Magdalene laundries and mother and baby homes. See further Sarah-Anne Buckley, *The Cruelty Man: Child Welfare, the Nspcc and the State in Ireland, 1886–1956* (Manchester: Manchester University Press, 2013). Paul Garrett, 'Excavating the Past: Mother and Baby Homes in the Republic of Ireland: Table 1', *British Journal of Social Work*, (2015). Paul Garrett, 'a "Catastrophic, Inept, Self-Serving" Church? Re-Examining Three Reports on Child Abuse in the Republic of Ireland', *Journal of Progressive Human Services*, (2013).

<sup>11</sup> Many personal and social liberties had been condemned in the papal encyclicals of the 19<sup>th</sup> century. Pope Pius IX authoritatively wrote in 1864 it is 'an error to believe that the Roman Pontiff can or should reconcile himself to, and agree with, progress, liberalism and modern civilisations'. See Pope Pius IX, 'Encyclical Letter Quanta Cura', (§69. See Aubert, 'Religious Liberty from "Mirari Vos" to the "Syllabus"', (53).

<sup>12</sup> This point is addressed later in this chapter. See generally the overview in Moyn, 'Jacques Maritain, Christian New Order, and the Birth of Human Rights.', (3), and also in Moyn, *Christian Human Rights*.

<sup>13</sup> Hogan, 'Devalera, the Constitution and the Historians', (293-320).

social teaching was a concurrent moderation of those anti-clerical secular and rationalist philosophies.<sup>14</sup>

In Carolan's view the Irish Constitution has been consistent with a classical republican view, not alone with the desire to restrain the power of the state but also to grant positive effects that secure 'the related republican objectives of equality, autonomy, political participation and public virtue'.<sup>15</sup>

The [...] desire to avoid the dominance of a single institution or group can be seen in its recognition of the people as ultimate sovereign, in its explicit vesting of a power of judicial review in the courts, in the guarantee of judicial independence, in the pre-emptive safeguards provided by Arts 25 and 26, and in its conferral of substantive rights on individual citizens.<sup>16</sup>

The republican value of non-domination prevents exploitation by vested groups within the state to exercise unchecked power and instead strives to create equilibrium constitutionally. Yet it would appear that the Irish Constitution aspired to provide the state with a revision of republicanism, providing greater integration of religious political thought and participation than envisaged in a more radical (and anti-clerical) reading of that same republican tradition.<sup>17</sup> The idea that the Irish Constitution could achieve a moderate reading of multiple philosophical and religious traditions is indeed its enduring legacy.

## 5.2.2 Constitutional Dignity

The historian John Pollard recounts the gradual introduction of references to human dignity in Papal speeches and encyclicals.<sup>18</sup> For the Popes of the 1920's and

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<sup>14</sup> Ibid.293-320). In Hogan's view that the only Catholic voices in Ireland (and Europe presumably) were reactionary, to the exclusion of moderate others, proposing the 'Constitution would have proved a far more ephemeral document, fatally damaged (in the long term) through the influence of the confessional, reactionary and authoritarian thinking which was fashionable in certain influential circles in the Ireland of the 1930s'. This also assumes that the secular and rationalist elements in Ireland and elsewhere in the 1930's were the epitome of moderation.

<sup>15</sup> Eoin Carolan, 'Recovering the Republic? Democratic Mixed Government and the Theory of Mixed Government', *ibid.*48/2 (173-200. 179.)

<sup>16</sup> *Ibid.* 179.

<sup>17</sup> Eoin Daly, *Religion, Law and the Irish State : The Constitutional Framework in Context* (Dublin: Dublin : Clarus Press). 178-182. The risk of civic republicanism is it may become "comprehensive" and a "civic religion" that breaches the public/private divide. On the distinction between civic and ethical republicanism, see Habermas, *Between Naturalism and Religion: Philosophical Essays*. 271-275.

<sup>18</sup> Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 475. See also Moyn, *The Secret History of Constitutional Dignity*. 106. See further Moyn, *Christian Human Rights*. (Kindle Location 228). According to Moyn, 'Christian Human Rights begins with 1937'. On the earlier 19<sup>th</sup> century history of international human rights in customary law as a source of rights language available prior to the Universal Declaration of human rights, see Jeremy Sarkin, 'The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and Their Application since the Nineteenth Century', *Human Rights and International Legal Discourse*, 1/1 (2007).



1930's, namely Pius XI and Pius XII, this new concept of human dignity was 'a weapon against persecution by totalitarian and other regimes, and in condemnation of war crimes'.<sup>19</sup> Moyn further remarks on the fact that human dignity had become 'an incredibly common concept across the Atlantic during the latter phases of World War II [...]'.<sup>20</sup> Indeed, Moyn has gone on to propose, 'it was in March 1937 that human dignity made its spectacular entry into world politics— including, thanks to the Irish, into constitutional politics'.<sup>21</sup>

The Irish Constitution as Moyn points out happens to be one location where the concept of human dignity takes a foundational role.<sup>22</sup> In a seminal essay, Moyn traces 'this neglected but revealed fact'.<sup>23</sup> He rightly views this insertion of the concept of human dignity 'as part of the establishment of an alternative constitutionalism – the constitutionalism of Christian democracy'.<sup>24</sup> Indeed, we may go further to propose that this departure was part of the germination of democratic political thought in Catholicism that had also begun to embrace and articulate human rights ideas. Human dignity had become a foundational concept providing the basis upon which accommodation with the liberal rights tradition could be expressed by a later generation of Catholic democrats.<sup>25</sup> Moyn strongly phrases these indications of an emerging new political philosophy in Catholicism and shows the conventional narrative of the history of human rights and human dignity is 'by and large false'.<sup>26</sup> Moyn successfully pinpoints how the Irish Constitution was to the forefront of a new turn by Catholicism towards Christian democracy and human rights ideas.<sup>27</sup> This trajectory within Catholicism moved

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<sup>19</sup> Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 475.

<sup>20</sup> Moyn, *The Secret History of Constitutional Dignity*. A more updated version of this article is found in Moyn, *Christian Human Rights*.

<sup>21</sup> Moyn, *Christian Human Rights*. Kindle Locations 460-461.

<sup>22</sup> Moyn, *The Secret History of Constitutional Dignity*. 96.

<sup>23</sup> *Ibid.* 96.

<sup>24</sup> *Ibid.* 96 -97.

<sup>25</sup> See in particular Maritain, *Man and the State*. 106-107.

<sup>26</sup> Moyn, *The Secret History of Constitutional Dignity*. 97.

<sup>27</sup> See also *ibid.* 97-98. The construction of the Irish Constitution and its inclusion of human dignity could be interpreted as part of the project to renew of European democracy, and a reconstruction of French republican intellectual thought. The realisation of this project for European democracy and human dignity certainly came from an era of reaction to the polarised status of religion in France following the 1905 laws on secularisation. On the 1905 separation of Church and state in France, see Pope Pius X, 'Une Fois Encore (on the Separation of Church and State)', *Acta Sanctae Sedis*, XL (January 6th, 1907), 3-11. §8

[...] if there is a struggle on the question of religion in your beloved country, it is not because the Church was the first to unfurl the flag, *but because war was declared against her* [emphasis added].

As Moyn confirms,

[t]he central source of the conceptual work to make possible the Irish Constitution's assignment of "dignity" to the individual was in a raucous French dispute of the mid-1930's about the nature of Catholic politics, among those recovering from an earlier flirtation with far right politics [...]

forward with constitutions like the Irish Constitution, with Christian democratic ideas and human rights propositions, particularly human dignity, to create a different kind of catholic political thought.<sup>28</sup> That project would only later be fully and more comprehensively expressed in papal encyclicals such as *Pacem et Terris*, and the Second Vatican Council document *Dignitatis Humanae*.<sup>29</sup>

Moyn proposes that the shift in understanding of the future of Catholicism in the modern state pivoted between two diverging theories, a “corporatist” Catholicism and “civil society” Catholics.<sup>30</sup> The latter position was developed by Maritain as a democratic “civic or secular faith” in course of mid-20<sup>th</sup> century, a departure that still invokes academic debate today.<sup>31</sup> It would seem this gradual transformation of Catholic political theory had in part informed the creation of the Irish Constitution, rather than as a project of the full blooded republicanism associated with French political thought. Reconciling religion, republicanism and democracy was one of the more notable achievements of the Irish Constitution at the time, especially given the widely held view that French republicanism was the antithesis of Catholicism.<sup>32</sup> The existence of a dignitarian theory in the Irish Constitution underlines the shift from a historical anti-clerical republican tradition to one partly informed by the germination of a Catholic political movement towards Christian democracy, and that had embraced Wolf Tone’s philosophy of an ecumenical stance towards religion.<sup>33</sup>

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This is a point also observed in the previous chapters of this thesis. See also Fanning, 'George Tyrell, Jacques Maritain and the Challenge of Modernity', (291-299). Catholics had struggled against modernism and Protestant individualism at the turn of the 19<sup>th</sup> century, and the development of the philosophy of Personalism, and “dignity” became central to their response. See Bernard A. Gendreau, 'The Role of Jacques Maritain and Emmanuel Mounier in the Creation of French Personalism', (97-108). See generally Eric O. Hanson, *The Catholic Church in World Politics* (Princeton: Princeton University Press). 41-42.

<sup>28</sup> For example on the Mexican Constitution see Wright-Carozza, 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights', (304) and also Moyn, *Christian Human Rights*. Kindle Locations 469-470.

<sup>29</sup> Pope John XXIII, 'AAS 55', (§8), Second Vatican Ecumenical Council, 'Declaration "Dignitatis Humanae"', *ibid.* 58 (§ 1) 'A sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man [...]'.  
<sup>30</sup> Moyn, *The Secret History of Constitutional Dignity*. 98 [footnoted omitted]. This point on civil society Catholicism is drawn from Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', ( 565. Chappel observed,

The vision of political and civil society at its heart is deeply Catholic. Catholic political theory has, since at least the nineteenth century, argued for the decentering of sovereignty away from the nation state and towards a cluster of legitimate, non-political institutions: notably the family, the profession, and the Church.

On the Catholic theory of Corporatism see Pope Pius XI, 'Quadragesimo Anno AAS 23 (1931)', (§1).

<sup>31</sup> Maritain, *Man and the State*. 110. This point is developed in Chapter four.

<sup>32</sup> Maritain, *Integral Humanism; Temporal and Spiritual Problems of a New Christendom*. 201-202.

<sup>33</sup> See further Pettit, 'The Tree of Liberty: Republicanism: American, French, and Irish', ( 40). There is renewed interest in republicanism thought as a basis for the Irish Constitution. See Daly and Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law*. In contemporary Ireland 'the word republicanism, at

### 5.2.3. The Preamble to the Irish Constitution

Moyn proposes ‘de Valera saw the preamble as the place to achieve symbolic Christianisation of the document, while specific articles would offer a considerable incorporation (though not total lock) of Catholicism on Irish politics’.<sup>34</sup> Importantly Moyn states:

The constitutionalisation of the freedom and dignity of the individual, in short can be taken as a symbol of de Valera’s larger balancing act, in which he crafted a Christian democratic synthesis throughout the document. In an era of the victory of Catholic corporatism or outright fascism, Ireland proved a peripheral laboratory of civil society Catholicism or even post-Second World War Christian Democracy.<sup>35</sup>

Therefore, preamble to the Irish Constitution is noteworthy in that it opens with a Christian doxology (a devotional recognition of the Trinity), which is arguably significant because this establishes a form of Christian communitarian humanism, in contrast to other concurrent forms of Socialist communitarianism in the 1930’s.<sup>36</sup> This opening clause of the preamble sets limits to temporal sovereign authority by being submissive to the authority of a higher law. The doxology establishes an overarching principle for a pluralist idea of sovereignty (if it’s understood

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least, is increasingly understood in the “civic” rather than ethno-nationalist sense, and applied to themes such as citizenship, the separation of church and state, and the rule of law, which reverberate well beyond the historical quirks of the Irish tradition’ (4). They further propose Ireland was ‘where civil morality was divested to the religious domain, or more recently, identified with the demands of the market’ (50). They emphasize citizenship is a politicised identity, replacing non-political or pre-political identities, as outlined in the Irish Constitution (8-9). With the eclipse of natural law jurisprudence in Ireland they argue their ‘contemporary republican theory offer[s] a comprehensive and morally attractive framework for an analytical theory of constitutional law’ (60). See also Carolan, ‘Recovering the Republic? Democratic Mixed Government and the Theory of Mixed Government’, (173). More generally on Republican revisionism see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Kindle edn., Oxford Political Theory; Oxford: Oxford University Press). 4. Who sought to ‘show that this language of domination and freedom—this language of freedom as non-domination—connects with the long, republican tradition of thought that shaped many of the most important institutions and constitutions that we associate with democracy’.

<sup>34</sup> See Moyn, *The Secret History of Constitutional Dignity*. 103.

<sup>35</sup> See *ibid.* 103. Moyn also observed an interesting consequence of this ‘peripheral laboratory’ that occurred ‘when conservative democracy came to post-war Germany and elsewhere, dignity could now have a crucial role [...]’.

<sup>36</sup> This clause states:

*In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred [...]*

See *ibid.* 102-103. Moyn describes the papal encyclical as “epoch-making” because it offered human dignity ‘by far its highest profile entry in world politics to date (101). Distinguishing Christian and Socialist communitarianism, see Pope Pius XI, ‘Divini Redemptoris, AAS (1937)’, (§10:

Communism, moreover, strips man of his liberty, robs human personality of all its dignity [...].

§14. It subverts the social order, because it means the destruction of its foundations; because it ignores the true origin and purpose of the State; because it denies the rights, dignity and liberty of human personality.

traditionally the Trinity is three persons, one divine unity), rather than a monist theory of sovereignty. This is a position in keeping with an historical Catholic understanding of sovereign authority as dispersed and cosmopolitan.<sup>37</sup> It is also hard not to observe how this pluralist account of sovereignty contrasts with the monistic (and deistic) account of sovereignty in Rousseau and Hobbes.<sup>38</sup> The ensuing clauses of the preamble recognise the enduring legacy of Christianity in Irish history, and offer two parallel and counter-weighted accounts of the State's historical and ideological origins. The first one is republican and emancipatory with 'a doctrine of the self-determining nation', and looking to the revolutionary and anti-colonial struggles in Europe and elsewhere.<sup>39</sup> The second clause offers a Christian vision focused on human dignity and freedom, and given Ireland's colonial history, proposes these values "may be assured" as a consequence of the Constitution.<sup>40</sup> The cardinal virtues of prudence, justice and charity are included in the preamble guide as the temporal goals of the state towards the common good,

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<sup>37</sup> see Courtney Murray, 'The Church and Totalitarian Democracy', ( 552-553 and especially 555-557). Courtney-Murray offers a critique of the monist French republican state (*constitutio civitatum*), in contrast with the explicitly Christian dualist system of government (*civilis hominum societatis Christiana temperatio*). See also, Pettit, 'The Tree of Liberty: Republicanism: American, French, and Irish', ( 33). Pettit note that a mixed theory of government can be traced back to classical Roman republican values, when the dispersion of power was described by the Greek slave-historian Polybius as a mixed constitution [footnote omitted]. It was mixed in the sense that it contained elements of monarchy, aristocracy and democracy. That it could be compatible to Catholic political thought can be shown (as in previous chapters) in Aquinas on mixed forms of government, an idea that was appropriated by Maritain and his contemporaries. Historically, French republicanism favoured the authority of *le peuple souverain* – the sovereign, self-ruling people, as the pinnacle in the hierarchy of sovereign governing authority. See *ibid.* 35. On the monist theory of Bodin see further Tuck, *The Sleeping Sovereign. The Invention of Modern Democracy*.

<sup>38</sup> Early chapters have noted the shift in an understanding of sovereignty from the period of *Respublica christiana* to the monist theories of sovereignty in Rousseau and Hobbes. The Irish Constitution's preamble indicates a shift towards a post-monist or even a post-enlightenment tradition. Given recent trends in international theory against monist sovereignty the preamble was in many respects forward thinking. See also F. H. Hinsley, *Sovereignty* (2nd edn.; Cambridge: Cambridge University Press, 1986). 95-100 and 222- 235. The foundation of the United Nations 'constitutes a greater displacement of assumptions about relations between states than any that have ever taken place'. See generally on Deism, Taylor, *A Secular Age*. 311.

<sup>39</sup> This clause states:

*Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation [...],*

On the history role of the United Irishmen in the 1790's and the pursuit of liberty, and a doctrine of the self-determining nation' see Pettit, 'The Tree of Liberty: Republicanism: American, French, and Irish', (37)

<sup>40</sup> This clause states:

*And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations.*

See Irish Supreme Court, *McGee vs AG* (1973). The Court noted:

According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity.

See Pope Leo XIII, 'Encyclical Letter *Rerum Novarum*', (§1. See also Fortin, 'Sacred and Inviolable': *Rerum Novarum* and Natural Rights', (202) Fortin notes the transformation of Catholic social thought throughout the 19<sup>th</sup> century.

and promote a balance of practical ethics. The second clause also includes principles of subsidiarity, unity and right order; all this could be attributable to a developing tradition located in Catholic social thought in the late 19<sup>th</sup> century.<sup>41</sup> The preamble presents a principled accommodation between two post-enlightenment traditions, which can be identified as stemming from the Christian natural law tradition and the tradition of legal positivism.

#### 5.2.4 Two Methodologies

The Irish Constitution reveals the overlapping of two Catholic political theories, one stemming from a strictly Leonie model, and a second belonging to an emerging civil society Catholicism.<sup>42</sup> Catholic constitutional and democratic thought developed in response to its peripheral position in Europe, on the fringes of new ideological movements in Europe. This led to the creation of a new breed of constitutionalisation of religious ideals in an emerging nation state, with a strong anti-colonial history and memory.<sup>43</sup> While the thesis of a confessional and corporate state dominated this process, there was also as Moyn rightly notes, the integration of a new kind of constitutionalism responding to and restraining the emerging of a centralising state structure.<sup>44</sup> Moyn traces the particularity of the conceptualisation of human dignity as an archetypical response of Catholicism during its peripheral and ambiguous position in Europe, and in an era of state formation.<sup>45</sup> Catholic jurists had focused upon the resuscitation of Catholic fortunes through the constitutionalisation of its own natural law tradition by setting limits upon the exercise of sovereignty by the state, and maintaining an

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<sup>41</sup> Curiously, two other cardinal virtues are absent, namely fortitude and prudence. It might be speculated that those virtues are described in the preceding clauses, identifying the virtue of fortitude in the emancipatory clause, and the virtue of prudence identified in the clause on social order and the common good. On the virtues and Christian thought, see Macintyre, *After Virtue: A Study in Moral Theory*. and Jean Porter, *The Recovery of Virtue* (Louisville, Kentucky: Westminster/ John Knox Press).

<sup>42</sup> The Leonie model was described in the previous chapter and draws upon the writing of Pope Leo XII, see Pope Leo XIII, 'Ass 18 (1885)', (§ 13-14) 'There must, accordingly, exist between these two powers a certain orderly connection, which may be compared to the union of the soul and body in man'.

<sup>43</sup> See D. Keogh, *Ireland and the Vatican: The Politics and Diplomacy of Church-State Relations, 1922-1960* (Cork: Cork University Press, 1995). 140. Keogh remarks that de Valera was recognised as 'a democrat in Europe where many Catholic political leaders were fascist, authoritarian and dictatorial. There was wisdom enough at the Vatican in 1937 to accept that Ireland had realised the optimum in an imperfect world'. While the Constitution had not followed the confessional "thesis" it 'was an unusually firm statement upholding the values and aspirations of the Vatican'. It is noteworthy that while the Irish diplomat Walsh carried the Irish Constitution for approval to the Vatican, and in conversation with Eugenio Pacelli (latterly Pope Pius XII), there was a pragmatic engagement to agree on religious pluralism because of the religious denominational make up of Ireland, leading to papal silence on the issue.

<sup>44</sup> Moyn, *The Secret History of Constitutional Dignity*.

<sup>45</sup> Ibid. The previous chapter also sought to trace this sense of Catholicism's efforts to reassert itself in the political and legal agenda of European state formation. For an interesting account of this transformation of papal and Catholic fortunes from the viewpoint of an Irish Diplomat in the 1930's, see Daniel A. Binchy, 'The Papacy in a Changing World', *Studies: An Irish Quarterly Review*, 26/104 (1937), 641-47.

expansive civil sphere, where the Church might reign autonomously.<sup>46</sup> In that sense the recognition of the late 19<sup>th</sup> century Leoine thesis (that the church would be respected as sovereign in its own sphere), remained evident if not explicitly mentioned in the Irish Constitution's transformation.<sup>47</sup>

The ideal was that Church's natural law tradition might provide equilibrium to the state, in the new polity of parliamentary democracy, within an overarching framework of Constitutional law. Pre-political and unenumerated rights balanced positive law, which made sense to a tradition of *potestas indirecta*, as developed upon in 19<sup>th</sup> century by the Catholic Church.<sup>48</sup> The position of natural rights defined as 'antecedent and superior to all positive law' granted a privileged position to religion and the natural law tradition from undue interference by the

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<sup>46</sup> For example, in the Irish Constitution's natural law tradition as stemming from Catholicism makes statements on the family as possessing 'inalienable and imprescriptible rights, antecedent and superior to all positive law'.

The Family. Article 41 1 1°

The State recognises the Family as the natural primary and fundamental unit group of Society and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

See Emmet Larkin, 'Church, State, and Nation in Modern Ireland', *The American Historical Review*, 80/5 (1975), 1244-76. 1273. 'De Valera, in fact, went so far as to make that informal concordat of 1884 [with the catholic Bishops who offered support to legitimate nationalism] more explicit in the constitution he drew up for the Irish state and had ratified by the nation in 1937'.

<sup>47</sup> In comparison see Keogh, *Ireland and the Vatican: The Politics and Diplomacy of Church-State Relations, 1922-1960*. 226. Keogh notes that the Irish Constitution was offered by Irish diplomats to Italian politicians during the creation of the Italian Constitution (came into force on 1 January 1948), as part of an effort to 'forge close relations with Christian Democrats' [footnote omitted]. The final Italian Constitution was even 'more acceptable than the Holy See might have expected'. Therefore, it contains an explicit Leonie text in Article 7:

The State and the Catholic Church are *independent and sovereign, each within its own sphere*. Their relations are regulated by the Lateran pacts. Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments [emphasis added].

The Irish Constitution's relationship to the Catholic Church was carefully worded with the text of the Lateran Treaty in mind. see *ibid.* 188. See also Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*. 138. Müller observes, 'Maritain's philosophy proved particularly significant for a group of left-leaning Christian Democratic thinkers involved in the drafting of the Italian Constitution' [footnote omitted]. They had embraced Maritain's philosophical personalism as a core idea, and followed with an economic policy under the banner "First the person, and then the market". Müller points to Article 3 of the Italian Constitution:

It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding *the full development of the human person* and the effective participation of all workers in the political, economic and social organisation of the country [Italics added].

See generally, Carlo Masala, 'Born of Government: The Democrazia Cristiana in Italy', in Michael Gehler and Wolfram Kaiser (eds.), *Christian Democracy in Europe since 1945* (2; London: Routledge), 101-17.

<sup>48</sup> Unenumerated rights have been highlighted and debated in Irish Constitutional law. See Desmond M. Clarke, 'The Role of Natural Law in Irish Constitutional Law', *The Irish Jurist*, 15/2 (1982), 187-220. 3.

The natural law tradition which appears to be most relevant to Irish jurisprudence is itself a hybrid scholastic theory, partly derived from Aquinas and partly inherited from later scholastics through the intermediary of early twentieth-century Roman Catholic theology.

See also interestingly written in the context of Jacques Maritain's thought, Bradley V. Lewis, 'Liberal Democracy, Natural Law, and Jurisprudence: Thomistic Notes on an Irish Debate', in Timothy Fuller and John P. Hittinger (eds.), *Reassessing the Liberal State. Reading Maritain's Man and State* (Washington: Catholic University Press, 2001), 140-58.

state.<sup>49</sup> However, contemporaneously jurisprudence from the Irish Supreme Court has thrown these pre-political and unenumerated rights into serious question.<sup>50</sup> As a consequence of the absence of a clear understanding of the natural law, there is also a concern about excessive judicial activism in interpreting the Constitution.<sup>51</sup> Human rights could offer a new form of legal supremacy to national Constitutional law, particularly as it strives to protect fundamental rights.<sup>52</sup> Existing ideas about 'Supra-Constitutional' limits through international law may provide a restraining mechanism, in particular through international human rights and peremptory norms of international law.<sup>53</sup> However, this would seem to reaffirm the ongoing relevance of natural law, given international human rights law had also accommodated that natural law tradition in its own genesis.

More recently, and in response to the problem of the relevance of the natural law to the Irish Constitution, the Irish legal scholar David Kenny made a thought-provoking observation regarding the protection of the rights of the person in the Irish Constitution.<sup>54</sup> Kenny proposes there is a potential for a turn from natural law to the right of the person, and human dignity, in Constitutional interpretation to substantiate stronger personal claims in the absence of clarity about the role of the natural law. The role of the natural law had been overturned but 'never formally rejected, instead gradually falling into disuse after the Supreme Court held that the natural law, though acknowledged as superior to positive law by the Constitution,

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<sup>49</sup> Moyn, *The Secret History of Constitutional Dignity*. 99.

<sup>50</sup> See *Ryan v Attorney General* [1965] IR 294. The Court accepted 'there are many personal rights of the citizen which follow from *the Christian and democratic nature of the State* which are not mentioned in Article 40'. However, see also Irish Supreme Court Judgment of Walsh J., *McGee vs AG* (1973), where difficulties arise in interpreting the natural law tradition:

In a pluralist society such as ours, the Courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law.

<sup>51</sup> See Rory O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms' (1999) 4 JCL 48, 61-66; Aisling O'Sullivan and Phil C. W. Chan, 'Judicial Review in Ireland and the Relationship Between The Irish Constitution and Natural Law' (2006) 15 Nottingham LJ 18, 32; Aileen Kavanagh, 'Unconstitutional Constitutional Amendments from Irish Free State to Irish Republic' in Eoin Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional 2012) 331.

<sup>52</sup> See Yaniv Roznai, 'The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments', *International and Comparative Law Quarterly*, 62 (557-97. 566-569. Roznai reviews the current debate about the relevance of the natural law to the Irish Constitution.

<sup>53</sup> *Ibid.* (574-580). This is especially evident in the area of fundamental rights that is presented to offer the possibility of a new form of legal supremacy to national Constitutional law.

<sup>54</sup> David Kenny, 'Recent Developments in the Rights of the Person in Article 40.3: Fleming V Ireland and the Spectre of Unenumerated Rights', *Dublin University Law Journal*, 36 (322). Article 40.3.2:

The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

could not be interpreted and applied by judges'.<sup>55</sup> The existing Constitutional clause to vindicate the rights of the person does appear to echo the genre of natural law legal thought present during the interwar years (i.e. Maritain's philosophical Personalism). This observation reflects the Irish Constitution as a hybrid legal project that sought accommodation between various legal traditions. In future Kenny suggests, this right of the person is 'a provision that should be at the heart of constitutional discourse'.<sup>56</sup>

The Irish Constitution is an example of where two Catholic political theories overlap and intersect. One is the Leonie model of Church and state, as body and soul, one corpus, with a comprehensive vision of the state. That model was closely tracked by a second emerging political theory belonging to civil society Catholicism concerned with liberties and rights, democracy, secularism and pluralism, which the Irish Constitution also embraced.

### 5.3 Christian Democrats and a Secular Democratic Faith

Post-war Catholicism began to shape European political developments and fulfil the role of an organic community where international life had become fractured and disorganised. Pulzer qualifies the idea that cross-frontier collaboration in Europe was a monopoly of Christian democrats, and includes numerous European social democrats, liberals and traditional conservatives.<sup>57</sup> However, in the early stages of European integration their priorities lay in concerns that were focused elsewhere, on the domestic protection of the sovereign nation state, over which liberals prioritised self-determination, and traditional conservatives had prioritised patriotism.<sup>58</sup> Whereas Social Democrats 'had flow under the flag of the unity of the proletarians of all the lands', their internationalism was 'universal internationalism, not restricted to Europe [...]'.<sup>59</sup> Their emphasis on post-1945 welfare programmes and a range of social entitlements and rights, 'gave the nation state a new

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<sup>55</sup> Ibid. 330. As cited, see, Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995 1 IR 1, 38-41.

<sup>56</sup> Ibid. 341. See also 323 on Moyn, *The Secret History of Constitutional Dignity*. And Pope Pius XI, 'Divini Redemptoris, AAS (1937)', (§ 33), '[...] Catholic doctrine vindicates to the State the dignity and authority of a vigilant and provident defender of those divine and human rights on which the Sacred Scriptures and the Fathers of the Church insist so often', [...] §51 'it is impossible to care for the social organism and the good of society as a unit unless each single part and each individual member - that is to say, each individual man in the dignity of his human personality - is supplied with all that is necessary for the exercise of his social functions'.

<sup>57</sup> Peter Pulzer, 'Nationalism and Internationalism in European Christian Democracy', in Michael Gehler and Wolfram Kaiser (eds.), *Christian Democracy in Europe since 1945* (2; London: Routledge), 10-24. 21-22.

<sup>58</sup> Moyn, *The Last Utopia: Human Rights in History*. 76-77. Moyn notes the 'surprising fact that there was no socialist renaissance of discourse about rights – especially the new international rights-in the post-war moment' [footnote omitted].

<sup>59</sup> Pulzer, 'Nationalism and Internationalism in European Christian Democracy'. 22.



legitimacy'.<sup>60</sup> These differing priorities gave Christian democrats 'a competitive advantage in advancing the project of European integration [...]'.<sup>61</sup> Therefore, those two concerns, against nationalism and the centralising power of the sovereign nation state, coupled with the threat of Communism, gave Christian democrats an uncomplicated ideological counter-argument to any resistance against their larger project of European advancement and unity.<sup>62</sup>

Pelinka reveals that post-war Christian democratic parties had a "bourgeois" image but their contribution also led to a reduction of class conflict by uniting the middle classes across Europe, which is 'mainly to be seen in their complete support of corporatist structures of social partnership', often in a populist way by co-operating with Social Democratic parties across Europe.<sup>63</sup> Christian Democratic parties 'became the most important "bourgeois" carriers of social partnership and consociational democracy [...]'.<sup>64</sup> As well, Gehler discerns Christian democratic parties were highly coordinated in the late 1950's, attending "Geneva Meetings", to hold confidential talks about the future of European relations, and respond collaboratively to the Marshall Plan.<sup>65</sup> This Circle of Christian democratic parties worked informally alongside the more formalised the *Nouvelles Equipes Internationales*, which represented Christian democratic parties across Europe at the time.<sup>66</sup> Their discussions focused on the political organisation of Western Europe, concern for the future of Germany, and Franco-German rapprochement, and also included was European defence, and the co-ordination of Christian democratic parties' political platform.<sup>67</sup> However, its most successful element was 'in raising the spectre of the communist peril and the Soviet threat to Europe'.<sup>68</sup>

Underlining that sense of purpose was the idea of a natural bond and a common vision among the peoples of Europe, and this became implicit in the bureaucratic and monetary union that Europe gradually established. *Europa* may have been the name given by the Greeks to a vast continent, yet the ordering of the post-War Europe was founded on more than the realisation of a political or economic

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<sup>60</sup> Ibid. 22.

<sup>61</sup> Ibid. 22.

<sup>62</sup> Ibid. 22. Pulzer also suggests to many detractors (among the anti-clerical Left and militant protestants) those founding figures appeared to represent a resurgent Counter-Reformation politics.

<sup>63</sup> Anton Pelinka, 'European Christian Democracy in Comparison', *ibid.*, 193-206. 203.

<sup>64</sup> Ibid. 203. Pelinka points to the Catholic nature of these parties, stemming from predominantly Catholic countries. They were 'also a phenomena of the Catholic protest against real or supposed protestant supremacy' in European politics (204). Established as conservative counterweight to the Left, they gradually moved to the centre in European politics.

<sup>65</sup> Michael Gehler, 'The Geneva Circle of West European Christian Democrats', *ibid.*, 207-20. 207.

<sup>66</sup> Ibid. 207.

<sup>67</sup> Ibid. 211-214.

<sup>68</sup> Ibid. 216.

utopia.<sup>69</sup> These developments also included maturing, though hesitant ecumenical relations among the various Christian and religious denominations, that in turn motivated the European project of political and economic unity.<sup>70</sup> The symbolic message of the concept of “diversity within unity” began to be repeated in Europe by Christians to re-emphasise a more complete vision of the ‘spiritual composition of Europe’.<sup>71</sup> In 1953, ecumenical relations among Protestant churches matured with the development of an advisory body for their churches, leading to the Committee on the Christian Responsibility for European Cooperation.<sup>72</sup> Looking to the future of European Protestant churches they proposed two official statements, with two main responsibilities, ‘to preserve and expand the religious liberties which belong to our European spiritual heritage’, therefore envisaging working together with the Catholic Church.<sup>73</sup> However, they were also ‘to affirm the need for diversity within unity as a fundamental characteristic of the European community’, and suggested that they ‘oppose any attempts to restore the medieval pattern of a Christendom in which one particular church has a place of exclusive privilege and power’.<sup>74</sup>

While, at least in part, these statements from Protestant confessions suggested a need to work with the Catholic Church, it was coupled with recognition that Catholicism’s influence on major contributors to the European Community gave rise to concerns about the homogeneous nature of the European project.<sup>75</sup> Recent historical accounts about the influence of Catholic political thought have confirmed those concerns. They have also stressed a contribution to not alone the advancement of Christian democracy but the formation of the European project, which included influence on the creation of a political and an economic union.<sup>76</sup>

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<sup>69</sup> Joseph Cardinal Ratzinger, *A Turning Point for Europe? : The Church in the Modern World : Assessment and Forecast* (San Francisco: Ignatius Press) 177 p. See also Chelini-Pont, ‘Papal Thought on Europe and the European Union in the Twentieth Century’, (131-146).

<sup>70</sup> Dianne Kirby, ‘Christian Co-Operation and the Ecumenical Ideal in the 1930s and 1940s’, *European Review of History: Revue europeenne d’histoire*, 8/1 (37-60). See also Nurser, ‘The “Ecumenical Movement” Churches, “Global Order,” and Human Rights: 1938-1948’, (841-881). See also Lucian N. Leustean, ‘The Ecumenical Movement and the Schuman Plan, 1950–54’, *Journal of Church and State*, 53/3 (September 1, 2011), 442-71. Leustean details the history of the mainly protestant ecumenical movement of the interwar period and the newly created World Council of Churches, revealing their mobilisation in response to European integration.

<sup>71</sup> Leustean, ‘The Ecumenical Movement and the Schuman Plan, 1950–54’, (466).

<sup>72</sup> See Moyn, *Christian Human Rights*. Kindle Locations 252-254. Moyn observes,

The summer of 1937 was also when the epoch-making Oxford Conference took place, the major event in the crystallization of transatlantic Protestant “ecumenism,” which laid the foundation for the World Council of Churches after World War II. It was thanks to this event that the rhetoric of “the human person” as a moral alternative to power politics— and likewise defined against the totalitarian specter— was matched in some transatlantic Protestant thinking.

<sup>73</sup> Leustean, ‘The Ecumenical Movement and the Schuman Plan, 1950–54’, (465).

<sup>74</sup> *Ibid.* 465.

<sup>75</sup> *Ibid.* 466.

<sup>76</sup> Kalyvas, *The Rise of Christian Democracy in Europe*. And Greenberg, ‘The Origins of Christian Democracy: Politics and Confession in Modern Germany’, (328). See also Dianne Kirby, ‘Anglo-American Relations and the

Leustean details the efforts by Catholics in post-war Europe to become 'more publicly involved in the process of European reconstruction'.<sup>77</sup> By the early 1950's a Secretariat for the Catholic Church had been established in Strasbourg, the seat of the Council of Europe and following European reconstruction, was 'the first Catholic body to engage in dialogue with European institutions in Strasbourg and later Brussels'.<sup>78</sup> Leustean observes that in the beginning 'both Catholic and Protestant church failed to assign a spiritual significance to the Schuman declaration'.<sup>79</sup> Focus had been on the development of the Council of Europe and the United Nations, and therefore it received scant recognition.<sup>80</sup> Nevertheless, officially there was support for European federalism but initially the Catholic Church offered limited comment on the political reorganisation of Europe, following the Schuman Declaration in 1950.<sup>81</sup> Problematically, Christian Churches, including the Catholic Church, had become 'entangled in Cold War divisions rather than developing a systematic dialogue with European institutions', leaving engagement to local Catholic communities and Catholic individuals to the task.<sup>82</sup>

In Europe, the United States diplomat John Foster Dulles had helped further the idea that human rights project was 'a Christian concept'.<sup>83</sup> Dulles embarked on a

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Religious Cold War', *Journal of Transatlantic Studies*, 10/2 (167-81. and also Giuliana Chamedes, 'The Catholic Origins of Economic Development after World War II', *French Politics, Culture & Society*, 33/2 (55. For further background see Neil Ormerod, Paul Oslington, and Robin Koning, 'The Development of Catholic Social Teaching on Economics: Bernard Lonergan and Benedict XVI', *Theological Studies*, 73/2 (391-421. And Paul Misner, 'Catholic Labor and Catholic Action: The Italian Context of Quadragesimo Anno', *The Catholic Historical Review*, 90/4 (650-74. Himes and Cahill, *Modern Catholic Social Teaching : Commentaries and Interpretations*.

<sup>77</sup> Leustean, 'Roman Catholicism, Diplomacy, and the European Communities, 1958-1964', (53). See more generally Karsten Lehmann, *Religious NGO's in International Relations. The Construction of 'the Religious' and 'the Secular'*, ed. Jeffrey Haynes (Routledge Studies in Religion and Politics; Oxon, Oxford: Routledge). Lehmann seeks to address the debate about the "resurgence of religion" that 'seems to take place without religions', and reinsert religion as a valid question by understanding the shift from "church diplomacy" to "civil society activism". He also assesses transnational religious actors, challenging assumptions of homogeneity, observing plurality similarly common in secular actors, 'with various concerns that go beyond a narrow focus in religious fundamentalism and anti-modernism' (6). In particular, Lehmann focuses on human rights discourse within Religious NGO's development, and proposes their contribution to the construction of human rights at the UN 'must not be underestimated' (67).

<sup>78</sup> Leustean, 'Roman Catholicism, Diplomacy, and the European Communities, 1958-1964', (54-55). The body was known as the Catholic Office on Information and European Issues (*Office Catholique d'Information sur les Problèmes Européens* or OCIPE).

<sup>79</sup> Leustean, 'The Ecumenical Movement and the Schuman Plan, 1950-54', (446)

<sup>80</sup> Ibid.446)

<sup>81</sup> Leustean, 'Roman Catholicism, Diplomacy, and the European Communities, 1958-1964', ( 55. Leustean details some papal statements during the period. See also Pelinka, 'European Christian Democracy in Comparison'.

<sup>82</sup> Leustean, 'Roman Catholicism, Diplomacy, and the European Communities, 1958-1964', (56). On the development of dialogue with EU institutions see chapter Three.

<sup>83</sup> Moyn, *The Last Utopia: Human Rights in History*. 75. See also Moyn, *Christian Human Rights*. Kindle Locations 1638-1639. 'Dulles and his colleagues hoped to push Americans toward a peace based on godly morality, rather than power considerations alone, while also rejecting the pacifistic temptations of their religious brethren' [...]. It is worth noting that the son of John Foster Dulles was Avery Dulles, who converted

‘successful wartime campaign for a moralistic but non-pacifistic interpretation of Protestantism [that showed] human rights were now called to be the last best defence against the communist threat’.<sup>84</sup> During the Cold War, the US had deployed human rights rhetorically in its foreign policy, yet Dulles ‘would not distract from his role in cementing the Christian interpretation of the language before then, especially abroad’.<sup>85</sup> The European Christian embrace of human rights lay uncontested in an environment where Christian democracy was the ascendant political project, influencing ‘notably the political and cultural origins’ of the European Convention of Human Rights in 1950’.<sup>86</sup> However, as Moyn points out, the ‘conservative, Cold War origins of the convention were forgotten’.<sup>87</sup>

High level discussions between the Holy See and the Council of Europe and other European institutions, led to the opening of the opening of OCIPE offices in Brussels in 1963. This led to further inter-confessional and inter-religious contact with other representatives there, particularly after the Second Vatican Council.<sup>88</sup> Following a hiatus from 1964 due to French reticence, the Holy See was accredited with diplomatic relations to the EEC in 1970.<sup>89</sup> As Leustean observes, the Catholic Church had preferred diplomatic relations with states, yet this movement beginning in the 1950’s lead to a different emphasis on developing relations with transnational and supranational institutions.<sup>90</sup> Notably, French resistance due to

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to Catholicism and became a Jesuit priest and highly influential Cardinal in the US Catholic Church. He was a contemporary of John Courtney Murray and also served with him on the faculty of the Jesuit run Woodstock College from 1960 to 1974. Avery Dulles was a significant voice promoting human rights within the Catholic Church. See for instance, Avery Dulles, ‘Papal Teaching and the United Nations’, *America*, (Dec 5, 1998).

<sup>84</sup> Moyn, *The Last Utopia: Human Rights in History*. 75.

<sup>85</sup> *Ibid.* 76.

<sup>86</sup> *Ibid.* 76-80. On the history and the drafting of the European Convention of Human Rights, see Duranti, ‘The Holocaust, the Legacy of 1789 and the Birth of International Human Rights Law: Revisiting the Foundation Myth’, ( 174).

Duranti details the history of Alexandre Marc, who had belonged to an anti-Jacobin and illiberal right-wing Catholic society, who in the post-war atmosphere ‘recasting his personalist thought in the new language of international human rights norms’ (176). Marc’s approach to the development of the European Convention had followed the corporatist tradition, located in Catholic social thought. Duranti convincingly proposes it was this strand of thought, and more broadly associated with a move to Christian democracy, rather than remembrance of the Holocaust, that contributed to the establishment of the European Convention. During the drafting of the European Convention for the Council of Europe in 1948 it was hoped it would lead to ‘a declaration of the positive criteria of democracy’, which would include ‘the rights of man and communities, the separation of powers, respect for minorities, the right of opposition, the margin of self-determination of geographic or professional groups, intermediary communities in the framework of collective discipline’ (179) [footnote omitted]. Moyn, ‘From Communist to Muslim: European Human Rights, the Cold War, and Religious Liberty’, (63-86).

<sup>87</sup> Moyn, *The Last Utopia: Human Rights in History*. 80.

<sup>88</sup> Leustean, ‘Roman Catholicism, Diplomacy, and the European Communities, 1958-1964’, (60-68, and 73).

<sup>89</sup> *Ibid.* 70.

<sup>90</sup> *Ibid.* 75. The Catholic Church benefited from the Lisbon Treaty (signed by the EU member states on 13 December 2007, and entered into force on 1 December 2009) when ‘open, transparent and regular dialogue’ with religion was formally established, see Kenneth Houston, ‘Religion and European Integration: Predominant

the secular (*laïcité*) nature of the French state, ironically indicated that '[r]eligion also mattered' and not alone for political integration among member states.<sup>91</sup>

Certainly history can offer lessons to judge how well Catholic political thought had performed in response to contemporary problems. Prior to World War II the papal diplomat Pacelli (later Pope Pius XII) met with President Franklin Roosevelt in an effort to negotiate international peace.<sup>92</sup> While that strand of diplomacy was ineffectual, the relationship between the Church and American foreign policy found many new frontiers for collaboration and agreement.<sup>93</sup> Yet there were other more nebulous theatres of influence than Europe, for American foreign policy. The overlap between American foreign policy and their transatlantic agenda, linked to that of the Catholic Church has been observed in Eastern Europe, and also in Latin America.<sup>94</sup> As early as 1947 the Truman Administration had developed strong ties with Pius XII, adding 'a spiritual dimension to the political, military and economic strategies already expressed in the Truman doctrine and Marshall Plan [...].'<sup>95</sup> The Truman doctrine had been carefully constructed to 'inflame the natural missionary piety of Americans', and ease America's 'transition to global engagement, interventionism and world leadership'.<sup>96</sup> Catholic and Protestant churches, had been seen as a means of combating the spread of communism in Britain as well as the US.<sup>97</sup> However, Kirby observes British Protestants were 'suspicious about the place accorded Pius XII in the western alliance', a feeling echoed among the

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Themes and Emerging Research Priorities', *Religion Compass*, 5/8 (2011), 462-76. Martin Steven, 'Religious Lobbies in the European Union: From Dominant Church to Faith-Based Organisation?', *Religion, State and Society*, 37/1-2 (181-91). See also Ferrari, 'Religions, Secularity and Democracy in Europe: For a New Kelsenian Pact'. and also Ronan Mccrea, 'Religion and the Public Order of the European Union', *Oxford studies in European law* (Oxford: Oxford University Press, ), 1 online resource.).

<sup>91</sup> Leustean, 'Roman Catholicism, Diplomacy, and the European Communities, 1958-1964', (75).

<sup>92</sup> Hanson, *The Catholic Church in World Politics*. 44.

<sup>93</sup> Kirby, 'Anglo-American Relations and the Religious Cold War', (167-181. See also Chamedes, 'The Vatican and the Making of the Atlantic Order, 1920-1960', (1. On Pacelli's interwar diplomacy see Giuliana Chamedes, 'The Vatican and the Reshaping of the European International Order after the First World War ', *The Historical Journal*, 56/4 (2013b), 955 - 76. See further Leustean, 'Roman Catholicism, Diplomacy, and the European Communities, 1958-1964', (53-77).

<sup>94</sup> Kirby, 'Anglo-American Relations and the Religious Cold War', (167), and Chamedes, 'The Vatican and the Making of the Atlantic Order, 1920-1960', (289) See also George J. Gill, 'The Truman Administration and Vatican Relations', *The Catholic historical review*, 73/3 (1987), 408-23.

<sup>95</sup> Kirby, 'Anglo-American Relations and the Religious Cold War', (167) [footnote omitted]. See also Chamedes, 'The Vatican and the Making of the Atlantic Order, 1920-1960', (290). Chamedes observes, 'the American President noted that the United States also had at its disposal a "secret weapon" which was even more powerful than military might'.

<sup>96</sup> Kirby, 'Anglo-American Relations and the Religious Cold War', (171 [footnote omitted]. Kirby notes the relationship between the Truman administration and Pius XII was publicly acknowledged when Truman 'flaunted his alliance with Pius XII on the world stage in August 1947 via a heavily publicised letter exchange'.

<sup>97</sup> *Ibid.* 170. For instance Kirby notes 'the Hungarian Catholic Resistance Movement was set-up by the British Intelligence Service in 1947'.

membership of the World Council of Churches.<sup>98</sup> Some ‘regarded the Vatican as more totalitarian than the Kremlin and considered England in more danger from Roman Catholicism than communism’.<sup>99</sup> The closure of the American diplomatic mission to the Holy See in 1950, in response to home-grown sectarian protests, embarrassed but did not end the US-Vatican alliance against communism.<sup>100</sup> Indisputably their agenda dove-tailed over the ensuing decades, and was rewarded with the opening of an embassy and formal relations in 1984, at the height of Cold War contestations.<sup>101</sup>

The spread of Communism had preoccupied the diplomatic activities of the Holy See under Pope Pius XII, particularly as a result of the ‘increasing religious persecution in Eastern Europe’.<sup>102</sup> The Holy See had opposed the post-War Yalta agreement, which divided much of Europe along new boundaries and trapped Catholic communities within Soviet controlled nations.<sup>103</sup> In Eastern Europe the Catholic Church was seen as an integral part of the “old regime”, and therefore it was singled out for particularly harsh repression.<sup>104</sup> Concordats between the Holy

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<sup>98</sup> Ibid. 175.

<sup>99</sup> Ibid. 176.

<sup>100</sup> Ibid. 177. See also Gill, 'The Truman Administration and Vatican Relations', (423).

<sup>101</sup> An embassy was opened in 1984 by President Ronald Reagan, see Andrew M. Essig and Jennifer L. Moore, 'Us-Holy See Diplomacy: The Establishment of Formal Relations, 1984', *The Catholic Historical Review*, 95/4 (2009), 741-64.

<sup>102</sup> Leustean, 'Roman Catholicism, Diplomacy, and the European Communities, 1958-1964', (55). See importantly Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 364-414. The papacy was involved in humanitarian relief from the end of the war, see for example Pope Pius XII, 'Quemadmodum (Pleading for the Care of the World's Destitute Children)', *Acta Apostolicae Sedis*, 38 (1946a).

Interestingly Piotr H. Kosicki, 'Masters in Their Own Home or Defenders of the Human Person? Wojciech Korfanty, Anti-Semitism, and Polish Christian Democracy's Illiberal Rights-Talk', *Modern Intellectual History*, (2015), 1-32. Kosicki details the reception of Christian democracy in Poland prior to World War II, and the philosophy that was shaped by Jacques Maritain's thought, following Maritain's visit to Poland in 1934. He suggests it was also shaped by anti-Semitic nationalism, which 'openly declared that the achievement of a political order consistent with Catholic social teaching necessitated the purging of confessional and national minorities'. Kosicki further suggests 'this rights-talk was fundamentally exclusionary, and anti-Semitic in particular' (12), and 'after the conclusion of World War II, the notion of "rights of the human person" slowly disappeared from Polish Christian Democratic discourse' (24). Kosicki concludes, '[i]n the 1940s and 1950s, Polish Christian Democrats fell entirely out of the orbit of Catholic rights-talk, promoting instead a concept of "democracy" pegged entirely to national freedom with no attention to the human person (31). Only following the Second Vatican Council did Polish intellectuals, rather than Christian democrats, turn 'to rights-talk in parallel with the universal Catholic Church's embrace of dialogue, ecumenism, freedom of conscience, and Judaism' (32).

<sup>103</sup> Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 366 and 398. Interestingly, an Encyclical Letter looked to the father of Western Monasticism Saint Benedict, as a patron and founder of the European ideal for the renewal of Europe, and it was viewed as given out of concern over the division of Europe. See Pope Pius XII, 'Fulgens Radiatur (on Saint Benedict)', *Acta Apostolicae Sedis*, 39 (1946b). §25 '[...] even our age troubled and anxious for the vast material and moral ruins, perils and losses that have been heaped up, can borrow from him the needed remedies'. See generally, Sutton, 'Political Realism and Roman Catholic Faith in the Construction of Europe: Konrad Adenauer, Robert Schuman and Charles De Gaul'. 35.

<sup>104</sup> Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 367. Pollard points out that repression began with the nationalisation of schools and abolition of religious instruction, especially for the under-18 year olds.

See and numerous Communist governments in Eastern Europe were unilaterally abrogated or made null and void.<sup>105</sup> As the Iron Curtain closed, the most notable show trial of Archbishop Stepinac in Yugoslavia in 1945-46, later made a Cardinal by Pope Pius XII, galvanised Catholic resistance to Communism.<sup>106</sup> In Western Europe papal Cold War diplomacy saw the European integration movement become 'a major bulwark of Christian Europe against Communism'.<sup>107</sup> There was a shift in momentum by the Holy See as it began to encourage European integration and the creation of the Council of Europe, which the Holy See attended.<sup>108</sup>

Human rights had been part of the rhetoric of the Cold War, and yet it did offer practical opportunities to leverage concessions to religious communities in Eastern Europe. Mazower observes a shift in priorities during the Cold War, especially by the United States, from a position of indifference to human rights, to recognition of their value, as 'dictators started seeming more of a liability, and human rights acquired a new significance'.<sup>109</sup> Similarly, Hoffman proposes that human rights gradually became the language of international politics, while the United States emerged as the central power of influence during the Cold War, and its reach extended beyond the emerging frontier in Eastern Europe.<sup>110</sup> The appropriation of human rights by Western governments was also joined by dissidents and churches in Eastern Europe. Moyn proposes human rights had become the language of dissidents in Eastern Europe, as a minimalist vocabulary.<sup>111</sup> In that context, the

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<sup>105</sup> Ibid. 368-369. Dubious reasons included the Holy See's continued diplomatic relations with Eastern European governments-in-exile. For an account of the inter-war use of Concordats as an instrument to blunt the spread of Communism in Eastern European countries, see Chamedes, 'The Catholic Origins of Economic Development after World War II', (1970-971). Chamedes details how this activity assisted the Catholic Church 'to move from the margins to the centre of European affairs' but curiously, Chamedes describes the church's anti-communism as a form of "anti-secular" internationalism.

<sup>106</sup> Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 369-370.

<sup>107</sup> Ibid. 399.

<sup>108</sup> Ibid. 399.

<sup>109</sup> Mazower, *Governing the World: The History of an Idea* 319. See also Bourke, *Decolonisation and the Evolution of International Human Rights*. 8. Mazower points to events in Europe including the signing of the Helsinki Final Act (1975), which included human rights pledges.

<sup>110</sup> Stefan-Ludwig Hoffmann, 'Genealogies of Human Rights', in Stefan-Ludwig Hoffmann (ed.), *Human Rights in the Twentieth Century* (Cambridge: Cambridge University Press). 21. See also Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press). 'Before the mid-1970s the promotion of democracy had not always been a high priority of American foreign policy. It could again subside in importance'.

<sup>111</sup> Moyn, *The Last Utopia: Human Rights in History*. 135-137. Dissidents included the Charter 77 group, among others who grew in strength following the Helsinki Final Act. See also Celia Donert, 'Charter 77 and the Roma. Human Rights and Dissent in Socialist Czechoslovakia', in Stefan-Ludwig Hoffmann (ed.), *Human Rights in the Twentieth Century* (New York: Cambridge University Press, 2011), 191-214. Activism on behalf of human rights by newly created Non-Governmental Organisations during the Cold War was one of the catalysis's for human rights rise in prominence internationally. On the development of Human Rights Watch, see further Mazower, *Governing the World: The History of an Idea* 322-331. See also Peter Slezkine, 'From Helsinki to Human Rights Watch: How an American Cold War Monitoring Group Became an International Human Rights Institution', *Humanity*, 5/3 (345-70). See also Hoffmann, 'Genealogies of Human Rights'. 19-25. Hoffmann notes the 'appeal

Helsinki Final Act became a significant opportunity to emphasise human rights, and religious freedom, in Eastern Europe.<sup>112</sup> The Helsinki Final Act became part of wider strategy to guarantee ‘respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief’, and to emphasise the role of such rights.<sup>113</sup> The ten points of the Helsinki Final Act provided a basis for further recognition of human rights in Eastern Europe especially freedom of religion, even if the Soviets had initially attached little importance to the Final Act.<sup>114</sup> If the Helsinki Final Act was more likely viewed as a ‘commitment to the inviolability of the existing frontiers’ between East and West, it also gave acknowledgment to the rights of religious minorities under soviet rule.<sup>115</sup> Evans notes the Guiding Principles of the Helsinki Final Act led to the reaffirmation and expansion of human rights, with an emphasis on religious freedom, in future political agreements.<sup>116</sup> The Catholic Church utilised the move of recognition of more expansive rights for religious minorities in Eastern Europe, and emphasised the place of ‘the dignity of the human person’, with a prominent role of freedom of

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of the humanitarian engagement of many NGO’s lay precisely in their renunciation of traditional politics’ (21). On the development of Amnesty International see Moyn, *The Last Utopia: Human Rights in History*. 129-132. See also Mazower, *Governing the World: The History of an Idea* 321. The ratification of the new UN human rights covenants in the late 1970’s by various states revealed ‘the UN was actually more effective than some of its critics liked to acknowledge’. This development gave rise to a new significance, and traction, for human rights rhetoric.

<sup>112</sup> The Helsinki Final Act was signed in 1975 following the launch of the Conference on Security and Cooperation in Europe (CSCE). See Donert, ‘Charter 77 and the Roma. Human Rights and Dissent in Socialist Czechoslovakia’. 197. The CSCE developed to improve international cooperation among European states, and the United States and Canada. The multilateral agreement included ‘an unprecedented reference’ to human rights, ‘thus providing dissidents in the socialist block with a means of connecting human rights violations – previously viewed in international law as purely internal affairs of state – with the international politics of détente’.

<sup>113</sup> Final Act of Conference on Security And Co-Operation in Europe, (Helsinki Final Act), 1 August, 1975, ILM 14 (1975), 1292, 1295.

They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.

Within this framework the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.

See further Evans, *Religious Liberty and International Law in Europe*. 366-370. Evans remarks that ‘in retrospect it is possible to see in this political agreement the seeds that led to the collapse of Eastern European communism’.

<sup>114</sup> Mazower, *Governing the World: The History of an Idea* 320. See also Slezkine, ‘From Helsinki to Human Rights Watch: How an American Cold War Monitoring Group Became an International Human Rights Institution’, (345-370).

<sup>115</sup> Mazower, *Governing the World: The History of an Idea* 320.

<sup>116</sup> Evans, *Religious Liberty and International Law in Europe*. 367. See for example 1983 Madrid Concluding Document and 1989 Vienna Concluding Document, ILM 28 (1989). *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/684 (1981).



conscience and religion.<sup>117</sup> The policy of *Ostpolitik* by Pope Paul VI relied upon not allowing Eastern Europe become isolated from the wider Catholic Church, rather to view the continent as a whole.<sup>118</sup> When the Holy See attended and participated fully at the Conference for Security and Cooperation in Europe to produce the Helsinki Final Act, it also viewed human rights rhetoric as an opportune means to further its goals.<sup>119</sup> However, the legitimate concern for human rights in Eastern Europe continued to obscure the tension between Christian and liberal interpretation of the substance of those rights.

### 5.3.1 Shaping Europe's Cultural Foundations

The principle founders of the European Union, Konrad Adenauer, Robert Schuman, Alcide De Gasperi and Charles de Gaul, all belonged to Christian democratic parties and interestingly Müller suggests, '[n]ot by accident did they hail from the margins of their respective nation-states; all had been marked by the sometimes brutal homogenisation of the "late" nation-states of Italy and Germany'.<sup>120</sup> From this periphery of the older Catholic establishment they had carried a concern about the uses of national sovereignty and its centralising authority, and instead 'advocated subsidiarity and a Europe united in its "Christian-humanist" heritage'.<sup>121</sup> Sutton reviews the political thought that instilled a particularly Catholic way of looking at the state and Europe. He observes the value of papal indirect power in temporal matters, with a view that temporal sovereignty was subordinated to the spiritual 'if circumstances so dictated (*ratio peccati*)'.<sup>122</sup> Indeed Müller suggests they had at

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<sup>117</sup> See for example Pope John Paul II, 'Message of John Paul II on the Value and Content of Freedom of Conscience and of Religion', *L'Osservatore Romano, English ed.*, Friday, 14 November 1980 1980 p. 12-14. The papal message lists numerous rights and liberties that mirror those expressed in the Helsinki Final Act, and those in future UN declarations.

<sup>118</sup> Anthony O'mahony, 'The Vatican and Europe: Political Theology and Ecclesiology in Papal Statements from Pius XII to Benedict XVI', *International journal for the Study of the Christian Church*, 9/3 (2009/08/01, 177-94. 186. See also Chelini-Pont, 'Papal Thought on Europe and the European Union in the Twentieth Century', (136-137)

<sup>119</sup> O'mahony, 'The Vatican and Europe: Political Theology and Ecclesiology in Papal Statements from Pius XII to Benedict XVI', (186.

<sup>120</sup> Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*. 141. De Gaul is proposed as part of the Catholic democratic milieu in Sutton, 'Political Realism and Roman Catholic Faith in the Construction of Europe: Konrad Adenauer, Robert Schuman and Charles De Gaul'. See also Pulzer, 'Nationalism and Internationalism in European Christian Democracy'. 10.

<sup>121</sup> Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*. 141. Müller adds that this heritage implied anti-Communism by definition. See also Pulzer, 'Nationalism and Internationalism in European Christian Democracy'. 10. On assuming the Chancellorship of the German Federal Republic, Adenauer said:

We have overcome the nationalist ideas of the nineteenth and early twentieth century. From then originated the nationalism that led to a fragmentation of European life. If we wish to retrace the origins of our common European culture originating in Christendom, we must aim at re-creating the unity of European life in all its areas [footnote omitted].

<sup>122</sup> Sutton, 'Political Realism and Roman Catholic Faith in the Construction of Europe: Konrad Adenauer, Robert Schuman and Charles De Gaul'. 37.

times pursued 'an indirect way of gaining legitimacy for their project: rather than having the peoples of the initial member states vote for supranational arrangements, they relied on technical and administrative measures agreed among the elites [...]'.<sup>123</sup> This approach was not unique from the perspective of historical Catholic diplomacy which had, in the past, relied on indirect influence and elite agreement bridged across national borders. However, Sutton cautions about 'the danger of misconstruing the role of the Roman Catholic Church in politics, that is, when the Church is understood primarily as an institution [...]'.<sup>124</sup> Though the Catholic Church's indirect influence may have included diplomacy and the issuing of papal encyclicals, it was rarely so directly involved in political concerns. Sutton observes the Church 'has from time to time enunciated views relating to political matters, but only when fundamental moral or ethical issues have been at stake or under review'.<sup>125</sup>

Robert Schuman, the French Minister of Foreign Affairs, had agreed a pact on coal and steel between states in Europe, which provided the basis of further economic and trade agreements.<sup>126</sup> Therefore it 'made a public declaration which would fundamentally affect the future of post-War Europe'.<sup>127</sup> Schuman was very much in the tradition of Thomistic thought of Maritain, and even though there is no evidence that Schuman read Maritain,

[...] the similarity of spirit and even detail between Maritain's vision and Schuman's policy is striking; perhaps this results from Maritain's general

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<sup>123</sup> Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*. 142.

<sup>124</sup> Sutton, 'Political Realism and Roman Catholic Faith in the Construction of Europe: Konrad Adenauer, Robert Schuman and Charles De Gaul'. 38.

<sup>125</sup> Ibid. 38.

<sup>126</sup> Gary Willson, 'Christianity at the Founding. The Legacy of Robert Schuman', in J. Chaplin and G. Wilton (eds.), *God and the Eu. Faith in the European Project* (Oxon: Routledge). See also A. Fimister, *Robert Schuman: Neo Scholastic Humanism and the Reunification of Europe* (Brussels P.I.E. Peter Lang). Pius XII responded positively to the establishment of new European institutions. See further Chelini-Pont, 'Papal Thought on Europe and the European Union in the Twentieth Century', (137).

<sup>127</sup> Sutton, 'Political Realism and Roman Catholic Faith in the Construction of Europe: Konrad Adenauer, Robert Schuman and Charles De Gaul'.

Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organisation open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe.

As cited from Pascal Fontaine, *Europe, a Fresh Start: The Schuman Declaration, 1950–90* (Luxembourg: Office for Official Publications of the European Communities, 1990). in Leustean, 'The Ecumenical Movement and the Schuman Plan, 1950–54', (422-471).

influence on Schuman and Schuman's application of the same broad principles.<sup>128</sup>

In contrast to Schuman, Konrad Adenauer, who had been West Germany's chancellor from 1949 to 1963, did 'not appear to have been marked intellectually by the revival of Thomism in the Catholic world' but he also 'had no pretensions in this domain'.<sup>129</sup> Nevertheless, references to Christian culture are evident throughout his career and his emphasis 'on the plurality of European cultural identity'.<sup>130</sup> Adenauer had carried a religious and cultural outlook that closely aligned with those of his peers from within the Christian democratic movement, and had identified modernity with materialism and nihilism.<sup>131</sup> Chappel notes that like his contemporaries, 'Adenauer saw this tendency to nihilism as inherent in modernity itself, and not as a pathology of certain states'.<sup>132</sup>

In addressing the temperament common within European Catholicism, Sutton detects that, 'an encyclical on the politics of Western European integration could have been penned at any stage in the post-war period is well-nigh inconceivable'.<sup>133</sup> Sutton continues, 'the realm of politics or government should be seen as having a large degree of relative autonomy is a view that has been fostered by the humanistic bent of much of Catholic schooling ever since the Jesuits devised their *Ratio Studiorum* (Plan of Studies) at the end of the sixteenth century'.<sup>134</sup> Many

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<sup>128</sup> Fimister, *Robert Schuman: Neo Scholastic Humanism and the Reunification of Europe*. 124. Sutton, 'Political Realism and Roman Catholic Faith in the Construction of Europe: Konrad Adenauer, Robert Schuman and Charles De Gaul'. 42. Sutton suggests Schuman was influenced by Maritain and the French philosopher Maurice Blondel. Schuman wrote in 1963:

Democracy owes its existence to Christianity. It was born on the day that man was called in his temporal existence to realise the dignity of the human person, in individual freedom, in the respect of everyone's rights, and in the practice of fraternal love towards all. Never before Christ had such ideas been formulated. Democracy is thus linked to Christianity, both doctrinally and chronologically [footnote omitted].

<sup>129</sup> Sutton, 'Political Realism and Roman Catholic Faith in the Construction of Europe: Konrad Adenauer, Robert Schuman and Charles De Gaul'. 40. Adenauer had been mayor of Cologne See also Greenberg, *The Weimar Century: German Emigres and the Ideological Foundations of the Cold War*. 157-158. See also Geoffrey Pridham, *Christian Democracy in Western Germany* (London: Croom Helm Ltd, 1977). 56-141. Noel D. Cary, *The Path of Christian Democracy. German Catholics and the Party System from Windthorst to Adenauer* (Cambridge, Mass: Harvard Univ Press, 1996). 179-193. Greenberg, 'The Origins of Christian Democracy: Politics and Confession in Modern Germany', (327-328).

<sup>130</sup> Sutton, 'Political Realism and Roman Catholic Faith in the Construction of Europe: Konrad Adenauer, Robert Schuman and Charles De Gaul'. 41.

<sup>131</sup> James Chappel, 'Nihilism and the Cold War: The Catholic Reception of Nihilism between Nietzsche and Adenauer', *Rethinking History*, (1-16.12)

<sup>132</sup> Ibid.12).

<sup>133</sup> Sutton, 'Political Realism and Roman Catholic Faith in the Construction of Europe: Konrad Adenauer, Robert Schuman and Charles De Gaul'. 38.

<sup>134</sup> Ibid. 38. The study of Greek and Latin classical thought, 'in addition to spiritual formation, was fundamental for Jesuit schools'. This was the kind of humanism Thomas More and his contemporaries would have recognised.

notable European intellectuals were products of this Christian and humanist education, and this included those founders of the European project, who 'were perforce deeply marked by their classical education'.<sup>135</sup> Consequently, it no surprise that Maritain's book *Integral Humanism*, drawing on a modernised Neo-Scholasticism became 'the blueprint, or in the French phrase "*petit livre rouge*" (little red book), of a whole generation' of Christians democrats in Europe and the Americas.<sup>136</sup> McCauliff argues that this generation moved into positions of responsibility after World War II and 'constructed a new Christianity according to Maritain's inspiration'.<sup>137</sup> Jacques Maritain's *Integral Humanism* had in a positive sense 'put the values of the Enlightenment and the French Revolution into a Christian framework'.<sup>138</sup> Müller explains that while the thought of Jacques Maritain 'constituted an important reference point' to the intellectual formation of Christian

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<sup>135</sup> Ibid. 39.

<sup>136</sup> Maritain, *Integral Humanism; Temporal and Spiritual Problems of a New Christendom*. McCauliff, 'Jacques Maritain's Embrace of Religious Pluralism and the Declaration on Religious Freedom', ( 598 [footnote omitted]). According to McCauliff, the vision of Maritain and appropriated by Montini (future pope Paul VI) of a new Christian civilisation would be,

[...] lay rather than clerical, democratic rather than authoritarian, and capable of inspiring a mass political party in which all who shared "Christian values" could participate. The Church's influence would be indirect rather than direct, accepting autonomous institutions (like political parties and trade unions) and imbuing them with a Christian spirit.

Further on the "little red book" and the significance of Maritain as 'an *éminence grise* or *spiritus rector* of left Catholic experiments in the late 1930's, the crucial 1940's – and beyond', see also Gerd-Rainer Horn, *Western European Liberation Theology. The First Wave (1924-1959)*. (Oxford: Oxford University Press). 89-100. See also Perreau-Saussine, *Catholicism and Democracy: An Essay in the History of Political Thought*. 80. Perreau-Saussine notes an emphasis on the laity had precedence in the thought of Tocqueville. Tocqueville's ideas 'had little immediate effect on the Catholic Church. Yet they would be vindicated at the Second Vatican Council, which reconnected with certain aspects of the liberal Gallican tradition: a commitment to religious liberty and to the role of the laity, and a more favourable outlook on democracy'.

<sup>137</sup> McCauliff, 'Jacques Maritain's Embrace of Religious Pluralism and the Declaration on Religious Freedom', (599). See also for example, John Middleton Murry, 'Towards a Christian Society. True Humanism by Maritain, Jacques (Author)', *The Times Literary Supplement*, 28th January 1939. In his review Middleton had written:

The ruling concept of the new Christian society is pluralism. The restoration of medieval Christendom is impossible: history is an irreversible process. The underlying principles of the medieval Christian order have to be applied not univocally, but analogically.

See also Jacques Maritain, 'The Catholic Church and Social Progress', *Foreign Affairs*, 19/4 (1939).

<sup>138</sup> McCauliff, 'Jacques Maritain's Embrace of Religious Pluralism and the Declaration on Religious Freedom', (596. See valuably McCool, 'Maritain's Defense of Democracy', ( 134-135. McCool shows how Maritain diverges from an anti-democratic stream of Neo-Thomistic thought. Firstly, through Maritain's 'personal acquaintance with modern culture and his deep appreciation of it', and secondly 'his conviction that the Christian philosophy of St. Thomas could ground a sound theory of representative democracy'. Maritain was able 'to incorporate the contributions of Locke and Rousseau into his defence of representative democracy in his Thomistic social ethics' (135). See Maritain, *Integral Humanism; Temporal and Spiritual Problems of a New Christendom*. 240:

Christian thought will have to integrate truths discerned or surmised in the effort for social emancipation carried out during the whole of modern times, and yet purify them from the anti-Christian errors in the midst of which they were born.

Maritain was occasionally impossibly radical, though he recognised 'such a condition is very remote':

[...] in its entirety the Christian world of today break with a regime of civilisation spiritually founded on bourgeois humanism and economically on the fecundity of money, which at the same time keeping itself immune from the totalitarianism of Communist errors to which the same regime leads as to its logical catastrophe (245).

democrats, their political parties had become the ‘quintessentially anti-Communist parties of the era’.<sup>139</sup> Similarly, human rights ideas were part of this general genre of Christian social thought but also used rhetorically by Catholic democrats because ‘the language of personal rights could be deployed against “godless Bolshevism”’.<sup>140</sup> Thereby turning to Christian foundations helped secure a comprehensive alternative in contrast with the physical threat of Communism on the borders of Europe but also towards the ideological threat within.<sup>141</sup> Human rights ideas assisted in contrasting the achievements of an ascending European democracy over and against Communist collectivism that had rejected them as “bourgeois” values. Still, it does not mean Christian democrats ‘were self-consciously engaged in an attempt to resurrect what they might have seen as a congenial if distant past’.<sup>142</sup> Sutton further qualifies that ecclesiastical influence ‘played little or no part in the decisions taken in the immediate post-war decades by various statesmen of Roman Catholic persuasion to advance the cause of European integration’ and ‘they were not driven by the idea of restoring Christian Europe’.<sup>143</sup>

The outlook of those engaged in the reconstruction of Europe was not alone occupied with economic and political problems but went further to respond to the deep crisis within European intellectual thought. They sought to answer how a highly evolved European culture had produced two devastating World Wars.<sup>144</sup> According to Chappel, the political judgement was to initially view the progression of European history as linear but following the collapse of transcendent values, the state was historicised and submitted to an immanent historical process of race or class concerns, which culminated in the states own corruption by ideology.<sup>145</sup> To identify the roots of the problem in European culture, Chappel observes that when

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<sup>139</sup> Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*. 138-139. On Italian Christian democracy and fervent anti-Communism see Masala, 'Born of Government: The Democrazia Cristiana in Italy'. 104.

<sup>140</sup> Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*. 138.

<sup>141</sup> Ibid. 135 and 139 .

<sup>142</sup> Sutton, 'Political Realism and Roman Catholic Faith in the Construction of Europe: Konrad Adenauer, Robert Schuman and Charles De Gaul'. 35. See Martin, *Religion and Power: No Logos without Mythos* 12. Martin asks, '[h]ow was it possible to forget the appeal to the legacy of Charlemagne or the role of the Catholic Church in Hungary in 1956 and in Poland throughout the post-war period [...]'. Martin suggest this forgetfulness of the past, particularly the contribution of religiously motivated international actors, reveals the 'privatisation thesis depended on forgetting or eliding the obvious'. See also Moyn, *Christian Human Rights*. Kindle location 2314.

<sup>143</sup> Sutton, 'Political Realism and Roman Catholic Faith in the Construction of Europe: Konrad Adenauer, Robert Schuman and Charles De Gaul'. 45.

<sup>144</sup> Chappel, 'Nihilism and the Cold War: The Catholic Reception of Nihilism between Nietzsche and Adenauer', (2).

<sup>145</sup> Ibid. 2. An insightful attempt to diagnosis the problems during the period came from political philosophy, see for instance Voegelin, *The New Science of Politics, an Introduction*. See also William C. Havard, 'Notes on Voegelin's Contributions to Political Theory', *Polity*, 10/1 (1977), 33.

German Christian democrats 'came to power after 1945, they had been prepared, through decades of confrontation with Nietzsche's works, to understand European crisis using the language of nihilism'.<sup>146</sup> German Catholics 'turned the philosopher's theories on their head' directing the force of his argument not against Christianity but against the bourgeois materialism and secularism of the 19<sup>th</sup> century, which had precipitated the crisis of values in the early 20<sup>th</sup> century.<sup>147</sup>

Chappel details the nature of the opposition of Christian democrats to the nihilism of the post-War period, as integral to understand the political and moral confrontation in Europe. In Nietzsche's view, nihilism was the end point of (Protestant) Christianity rather than of secularisation or liberalism, and presented as a complete or total system of living, and its "will to truth" would exhaust the energies of European civilisation.<sup>148</sup> However, in the Catholic reading of Nietzsche's critique, particularly through the work of the German philosopher Max Scheler, and his philosophy of Personalism, Nietzsche could be overcome by diagnosing and curing Europe of a humanism that had turned out in reality to be "postulatory atheism".<sup>149</sup> The working out of this response atheistic humanism in the political sphere had begun in the work of Gurian, through his theory of totalitarianism.<sup>150</sup> In turn, suspicion was cast on versions of humanism derived from liberalism and secularism, and associated with totalitarian ideologies, as antithetical to the Christian humanism of those who began to develop the democratic institutions of Europe following World War II. The mobilisation of Catholicism into the political sphere to fill the vacuum hollowed out by World War II brought with it a profound critique of the European liberal tradition.<sup>151</sup> In the early Cold War years, that

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<sup>146</sup> Chappel, 'Nihilism and the Cold War: The Catholic Reception of Nihilism between Nietzsche and Adenauer', (2). See also Greenberg, 'The Origins of Christian Democracy: Politics and Confession in Modern Germany', (328).

<sup>147</sup> Chappel, 'Nihilism and the Cold War: The Catholic Reception of Nihilism between Nietzsche and Adenauer', (2). An example of this process is located in De Lubac, *The Drama of Atheist Humanism*. Completed in 1944, the theologian de Lubac wrote extensively on Nietzsche and commented 'It is what Vico called the age of "deliberate barbarism", and this is the age in which we live' (90). Notably, de Lubac quotes Maritain's *Integral Humanism*, and also the Russian Personalist philosopher Nicholas Berdyaev, who had spoken of the 1930-40's as an "end to the Renaissance", and of a return to the barbarism of the Middle Ages (71-72).

<sup>148</sup> Chappel, 'Nihilism and the Cold War: The Catholic Reception of Nihilism between Nietzsche and Adenauer', (4).

<sup>149</sup> De Lubac, *The Drama of Atheist Humanism*. 59 [citation is from Scheler]. De Lubac had developed the idea that the modern period was shaped by an '[...] absolute humanism, which claims to be the only genuine kind and inevitably regards Christian humanism as absurd' (24). In de Lubac, 'Modern humanism, then, is built upon resentment and begins with a choice' (25). In Nietzsche's words 'Now, it is our preference that decides against Christianity – not arguments' (49) [footnote omitted]. De Lubac also described the phenomena as a 'total and exclusive humanism', a phrase that parallels with the Catholic antipathy towards totalitarianism (448).

<sup>150</sup> This point was developed in the last chapter. See for example, Gurian, 'The Philosophy of the Totalitarian State'.

<sup>151</sup> The European liberal tradition was critiqued by others, most notably in Max Horkheimer Theodor W. Adorno, *Dialectic of Enlightenment* (London: Verso).

examination of the intellectual inheritance of European culture produced a reflex towards conservative consolidation of European Christian ideas in both politics and social order. The Cold War itself prolonged the rehabilitation of European liberal and secular humanism, while giving a new lease of life to Christian democratic and humanist values. The politicians who had initiated the process of European cooperation had a complex relationship with the various strands of European Catholic culture. That relationship determined that Christian democrats participated in a post-Enlightenment struggle with Eastern European socialism, and understood it as another nihilistic ideology that again threatened European civilisation.<sup>152</sup>

### 5.3.2 Christian Social Democracy and the Economy

The initial enthusiasm for economic reordering and solidarity in post-war Europe was gradually side-lined from a left of centre vision 'in favour of more market friendly versions'.<sup>153</sup> Müller observes a slow drift to neo-capitalist ideas within the later evolution of Christian democratic parties in the later 20<sup>th</sup> century, with a move from their broadly religious foundations to more populist and secularised politics.<sup>154</sup> The turn to neo-liberal capitalism in the latter 20<sup>th</sup> century in Europe by Christian democrats had not been an inevitable consequence of democratisation in Europe or their embrace of human rights. However, the more market friendly versions of the democratic state did signal a Cold War partnership with American economic policy as Europe competed in a rivalry with Eastern European collectivism and state monopoly over their economies.<sup>155</sup> The Cold War was a politically charged contestation but it was also an economic confrontation.

Chappel traces the history of that process of transformation of Christian democratic economic policy, moving from the idealism of Catholic social economics to populist support for Capitalism by Christian democrats.<sup>156</sup> Chappel focuses on Germany because 'Catholic politics and Catholic social science achieved unparalleled significance', which was bound up with the sacred but more

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<sup>152</sup> Chappel, 'Nihilism and the Cold War: The Catholic Reception of Nihilism between Nietzsche and Adenauer', (13).

<sup>153</sup> Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*. 138. See also Moyn, 'Personalism, Community and the Origins of Human Rights'.

<sup>154</sup> Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe*. 138.

<sup>155</sup> See Greenberg, *The Weimar Century: German Emigres and the Ideological Foundations of the Cold War*. 24. Greenberg proposes, Cold War policies are now viewed as 'the continuation and expansion of earlier American traditions, such as the spreading consumer culture, visions of "civilization," religious ideologies, and belief in progressive "development" [footnote omitted].

<sup>156</sup> James Chappel, 'Catholicism and the Economy of Miracles in West Germany, 1920–1960', *New German Critique*, 42/3 (2015), 9–40. 9.

importantly with the social.<sup>157</sup> Many official social encyclicals of the Catholic Church influenced this direction, due to the fact that Catholicism was doctrinally neutral to the political form of the state, and therefore could be decidedly biased towards social and economic problems of the state, without incurring political sanction.<sup>158</sup> Further, Chappel points to the realisation that Catholic economics had influence beyond the German context in the early 20<sup>th</sup> century, and so ‘there was striking continuity between Weimar and the Cold War’.<sup>159</sup> Retrospectively, the German Rhineland was to be the heart of social Catholicism, providing some of its most innovative thought and offered a generation of Catholic economists and politicians including Adenauer, material for constructing Germany and Europe.<sup>160</sup> Since the 19<sup>th</sup> century, Catholics had been ‘committed to a social pluralism over the logic of political or economic monopoly’.<sup>161</sup> The very premise of the centralising, monopoly making power of the state was inimical to Catholic political thought but also to its economic philosophy as well.<sup>162</sup> The social encyclical *Quadragesimo Anno* (1931) laid more firmly the groundwork for a “true social science” promoting an alternative to radical individualism, and believing the concept of subsidiarity and social solidarity would provide some of the solutions to society’s inequalities.<sup>163</sup>

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<sup>157</sup> Ibid. 10 -13.

<sup>158</sup> There have been many social encyclicals but most notably, the still quite radical, Pope Leo XIII, 'Encyclical Letter *Rerum Novarum* ', (§3)

[...] that some opportune remedy must be found quickly for the misery and wretchedness pressing so unjustly on the majority of the working class: for the ancient workingmen's guilds were abolished in the last century, and no other protective organization took their place. Public institutions and the laws set aside the ancient religion. Hence, by degrees it has come to pass that working men have been surrendered, isolated and helpless, to the hardheartedness of employers and the greed of unchecked competition.

<sup>159</sup> Chappel, 'Catholicism and the Economy of Miracles in West Germany, 1920–1960', (13).

<sup>160</sup> Ibid. 12-13.

<sup>161</sup> Ibid. 18.

<sup>162</sup> Ibid. 18. See F. J. Gordon, 'Protestantism and Socialism in the Weimar Republic', *German Studies Review*, (1988). On the alienation of socialists from Protestants and Catholics in early 20<sup>th</sup> century Germany Gordon notes, '[w]ith the work of Karl Marx, the metamorphosis of German socialism from a kind of anticlerical Christian idealism to a radically anti-religious materialism was accomplished and the consequent conflict with the churches assured' (424).

The scepticism toward the economic reach of the state, see in Pope Leo XIII, 'Encyclical Letter *Rerum Novarum* ', (§5)

Socialists, therefore, by endeavouring to transfer the possessions of individuals to the community at large, strike at the interests of every wage-earner, since they would deprive him of the liberty of disposing of his wages, and thereby of all hope and possibility of increasing his resources and of bettering his condition in life. [...] Hence we have the family, the "society" of a man's house - a society very small, one must admit, but none the less a true society, and one older than any State. Consequently, it has rights and duties peculiar to itself which are quite independent of the State (§12).

<sup>163</sup> See Pope Pius XI, 'Quadragesimo Anno AAS 23 (1931)', (§ 20, 28):

A new branch of law, wholly unknown to the earlier time, has arisen from this continuous and unwearyed labour to protect vigorously the sacred rights of the workers that flow from their dignity as men and as Christians. [...] because things have come to such a pass through the evil of what we have termed "individualism" that, following upon the overthrow and near extinction of that rich



Catholic economic thought attempted 'to imagine an economic order that would be modern while avoiding the monopolizing, anticlerical impetus of liberal and socialist modernity', and steer 'a path between laissez-faire individualism and statist monopoly'.<sup>164</sup>

For Chappel, Heinrich Pesch was one of those Catholic economists who gave voice to that impulse found in official Catholic encyclicals to develop ideas like subsidiarity and economic solidarity.<sup>165</sup> Pesch 'believed that this economic and political decentring would create a hypermodern national project, and not a reactionary one, what he called "the restructuring of the 'modern' state into a more modern state with greater decentralization"'.<sup>166</sup> The social Catholicism of Pesch was followed by the philosopher Max Scheler, a deeply influential theorist on Christian political thought, and he had proposed a choice 'between the "spirit" of solidarity and that of atomizing competition'.<sup>167</sup> The theory of Scheler and those of his circle placed the human person at the centre, as the basis for economic life.<sup>168</sup> The centrality of this idea was in sociability of human activity, that existed before economics or political acts thereby always directed towards a common good, whether that human activity occurred in small communities or by the state itself. The corporate nature of human activity founded on an understanding of the human person as relational, contrasted with republican and nationalist ideas about "citizens" that is concerned solely with a political identity from the state or the

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social life which was once highly developed through associations of various kinds, there remain virtually only individuals and the State (§78). [...] those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of "subsidiary function," the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State (§80).

<sup>164</sup> Chappel, 'Catholicism and the Economy of Miracles in West Germany, 1920–1960', ( 21 -22).

<sup>165</sup> Ibid. 22. Mueller, 'The Principle of Subsidiarity in the Christian Tradition', ( On subsidiarity as a principle of human rights law, see Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', (, and on the European community principle as a principle for democratic structuring, see Barber, 'The Limited Modesty of Subsidiarity', (

<sup>166</sup> Chappel, 'Catholicism and the Economy of Miracles in West Germany, 1920–1960', ( 22).

<sup>167</sup> Ibid. 23. On Scheler see De Tavernier, 'The Historical Roots of Personalism.', (361-392. The philosophical Personalism promoted by Scheler, and in France by Jacques Maritain had theological roots in German thought, especially that of Romano Guardini. See Krieg, 'Romano Guardini's Theology of the Human Person', (457. For instance, Guardini published his essay "The Lord" in 1937 in an effort to renew Catholics' devotion to Jesus Christ, thereby to offset Nazi propaganda regarding Adolf Hitler as Germany's saviour' (459). See also Krieg, *Catholic Theologians in Nazi Germany*. and also Dietrich, *Human Rights and the Catholic Tradition*. See also Romano Guardini, *Das Ende Der Neuzeit: Ein Versuch Zur Orientierung*.

<sup>168</sup> Chappel, 'Catholicism and the Economy of Miracles in West Germany, 1920–1960', (23).

Scheler sought desperately to rid German philosophy of arid neo-Kantianism, replacing Hermann Cohen's knowing individual with a human person who loves, worships, and works, always in a community. "Every religious act," he wrote, "is simultaneously an *individual* and a *social act*" (24).

Marxist idea of “workers” concerned about the economic value of an individual or the state’s exercise of labour.<sup>169</sup>

Caciagli suggests that the ‘tradition of Christian democratic thought undoubtedly contributed to a qualified rather than full acceptance of the capitalist model of development’.<sup>170</sup> Further ‘the social market economy can be considered the last important contribution of Christian democracy to European political thought’.<sup>171</sup> They had attempted to provide an alternative to a radical economic individualism or alternatively a Marxist conception of economics but also revealed their theory was remarkably malleable to other influential ideologies, having been taken up by fascism.<sup>172</sup> In the early-20<sup>th</sup> century there was no necessary link of Catholicism to democracy, whereas fascism had extolled corporatism and the traditional ordering of society, which was deeply hierarchical. The transformation of organic social ordering of society and its economic structure came through the test of World War II, and parsed the Catholic economic model of subsidiarity and solidarity from its corporatist pretensions.<sup>173</sup> Greenberg observes, the ‘decision of Christians to reconstitute their politics around support for democracy was therefore just as revolutionary as their new commitment to pan-Christian unity’.<sup>174</sup>

A decentred economic policy worked against the monopoly of the state, by offering subsidiarity as a principle tool for the economic redistribution of wealth.<sup>175</sup> Private property retained its shape as neither an absolute right but also not completely at the disposal of the state. Christian democratic parties drew upon Catholic social thought just as freely as they did from Catholic political thought, which had sought

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<sup>169</sup> Ibid. 24. ‘For the socialists, humanity is organized into classes; for the Catholic, humanity is organized into a constellation of legitimate communities’ (26). These points return to the classical philosophy of Cicero and Augustine discussed in a previous chapter about the basis human community located in the family, and upon which the state finds its organisation and structure, that can function without seeking to undermine that unit, rather it functions to support the common good.

<sup>170</sup> Mario Caciagli, ‘Christian Democracy’, in T. Ball and R. Bellamy (eds.), *The Cambridge History of Twentieth-Century Political Thought* (Cambridge: Cambridge University Press, 2003), 165-80. 176. This included the introduction of the welfare state, which became vastly bloated in some countries.

<sup>171</sup> Ibid. 179.

<sup>172</sup> Ibid. 179. See further Greenberg, ‘The Origins of Christian Democracy: Politics and Confession in Modern Germany’, (328). Greenberg argues that Adenauer had partially utilised the war rhetoric of the Nazi party’s nationalism. Greenberg suggests, ‘its allure stemmed from many German nationalists’ long-held belief that their country was a ‘spiritual’ entity fighting ‘materialist’ enemies, whether these be capitalist or Socialist’.

Further Greenberg notes, ‘Hitler and his followers, too, routinely lambasted Western capitalism and Eastern Communism as identical twin ‘materialist’ threats to Germany’s racial vitality’. Finally, Greenberg remarks,

That Adenauer and others built democracy by utilizing Nazi concepts is one of the greatest ironies of post-war Europe, and it demonstrates how deeply allegedly Christian ideology drew from other worldviews.

<sup>173</sup> Chappel, ‘Catholicism and the Economy of Miracles in West Germany, 1920–1960’, (25-28).

<sup>174</sup> Greenberg, ‘The Origins of Christian Democracy: Politics and Confession in Modern Germany’, (328).

<sup>175</sup> Chappel, ‘Catholicism and the Economy of Miracles in West Germany, 1920–1960’, (29).

to place limits on the sovereignty of the state through a principle of subsidiary and transnational bodies.<sup>176</sup> Chappel observes that post-World War II European political thought had originated ‘in anti-Bolshevism and the technocratic circles of the 1930s, not in the fiery rhetoric of the trade unions or the Resistance’.<sup>177</sup> Nevertheless, in contrast to neo-liberalism, European economic theory has ‘underlined the social responsibility of entrepreneurs, the need for political intervention in the economic cycle and, above all, the commitment of the state in the area of social policy’.<sup>178</sup> Even if Christian democratic parties had abandoned their earlier ambitions for “Christian socialism”, they retained an emphasis on the “social” by means of redistribution through various forms of social equality, namely social security, pension schemes, health care and housing.<sup>179</sup> The nature of Catholic social thought and the economic principles it offered provided a durable but also easily adaptable set of rubrics, once the fundamentals that protected the natural community of family life and society were assured.<sup>180</sup>

De Gasperi, Robert Schuman, and Konrad Adenauer ‘were convinced Catholics who naturally sought venues of authority outside and above the nation-state’.<sup>181</sup> That conservative basis for economic practice at home did not lead to national isolationism but unexpectedly enabled the establishment of transnational governance on economic as well as political affairs. While the nation-state might strive to preserve an organic structure based on the family unit, and subsidiary communities within the state, the model for European co-operation and integration would reveal that, the state itself would be subject to larger economic programmes of a European Community. This aspiration towards economic collaboration in Europe revealed that ‘neoliberalism as it existed in the late 1940s and 1950s was surprisingly harmonious with Catholic political economy [...]’.<sup>182</sup> Neo-liberalism at the time had also aspired to the end of “monopolistic” controls or cartel-centred economics, giving preference for ‘a more pluralistic, multipolar

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<sup>176</sup> Ibid. 30.

<sup>177</sup> Ibid. 30. See also C. S. Maier, ‘The Two Postwar Eras and the Conditions for Stability in Twentieth-Century Western Europe’, *The American Historical Review*, (1981). 323, ‘the post-war years brought not only an ebbing of radicalism but at least a generation of political and economic stability as well’. See also M. Nolan, ‘Gender and Utopian Visions in a Post-Utopian Era: Americanism, Human Rights, Market Fundamentalism’, *Central European History*, (2011).

<sup>178</sup> Caciagli, ‘Christian Democracy’. 179.

<sup>179</sup> Ibid. 179.

<sup>180</sup> Moyn, ‘Personalism, Community and the Origins of Human Rights’. 100. Moyn describes this as the “re-casting of bourgeois Europe”, which ‘occurred under the political hegemony of Christian Democracy, even if one wants to see it as redounding to the benefit of liberal capitalism in the long run’ [footnote omitted]. See further Conway, ‘Left Catholicism in Europe in the 1940’s. Elements of an Interpretation’.

<sup>181</sup> Chappel, ‘Catholicism and the Economy of Miracles in West Germany, 1920–1960’, (33).

<sup>182</sup> Ibid. 36.

system'.<sup>183</sup> However, Christian democracy itself had by the 1960's begun a 'surprisingly rapid and profound decline'.<sup>184</sup> Greenburg confirms that as the 1960s progressed, 'the rise of consumer culture, new gender norms, and other social shifts rendered Christian Democracy's traditionalist message increasingly out dated'.<sup>185</sup> Full blown neo-liberalism of the late 20<sup>th</sup> century had yet to materialise, and only as the Eastern European system began to show signs of failure, did the European Communities regulation and order become more unfettered.<sup>186</sup> Mazower observed that only after the 2008 financial crash politicians began to acknowledge that the financial markets were "a monster that must be tamed".<sup>187</sup> With the collapse of Christian democracy and its social and economic ethics being gradually sidelined, it remained to be seen could a human rights based approach tame the globalised economic leviathan.<sup>188</sup>

This confluence of catholic political thought and neo-liberal economics was not the last word on how distributive justice might be interpreted. Outside the European centre of influence, dominated often by United States interests, other expressions of economic justice began to be vocalised. This chapter turns to Latin America and liberation theology, as a new source of thought about social justice, and human rights, which could reform the modern state, not this time from "above" but from "bellow".

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<sup>183</sup> Ibid. 37.

<sup>184</sup> Greenberg, 'The Origins of Christian Democracy: Politics and Confession in Modern Germany', (329).

<sup>185</sup> Ibid.329. Greenberg continues:

As alarmed Christian Democrats suddenly recognized, the Protestant-Catholic coalition's principal enemy was neither the return of inter-confessional hostility nor the triumph of Socialist 'materialism', but rather stability and religious apathy. By bringing prosperity and ending their prolonged internal feud, Christian Democrats created the conditions that ultimately brought about their own ideological demise.

See also more generally, Mitchell, *The Origins of Christian Democracy: Politics and Confession in Modern Germany*.

<sup>186</sup> See Mazower, *Governing the World: The History of an Idea* 409. The European market liberalisation followed as Mazower observed when,

[...] in the early 1980s, France's finance minister Jacques Delors witnessed at first hand through the travails of the Mitterrand government the impossibility of building socialism in one country, and as president of the European Commission from 1985 to 1995 he resolved to shore up social solidarity at the continental level while accelerating market integration.

Mazower points to European expansion and the end of "social Europe" following the end of the Cold War:

Integration thus brought a shift away from redistribution toward the control of inflation and capital and labour mobility. Signed in February 1992, the Maastricht Treaty gestured decisively toward not a Europe of welfare and regulated capital but rather to an intensification of the single market and an acceleration of trade and financial flows through the creation of a common currency (p. 410).

<sup>187</sup> See *ibid.* 409. The words are of the German president Horst Köhler [footnote omitted].

Mazower, Mark. *Governing the World: The History of an Idea* (p. 413). Penguin Books Ltd. Kindle Edition.

<sup>188</sup> See in particular Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism', *Law and Contemporary Problems*, 77 (2015b), 147-69.

## 5.4 Human Rights and Liberation Theology

One of the surprising events following the election of Jorge Cardinal Bergoglio to the pontificate was his meeting on September 11<sup>th</sup> 2013 with the Peruvian Dominican Father Gustavo Gutierrez.<sup>189</sup> They met informally and the meeting was not listed on Pope Francis official schedule. However, the very fact of the meeting suggested a nominal reconciliation between Catholicism and the Marxist leaning Liberation Theology of which Gutierrez was one of its most influential intellectuals. The Peruvian Gutiérrez is a pivotal figure in the story of liberation theology and provides a close analogy of the problematic place of human rights thought within the theology and practice of Catholicism. As Cavanaugh points out many liberation theologians began their social activism in the European lay Catholic social movement called Catholic Action.<sup>190</sup> The theologian Karl Rahner proclaimed liberation theology to be ‘the first locally realised product of the “world Church”, which he foresaw at the Second Vatican Council.<sup>191</sup>

Having studied at Louvain and Lyons, Gutiérrez was also well versed in *la nouvelle théologie*, and the worker priest movement but also classical scholastic theology.<sup>192</sup> Having met Jacques Maritain in the period 1968-1971, he had taken up his ideas and ‘made possible an autonomous political action based on justice and human rights rather than on the agenda of the Church’.<sup>193</sup> The idea that Catholic activism could take up a left-wing discipline was ironically observed by Maritain in reviewing that the 19<sup>th</sup> century encyclical *Rerum Novarum*, commenting ‘many people [...] were almost scandalised and imagined the Pope was “becoming a socialist”’.<sup>194</sup>

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<sup>189</sup> Francis X. Rocca, 'Under Pope Francis, Liberation Theology Comes of Age', *Catholic News Service*, Sept 13, 2013. It has been suggested that the ground for this meeting was prepared via German archbishop Gerhard Ludwig Müller who had written a book with Gutierrez in 2004. Benedict XVI chose archbishop Müller to replace him as head of the Congregation for the Doctrine of the Faith. See further Andrea Tornielli, 'The Vatican and the Liberation Theology Movement Make Peace', *La Stampa/Vatican Insider*, Sept 4, 2013.

<sup>190</sup> Cavanaugh, *Torture and Eucharist: Theology, Politics, and the Body of Christ*. 142 [Footnote omitted].

<sup>191</sup> Linden, *Global Catholicism: Pluralism and Renewal in a World Church*. 118. Karl Rahner, 'Towards a Fundamental Theological Interpretation of Vatican II', *Theological Studies*, 40 (716-27.) See also Roberto S. Goizueta, 'Gustavo Gutierrez. A Theology of Liberation: From Lima to Medellín', in P. Scott and W.T. Cavanaugh (eds.), *The Blackwell Companion to Political Theology* (Oxford: Wiley, 2006).

<sup>192</sup> Linden, *Global Catholicism: Pluralism and Renewal in a World Church*. 117. See for instance Jon Sobrino, *Christology at the Crossroads: A Latin American View* (New York: Orbis Books). 195-198. Sobrino critiques Western scholasticism that relies on Greek philosophy as a means of bypassing the central Christian response to suffering, oppression and poverty.

<sup>193</sup> Cavanaugh, *Torture and Eucharist: Theology, Politics, and the Body of Christ*. 178. See Gutiérrez, *A Theology of Liberation: History Politics, and Salvation*. 35-6. On the Worker Priest movement see Horn, *Western European Liberation Theology. The First Wave (1924-1959)*. 225-289. See also Robert Atkins, 'Dorothy Day's Social Catholicism: The Formative French Influences', *International Journal for the Study of the Christian Church*, 13/2 (2013/05/01, 96-110. 104-108. See also the influential book that encouraged lay catholic activism, Congar, *Lay People in the Church*.

<sup>194</sup> Atkins, 'Dorothy Day's Social Catholicism: The Formative French Influences', (99). Pope Leo XIII, 'Encyclical Letter Rerum Novarum', (§1-2). The opening paragraphs give sufficient flavour of the social commentary in

Indeed, the association of a prominent neo-Scholastic scholar with the radicalism of Gutiérrez could leave a similar impression of Maritain as Pope Leo XIII. Nevertheless it was liberation theologians and those associated with *la nouvelle théologie* who faced the severe criticism for their seeming unorthodoxy in mid-20<sup>th</sup> century.<sup>195</sup> Maritain had escaped the same scrutiny because he had defended Pius XI's condemnation of *Action Française* and because of 'his abstention from practical politics and the vagaries of social movements [...]'.<sup>196</sup> However, Maritain's influence was pronounced in the left-of-centre liberation theology movement and he was an intellectual resource for numerous lay Catholic initiatives in Europe and the Americas. Those movements carried with them Maritain's ideas on democracy, participation and human rights, as new departures for Catholic social activism. Maritain's had a direct connection with the development of Christian democracy in Latin America, having visited Argentina in the late 1930's.<sup>197</sup> Two of the leaders of Chile's Christian democratic party, Jaime Castillo (Chairman of the Chilean Human Rights Commission) and Eduardo Frei (President of Chile, 1964-1970), wrote books and pamphlets to promote Maritain's work.<sup>198</sup> While Conservatives condemned Maritain's work in book length protests in the 1950's, citing 19<sup>th</sup> century papal encyclicals to condemn Maritain's perceived heterodoxy, Catholic political thought had moved on and therefore these critics of Maritain lost the ground 'to that of a defender of democracy and human rights'.<sup>199</sup> The path to liberation theology had European roots that began in the struggles of Christian, and socialist, struggles with European industrialisation and birth of capitalism. As that debate unfolded, rights language became part of how liberation theology became expressed but not happen without a critical examination of human right's liberal and "bourgeois" history.

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the encyclical. See also Moyn, 'Personalism, Community and the Origins of Human Rights'. 100. Moyn suggest the Personalist philosophy of Maritain and Mounier 'could have had left-wing implication, and to some extent did, prompting an evanescent "left Catholicism" that quickly sputtered' [footnote omitted].

<sup>195</sup> Atkins, 'Dorothy Day's Social Catholicism: The Formative French Influences', (105). The theologian Yves Congar described his experience at this time as his personal Good Friday [footnote omitted]. 46. See however, Joseph Cardinal Ratzinger, 'Introductory Article and Chapter 1: The Dignity of the Human Person', in Herbert Vorgrimler (ed.), *Commentaries on the Documents of Vatican II. Pastoral Constitution in the Modern World. Part 1: The Church and Man's Calling*. (V; London: Burns & Oats Ltd), 115-63. 156. When Ratzinger reflects on the Second Vatican Council's text on human dignity he recognised that Marxism had provoked a new sense of activism in the Catholic Church, which it had hereto neglected.

In justice it would of course, have to be admitted that in actual fact Christian hope has frequently tended to weaken the will to work at earthly tasks. Christian "contempt for the world" has resulted ultimately, in modern times, in the humanist impulse of Christianity having to be pursued in opposition to official Christianity [...] it should have been admitted that at bottom, after all, we owe it to the atheists' attack that we have become properly aware once more of our own duties.

<sup>196</sup> Horn, *Western European Liberation Theology. The First Wave (1924-1959)*. 90.

<sup>197</sup> Sigmund, 'The Catholic Tradition and Modern Democracy', (540).

<sup>198</sup> *Ibid.* 541.

<sup>199</sup> *Ibid.* 541-542.

In the late 19<sup>th</sup> century the Italian cleric Don Romolo Murri, who had begun to study Marxism, and observed the crushing impact of industrialisation on the working power, proposed ‘the two opposites in recent Italian politics, social radicalism and Catholicism, which has become a basis for a legal and honest national party that is also valid and vigorous’.<sup>200</sup> Saresella observes that ‘this alliance was especially favorable in Italy, since both had grievances against the Italian State and the liberal bourgeoisie’.<sup>201</sup> As early as 1905, despite their differences, it was possible to propose an agreement on a political programme, challenging official interpretations of an intractable and entrenched relationship between Catholicism and socialism.<sup>202</sup> Murri had seen that a democratic programme and a careful ‘distinction between historical materialism and dialectical materialism’ could express the social thought of both philosophies and respond to the problems of Italian modernisation.<sup>203</sup> Saresella shows how Murri’s thought was marginalised by the extremes on both sides with Socialist anti-clericalism and the Church’s conservative reaction to the perceived threat of Marxism.<sup>204</sup> Saresella further details various journals and periodicals that sprung up to express a “Christian socialism” with concern for rural poor labourers.<sup>205</sup> However, for a period after World War I such experiments were suppressed following the papal encyclical on modernism *Pascendi Dominici Gregis* (1907).<sup>206</sup> In Italy, with the rise

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<sup>200</sup> Daniela Saresella, 'Christianity and Socialism in Italy in the Early Twentieth Century', *Church History*, 84/03 (2015), 585-607. 591 [footnote omitted].

<sup>201</sup> Ibid. 591.

<sup>202</sup> Ibid. 592. While slower to react to authoritarian Nazism the two popes Pius XI and Pius XII ‘consistently condemn communism’. See Hanson, *The Catholic Church in World Politics*. 45.

<sup>203</sup> Saresella, 'Christianity and Socialism in Italy in the Early Twentieth Century', (592).

<sup>204</sup> Ibid. 592. Saresella points out that Murri was inevitably censured by the Church in 1907 for his modernist thought, and later excommunicated in 1909 for standing for elections for the Radical Party (595).

<sup>205</sup> Ibid. 595-9.

<sup>206</sup> Ibid. 604. See Pope Pius X, 'Pascendi Dominici Gregis (on the Doctrine of the Modernists)', *Acta Sanctae Sedis*, 40 (593-650. §35. This encyclical addresses how modernist theology viewed Christianity as ‘the product of the progressive development’ of history, relativizing dogmatic, cultural, ecclesiastical forms in history but ‘never suspecting that their determination of the primitive germ is an *a priori* of agnostic and evolutionist philosophy, and that the formula of it has been gratuitously invented for the sake of buttressing their position’. The remedy was a return to Scholastic philosophy (§45-47) established by Pope Leo XIII, 'Encyclical Letter Aeterni Patris (on the Restoration of Christian Philosophy)', *ibid.* 12 (97-115.) However at Vatican II, '[T]he council enlarged the concepts of tradition and revelation, thus changing the Church’s understanding of human history as a source for theology and magisterium’. See Faggioli, *Vatican II: The Battle for Meaning*. Kindle Locations 556-557. Of course this move led to many internal church battles over the relationship between history and Christian revelation. See also Hanson, *The Catholic Church in World Politics*. 42-43. On the contrasting careers of modernisers in Catholicism, see Fanning, 'George Tyrell, Jacques Maritain and the Challenge of Modernity', (294), Maritain wrote, 'If I am anti-modern, it is certainly not out of personal inclination, but because the spirit of all modern things that have proceeded from the anti-Christian revolution compels me to be so' [footnote omitted].

of Mussolini, who used Church authority to defend order and tradition, these vacant interactions between socialism and Christians were all but dissolved.<sup>207</sup>

Alongside strands of “civil-society Catholicism” and the *Nouvelle Théologie* movement, that had sought to engage with the methodologies and ideologies of the modern world, leading figures in France like Maritain rejected ‘a dechristianised modern world and its project of a “true” modernity, [for] a new culture and civilisation of Christian inspiration’.<sup>208</sup> Maritain had ‘described Soviet anthropocentric humanism as “*la position athéiste pure*”, diametrically opposed to the Christian faith’.<sup>209</sup> The historian Michael Kelly also reveals that articles in the French Catholic journal *Esprit* ‘pioneered the pre-war Catholic discovery of the young Marx’ as ‘a spiritual protest against the dehumanising effects of the industrial revolution’.<sup>210</sup> From within this strand of French Catholic thought, Marx offered, in the words of Mounier, ‘a penetrating analysis of the alienation of Modern Man’.<sup>211</sup> Kelly suggests they attempted to turn Marx against the heirs of Marx, and even portray more recent Marxist-Leninist disciples as ‘a materialist, dogmatic “deviation” of the young Marx’s thought, and denounced Communist Russia as a tyranny unfaithful [...]’ to their earlier Marxist sources.<sup>212</sup> They further believed that Marxist thought, with the intuitions of alienation and dehumanisation, was “*prégnante de valeurs judéo-chrétiennes*”, and thereby needed to be saved from its heretical distortions.<sup>213</sup> However, their view that historical progress and community (as solidarity), might be grounds for a better engagement with Socialism and as a source of dialogue was lost with the advent of

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<sup>207</sup> Saresella, 'Christianity and Socialism in Italy in the Early Twentieth Century', (595-9. 604). Saresella also notes the academic cleric Buonaiuti lost his 'teaching post and then dismissed in 1931 as a consequence of his determination not to swear loyalty to the Fascist régime, Buonaiuti lived in poverty right up to his death in April 1946'.

<sup>208</sup> See Michael Kelly, 'Catholicism and the Left in Twentieth-Century France', in K. Chadwick (ed.), *Catholicism, Politics and Society in Twentieth-Century France* (Liverpool: Liverpool University Press). See also Moyn, *The Secret History of Constitutional Dignity*. 98. and Mettepenningen, *Nouvelle Théologie - New Theology: Inheritor of Modernism, Precursor of Vatican II*.

<sup>209</sup> Kelly, 'Catholicism and the Left in Twentieth-Century France'. 86.

<sup>210</sup> Ibid. 89. See also Philip E. Berryman, 'Latin American Liberation Theology', *Theological Studies*, 34/3 (357-95.375).

<sup>211</sup> Kelly, 'Catholicism and the Left in Twentieth-Century France'. 89.

<sup>212</sup> Ibid. 90. See alternatively N. Lenin, 'Socialism and Religion (Originally in *Novaya Zhizn*, No. 28)', *Lenin Collected Works* (Moscow: Progress Publishers, December 3, 1905 (1965)), 83-87.

<sup>213</sup> Kelly, 'Catholicism and the Left in Twentieth-Century France'. 90. “pregnant with judaeo-christian values”. See also Daniela Saresella, 'The Dialogue between Catholics and Communists in Italy During the 1960s', *Journal of the History of Ideas*, 75/3 (493-512.503). See also Hermann, 'Total Humanism: Utopian Pointers between Coexistence and Pluralism', (69). Hermann assesses the humanism of marxism and viewed as a “total” or closed notion.



World War II. During the Cold War a new political landscape would predominate the relationship between religion and socialist ideology.<sup>214</sup>

Although the Cold War dominated Catholic political thought, and Vatican policy of *Ostpolitik* shaped Western European Catholicism, efforts at dialogue with Marxism continued. The French Jesuit and Marxist scholar Pierre Bigo argued that Catholics 'needed to be liberated from the static conceptions of history which led them to believe that nothing would happen "between Jesus Christ's resurrection and his return at the end of time."' <sup>215</sup> Instead he proposed a non-materialistic Marxist humanism as a contribution to dialogue between Marxism and Christianity.<sup>216</sup> Bigo never neglected Marx's atheist, materialist and collectivist dimensions, but attempted to penetrate them in order to appreciate their positive aspects, and to specify Marxism's historical nature rather than its theoretical one. Bigo travelled to Chile to become part of Latin American Institute of Doctrine and Social Studies (Chile), and continued to develop this line of research in Latin America.<sup>217</sup> It was to this lineage that Liberation theology was thought to have taken inspiration, as members of the Jesuit institute began to give Marxist social and economic analysis priority in the curriculum.<sup>218</sup> The shift in priorities of the Institute led to a crisis with many staff forced to resign but it also highlighted the wave of new thought that had begun to question North American influence on the Chilean Catholic Church, and also to question the plight of the indigenous poor in Latin America.

Early articulations of liberation theology were voiced in a fragmentary way at first by those trained in traditional academic theology. The liberation theologian Jon Sobrino had recognised that in response to the needs of the poor, many mid-20<sup>th</sup>

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<sup>214</sup> Kelly, 'Catholicism and the Left in Twentieth-Century France'. 90.

<sup>215</sup> Saresella, 'The Dialogue between Catholics and Communists in Italy During the 1960s', (500 [footnote omitted]). See further Kelly, 'Catholicism and the Left in Twentieth-Century France'. Kelly points out that in France a minority of academics had sought to engage with Marxism rather than combat it (76). They were focused on the Church's social teaching and the renaissance of Catholic thought. Officially the Church had highlighted a concern about Socialism in the 19<sup>th</sup> century, see Pope Leo XIII, 'Encyclical Letter *Rerum Novarum*', (§19): '[...]the notion that class is naturally hostile to class, and that the wealthy and the working men are intended by nature to live in mutual conflict. So irrational and so false is this view that the direct contrary is the truth'. On the further challenge of Communism, see Pope Pius XI, 'Divini Redemptoris', AAS (1937)', (§ 3) 'This all too imminent danger, Venerable Brethren, as you have already surmised, is bolshevistic and atheistic Communism, which aims at upsetting the social order and at undermining the very foundations of Christian civilization'.

<sup>216</sup> Saresella, 'The Dialogue between Catholics and Communists in Italy During the 1960s', ( 500). See further Bigo, *Marxisme et humanisme* (Paris: Presses Universitaires De France, 1953).

<sup>217</sup> F. Beigel, *The Politics of Academic Autonomy in Latin America* (Ashgate Publishing Limited, 2013).

<sup>218</sup> See Berryman, 'Latin American Liberation Theology', (370). The ILADES crisis illustrates many aspects of the question and is one of the places of origin of liberation theology.

century theologians ‘had no idea of how to respond to this emergent reality’.<sup>219</sup> They were ‘stammering out [liberation theology’s] insights without much conceptual profundity. It was coming from distant, unknown places, and its future was uncertain’.<sup>220</sup> This new liberation theology had become a language to respond to social injustice from the ground up, and confront ‘so-called Enlightenment rationality and democratic freedom’ that had supported the status quo.<sup>221</sup> From within this visceral realism, liberation theology challenged more orthodox approaches in theology, which was preoccupied with questions belonging to the European academy (dedicated to responding to theories of evolution, Christian-Marxist dialogue, ecumenism and the consequences of Vatican II). While liberation theologians aspired to respond to the political and economic realities of the time it also led to liberation theology’s dismissal as “underdeveloped”.<sup>222</sup> Nevertheless, Sobrino argued that this approach began ‘not with concepts or sophisticated arguments, but with reality’, particularly the “inbreaking of the poor” to unsettle contemporary theology.<sup>223</sup> Sobrino described liberation theology as follows:

[...] liberation theology’s fundamental assertion and conviction is that the poor—and God in the poor— have *broken into* history. The believer, the human person, has to respond to this reality, indeed correspond to it. We are charged to liberate the poor and, in Ellacuría’s phrase, to take them down from their cross.<sup>224</sup>

The liberation theologian Gutiérrez turned to Bartolomé de las Casas, who had defended indigenous Americans against Spanish territorial claims, as an example of

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<sup>219</sup> Jon Sobrino, 'Karl Rahner and Liberation Theology', *The Way*, 43/4 (2004), 53-66. 55. Sobrino includes theologians such as Jacques Maritain, Henri de Lubac and Hans Urs von Balthasar who sought to respond to liberation theology. See also Burleigh, *Sacred Causes. Religion and Politics from the European Dictators to Al Qaeda*. 370-372.

<sup>220</sup> Sobrino, 'Karl Rahner and Liberation Theology', (55).

<sup>221</sup> Ibid. 55.

<sup>222</sup> Ibid. 56.

<sup>223</sup> Ibid. 58. Sobrino attributes these developments to similar strands of thought identified in the the theology of Karl Rahner.

<sup>224</sup> Ibid. 58 [emphasis included]. See also some of this important works, Jon Sobrino, *The True Church and the Poor* (New York: Orbis Books). Jon Sobrino, *No Salvation Outside the Poor: Prophetic-Utopian Essays* (Orbis Books). Sobrino, *Christology at the Crossroads: A Latin American View*. See also Gustavo Gutiérrez, 'The Task and Content of Liberation Theology ', in Christopher Rowland (ed.), *The Cambridge Companion to Liberation Theology* (Cambridge: Cambridge University Press), 19-39. 20 Liberation theology has been described by Gutiérrez as follows:

The participation of Christians in the process of liberation in Latin America that some time ago we used to call the “most important fact” (hecho mayor) in the life of the Church is nothing other than an expression of the immense historical process that we know as *the “irruption” of the poor* [emphasis added].

an invocation of natural rights of the poor and disposed.<sup>225</sup> The growth of popular movements, including ‘an intensification of the struggle for justice [...] in a greater awareness of personal dignity and in the rights of old indigenous peoples’ and Gutiérrez includes, ‘unfruitful outbreaks of guerrilla violence’, all developed in response to authoritarian and repressive regimes in Latin America, shaped by the Cold War.<sup>226</sup> Gutiérrez continues, ‘we are on the threshold of something challenging and hopeful, which has meant that the poor begin to see themselves as subjects of their own history, as being able to take their destiny in their hands’.<sup>227</sup> Liberation theology became an interpretive tool used to understand the clash of ideologies during the Cold War, as well as a response to the anti-colonial struggles that also demanded the need for social and economic development, emphasised by the 1955 Asian-African Conference Bandung, Indonesia.<sup>228</sup> If the Bandung Conference had highlighted the peripheral status of many colonial states to international law, the Latin America liberation movement among lay Catholics and clergy had begun to view those emancipation struggles through a theological

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<sup>225</sup> Gutiérrez completed an extensive study of Las Casas, see Gustavo Gutiérrez, *Las Casas: In Search of the Poor of Jesus Christ* (New York: Maryknoll, 1995). 314-315. Las Casas described the native Indians as ‘oppressed with the most difficult labour and tyrannies beyond belief, take upon their gaunt shoulders, against divine and natural law, most heavy yoke and unbearable burden’ [endnote omitted]. During the 16<sup>th</sup> century Las Casas was charged to be ‘toiling for the liberation of the Indians and trying to take them away from the Spaniards; they considered him a destroyer of so many grandes that used the Indians and the enemy of their nation’ [endnote omitted]. On the potential of Gutiérrez work on Las Casas, see Christian Smith, ‘Las Casas as Theological Counteroffensive: An Interpretation of Gustavo Gutiérrez’s *Las Casas: In Search of the Poor of Jesus Christ*’, *Journal for the Scientific Study of Religion*, 41/1 (03// 2002), 69-73.

<sup>226</sup> Gutiérrez, ‘The Task and Content of Liberation Theology’. 21.

<sup>227</sup> *Ibid.* 21.

<sup>228</sup> *Ibid.* 21. See Bourke, *Decolonisation and the Evolution of International Human Rights*. 13-34. The years between the Bandung Conference of 1955 and the Algiers Conference of 1973 are said to have bookended the demise of the colonial era. See also R. Burke, ‘“The Compelling Dialogue of Freedom”: Human Rights at the Bandung Conference’, *Human Rights Quarterly*, (2006). See also Mazower, *Governing the World: The History of an Idea* 258. The Conference ‘marked the Third World’s arrival as a political force and the moment when the world’s fundamental division shifted from West-East to North-South’. The Conference in 1955 occurred in ‘the year that the General Assembly voted to make the right to national self-determination the centerpiece of any future human rights covenant’. See Moyn, *The Last Utopia: Human Rights in History*. 108. Moyn proposes that the anti-colonial struggle was not a human rights movement but simply ‘the struggle for collective self-government’. See also Mutua and Anghie, ‘What Is Twail?’, (37) Mutua suggests, ‘TWAIL opposes the complicity of Third World states in the international legal and economic order with a view to silencing the voices of the powerless’. However, as has been noted TWAIL is very weak in responding to the movements like Liberation Theology, or indeed to religion in general within its framework. However, see John Reynolds’s ‘Peripheral Parallels? Europe’s Edges and the World of Bandung’, available at academia.edu website. Reynolds notes religious actors attended the Bandung Conference. Reynolds suggests the following summary of the goals of the Bandung Conference (notably without human rights):

a call 1) for a peaceful coexistence among the nations, 2) for liberation of the world from the hegemony of any superpower, from colonialism, from imperialism, from any kind of domination of one country by another, and 3) for building solidarity towards the poor, the colonised, the exploited, the weak and those being weakened by the world order of the day and for their emancipation [footnote omitted].

lens.<sup>229</sup> On the periphery of imperialism and colonialism the call came for liberation by the poor, and in Latin America where they were mainly Catholic, it revealed a willingness to use the new development of lay Catholic action as a vehicle in their struggle for justice.<sup>230</sup>

In the same year the Bandung Conference took place 'one of the most important events in the history of Latin American Catholicism' occurred.<sup>231</sup> At the meeting of the General Conference of the Latin American Episcopacy in Rio de Janeiro (CELAM) in 1955, which took place during the Eucharistic Congress, and reviewed the mission of Catholicism, it began a process of re-evaluation of the Catholic role in colonisation, and the imprint of the Cold War on Latin America.<sup>232</sup> The CELAM Conferences became the focal point for articulating values indigenous to the experience of Latin American Catholicism, and was 'a novel type of meeting, unprecedented in Church history', in one sense because its response was on a continental level.<sup>233</sup> The formative and evocative phrase "the preferential option for the poor" became the watchword for opposition by Latin American theologians, advocating for a Church that might return to the more radical concerns of the disadvantaged and marginalised. Gustavo Gutiérrez developed the phrase between the second General Meeting of CELAM at Medellín in 1968 and CELAM's third General Meeting at Puebla in 1979.<sup>234</sup> In the view of the theologian Marie-

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<sup>229</sup> See Glendon, 'The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea', (68-70) and see also Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration*. 24-38. Gendon and Morsink respectively, point to the human rights tradition that evolved from Catholic social thought and natural rights, which had developed in Latin American countries, and contributed to the development of the UDHR. On the influence of the American Declaration of the Rights and Duties of Man (1948) [the Bogotá Declaration] on the UDHR, see Moyn, *The Last Utopia: Human Rights in History*. 66. See Papini, 'The Debate About the Principles of the Declaration of 1948: Questions of Yesterday and Questions of Today'. 3. See also Claudia Dangond Gibsone, 'The Influence of the Declaration of Bogotá on the Universal Declaration of Human Rights', *ibid.*, 77-89.

<sup>230</sup> See Kelly, 'Catholicism and the Left in Twentieth-Century France'. 163-164. Kelly notes that the new synthesis between Marxism and Catholicism was inspired by 'both the old missionary and new Third Worldist currents within French Catholicism, giving an explicit social dimension to the former and a theological foundation to the latter [footnote omitted]. See also Elizabeth A. Foster, "'Theologies of Colonization': The Catholic Church and the Future of the French Empire in the 1950s', *The Journal of Modern History*, 87/2 (281-315).

<sup>231</sup> Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 403.

<sup>232</sup> Peter Hebblethwaite, 'Liberation Theology and the Roman Catholic Church', in Christopher Rowland (ed.), *The Cambridge Companion to Liberation Theology* (Cambridge: Cambridge University Press), 209-28. 209. An apostolic letter was sent by Pius XII to the Conference Secretary. See Pope Pius XII, 'Apostolic Letter Ad Ecclesiam Christi', *Acta Apostolicae Sedis*, 47 (29th June, 539-44.). The letter addressed the shortage of clergy and the challenges of new ideologies. The website for General Conference of the Latin American Episcopacy <[www.celam.org](http://www.celam.org)>

<sup>233</sup> Hebblethwaite, 'Liberation Theology and the Roman Catholic Church'. 210. Berryman, 'Latin American Liberation Theology', (357-395).

<sup>234</sup> J. Milburn Thompson, 'Book Reviews: The Preferential Option for the Poor in Catholic Social Thought', *Cistercian Studies Quarterly*, 41/2 (384) See also Alan Riding Special to the New York Times, 'Catholic Bishops in Latin America Wage Bitter Struggle over Church's Leftist Trend. Church Identified with Wealthy Preparatory

Dominique Chenu the “preferential option for the poor” offered a new direction to the church as ‘both part of the “new birth” of theology and theologians in the developed world, and as the catalyst for the emergence of a “new paradigm”’.<sup>235</sup>

The force of this new paradigm was taken up during the drafting sessions of the Second Vatican Council with a concern to address the needs of the poor, and was highlighted by the creation of a Working Group, called the Church of the Poor Group.<sup>236</sup> In assessing the issue of the Church and the poor they acknowledged ‘that the Church ought to be willing to set herself against the State if it were needed to do so, and if the hitherto accepted relationship of prestige the Church sought with the State became forfeitable’.<sup>237</sup> The openness to these ideas, drawn from the activism of clergy and lay Catholics both in Europe and Latin America, could only have taken root with the encouragement of Pope Paul VI (Montini), who had a life-long friendship with Maritain.<sup>238</sup> In a new way, Paul VI’s papal encyclicals emphasised the option for the poor ideal, combined with an emphasis on integral humanism (a concept developed by Maritain), and linked that humanism to the right to development of peripheral nations.<sup>239</sup> It represented a period in the history

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Document Causes Upwar Dissension in the Church Attacks on Clergy 'Social Doctrine' Revived 'the Infinite Suffering of Our People'.', *New York Times* (1923-Current file), Apr 06 1978 p. 1.

<sup>235</sup> Twomey, *The "Preferential Option for the Poor" in Catholic Social Thought from John XXIII to John Paul II*. 20 [footnote omitted]. See also 2.4.5. See also Jorge González, 'Reading Christian Human Rights in Latin America', *Critical Legal Thinking. Law and the Political* (Online edn., Critical Legal Thinking. Law and the Political; Online/Oxford: Counterpress, 2016).

<sup>236</sup> For the history of the working group see, Alberigo and Komonchak, *History of Vatican II*. 382-386. See also Rohan Curnow, 'Stirrings of the Preferential Option for the Poor at Vatican II: The Work of the 'Group of the Church of the Poor'', *Australasian Catholic Record*, 89/4 (2012), 420-32. 429.

<sup>237</sup> Curnow, 'Stirrings of the Preferential Option for the Poor at Vatican II: The Work of the 'Group of the Church of the Poor'', (429).

<sup>238</sup> See S.J. Allan Figueroa Deck, 'Commentary on Populorum Progressio (on the Development of Peoples)', in Kenneth R. Himes and Lisa Soble Cahill (eds.), *Modern Catholic Social Teaching: Commentaries and Interpretations* (Washington, D.C.: Georgetown University Press), 292-314. 298.

<sup>239</sup> *Ibid.* 298. On linking development to a focus on the human person, and human solidarity, see Pope Paul VI, 'Populorum Progressio, AAS 59 (1967)', (§1ff) On linking liberation with fundamental human rights, see Pope Paul VI, 'Evangelii Nuntiandi, AAS 68 (1976)', (§1ff) §35-39. See also the influential statement by World Synod of Catholic Bishops 'Justitia in Mundo (justice in the World)', 30<sup>th</sup> November, 1971. The statement was deeply influenced by Bishops from poorer regions of the world. For example:

§ 9. Unless combated and overcome by social and political action, the influence of the new industrial and technological order favours the concentration of wealth, power and decision-making in the hands of a small public or private controlling group. Economic injustice and lack of social participation keep people from attaining their basic human and civil rights.

§ 15. The right to development must be seen as a dynamic interpenetration of all those fundamental human rights upon which the aspirations of individuals and nations are based.

§ 24. Justice is also being violated by forms of oppression, both old and new, springing from restriction of the rights of individuals.

§ 36. [...] the Church has the right, indeed the duty, to proclaim justice on the social, national and international level, and to denounce instances of injustice, when the fundamental rights of people and their very salvation demand it.

of the Catholic Church when the optimism and openness to the world seemed temporarily to coalesce.

Although, liberation theologians had an ambivalent relationship with human rights ideas, they began to take on a new force for vocalising opposition to Latin American governments, and to advocate for the rights of the poor and dispossessed.<sup>240</sup> Human rights had gained modest approval during the period of the Second Vatican Council but had 'garnered only minimal attention in the emerging theology of liberation that was to transform the Latin American Catholic Church in these times'.<sup>241</sup> Like many Southern hemisphere human rights advocates, Ković clarifies liberation theologians promoted social and economic rights before civil and political rights.<sup>242</sup> By late 1970's they had described human rights as "running out of steam" and viewing human rights as an "ideological trap" for those in the developing world.<sup>243</sup> They judged the effectiveness of human rights ideas by the practical impact it had on the lives of the poor, and their struggle for liberation, which in their view meant the impact of human rights ideas had been non-existent. As Liberation theologians embraced Marxist conceptual concepts (class struggle, alienation, ideology, praxis, revolution), they had also viewed human rights with a similarly critical Marxist perspective.<sup>244</sup> In Marxist thought,

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<sup>240</sup> See Cavanaugh, *Torture and Eucharist: Theology, Politics, and the Body of Christ*. See also Cleary, *Mobilizing for Human Rights in Latin America*. Cleary points to the centrality of Bartolomé de las Casas for articulating a Catholic human rights tradition in Latin America. See also Christine Ković, *Mayan Voices for Human Rights. Displaced Catholics in Highland Chiapas* (Austin: University of Texas Press). Ković goes into greater detail about the grassroots movement for indigenous rights in the highland of Chiapas, Mexico. There liberation theology and human rights ideas led to a change with the Catholic Church. Ković notes that 'liberation theologians used the term "the rights of the poor" rather than human rights to emphasise the relevance of social and economic rights (101). See also Kristin Norget, 'The Politics of Liberation: The Popular Church, Indigenous Theology, and Grassroots Mobilization in Oaxaca, Mexico', *Latin American Perspectives*, 24/5 (96-127).

<sup>241</sup> M. Engler, 'toward the 'Rights of the Poor'human Rights in Liberation Theology', *Journal of Religious Ethics*, 28/2 (339-65. 339).

<sup>242</sup> Ković, *Mayan Voices for Human Rights. Displaced Catholics in Highland Chiapas*. 101. Importantly, see also the citation Ković uses from Leonardo Boff and Clodovis Boff, *Introducing Liberation Theology* (Maryknoll, New York: Orbis Books). 61:

The struggle for promotion of human dignity and defence of threatened rights must begin with the rights of the poor [...] first must come *basic* rights, the right to life and to the means of sustaining rights (food, work, basic health care, housing, literacy); then come the other human rights: freedom of expression, of conscience, of movement, and of religion [emphasis included].

<sup>243</sup> Engler, 'toward the 'Rights of the Poor'human Rights in Liberation Theology', ( 239) [footnote omitted]. For a rebuttal of this view of human rights as a trap because of its emphasis on radical individualism, see Paul E. Sigmund, *Liberation Theology at the Crossroads* (Oxford: Oxford University Press, 1990). 190-191. Sigmund argues, that 'contemporary liberalism is not nearly as individualistic as liberation theologians believe'. On property rights, Sigmund argued liberalism 'recognised the right of the majority to limit private property by taxation for common purposes and legal procedures such as eminent domain' (192); property is not the absolute right in liberalism imagined by Liberation theologians.

<sup>244</sup> Engler, 'toward the 'Rights of the Poor'human Rights in Liberation Theology', (342. See Gutiérrez, *A Theology of Liberation: History Politics, and Salvation*. 66. Gutiérrez deemed it important to clarify their used of the term Socialist:

human rights were the product of 'a particularly set of alienating economic arrangements' and 'were considered to conceal the particular interests of the bourgeoisie and to expose the limits of this class's liberal revolution'.<sup>245</sup> Economic and social rights would be unnecessary after Marxist expectations had been fulfilled, with an end to private property, and control of the economic means of production.<sup>246</sup>

Engler observes liberation theologians sought to unmask human rights, particularly its claim to universalisality, and the ideological basis that reflected the societies who formed them.<sup>247</sup> The focus of human rights on first-generation rights problematically existed without mechanisms of enforcement for the rights central to the needs of the poor and exploited, economic and social rights. Those "inviolable" first generation rights had been identified with the concerns of the elite societies, which protected personal liberties and entitlements from clashes with others or with the state but also maintained the status quo and kept the poor and oppressed in poverty, and without their basic welfare being addressed (shelter, food, education, social security etc.).<sup>248</sup> The language of the universality of human rights was interpreted as protecting those who benefited from the rights that were enforced judicially through human rights mechanisms, while excluding the rights of those who could not access justice to vindicate their claims, especially the claims of the poor in Latin America, and those of the nations in the Southern hemisphere.<sup>249</sup> An important insight of liberation theology was to recognise the existence of structural injustice that kept the demands of the poor from rising to judicial protection but instead allowed civil and political human rights to support an 'orderly politico-economic system in which such an event would be an aberration'.<sup>250</sup>

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Old prejudices, inevitable ideological elements, and also the ambivalence of the *socialism* require the use of cautious language and careful distinctions [...] We refer to the progressive radicalisation of the debate concerning private property. The subordination of private property to the social good has been stressed often [...] We must hence *opt for social ownership of the means of production* [italics included].

<sup>245</sup> Engler, 'toward the 'Rights of the Poor'human Rights in Liberation Theology', (342).

<sup>246</sup> Charles Villa-Vicencio, 'Liberation and Reconstruction', in Christopher Rowland (ed.), *The Cambridge Companion to Liberation Theology* (Cambridge: Cambridge University Press), 183-206. 186-189. Villa-Vicencio reviews liberation theologians relationship to Marxism, and notes they 'it would be claiming too much to say that any prominent Latin American liberation theologian showed an unequivocal dogmatic commitment to Marxian-based socialism'.

<sup>247</sup> Engler, 'toward the 'Rights of the Poor'human Rights in Liberation Theology', (342-346).

<sup>248</sup> Ibid. 345.

<sup>249</sup> José Míguez Bonino, 'Whose Human Rights?', *International Review of Mission*, 66/263 (1977), 220-24.

<sup>250</sup> Engler, 'toward the 'Rights of the Poor'human Rights in Liberation Theology', (346). See Gutiérrez, *A Theology of Liberation: History Politics, and Salvation*. 67. Gutiérrez had proposed a number of elements to identifying structural injustice, including prophetic denunciation, conscientisation, practical solidarity with the

Civil and political rights did become a means of criticising the state, where the state was dominated by authoritarian regimes but to some this was utilised as an argument too late. William Cavanaugh is unapologetic in his criticism of the failure of Latin American Catholicism to effectively challenge the political authoritarianism adopted by states there.<sup>251</sup> Cavanaugh details the criminal activity of the Pinochet regime, including mass disappearances and torture, and the complicity of the Catholic Church in supporting and being manipulated by it.<sup>252</sup> In a piercing critique of the new political thought the Catholic Church embraced during the early to mid-20<sup>th</sup> century, he wrote:

In a well-intentioned effort to extricate itself from coercive politics, the church had embraced “social Catholicism”, an attempt to confine the church’s activities to a putative “social” sphere which vacating the “political” sphere. This attempt to stake a position as the “soul” of civil society amounted to *handing over of bodies to the state*.<sup>253</sup>

The Church had surrendered the right to resistance by following the plan broadly sketched by Maritain and the European promoters of democracy and human rights, giving the state autonomy from political resistance or direct political interference. Because the Church had accepted a level of autonomy and not sought to directly intervene (politically) there was no successful form of opposition to the state by civil society, enabling the state’s to pursue the policies of state security.<sup>254</sup> Cavanaugh goes further by suggesting that clear spheres of autonomy between the Church and state only further centralised the power of the state, including expecting religious acquiescence, and the manipulation of the means of critique by civil society, including via human rights.<sup>255</sup> The Church’s *handing over of bodies to*

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poor, a transformation of the inadequate structures of the church, and the lifestyle of the clergy (68-71). On structural injustice Gutiérrez wrote:

[...] existing structures block popular participation and marginalise the great majorities, depriving them of channels for expression of their demands. Consequently, the Church feels compelled to address itself directly to the oppressed – instead of appealing to the oppressors – calling on them to assume control of their own destiny, committing itself to support their demands, giving them an opportunity to express these demands, and even articulating them itself [footnote omitted].

<sup>251</sup> See Cavanaugh, *Torture and Eucharist : Theology, Politics, and the Body of Christ*. 151-156. Cavanaugh shows how deeply influential the thought of Maritain was in Latin America, including his ideas about a “new Christendom” and Christian democracy. See also Hanson, *The Catholic Church in World Politics*. 71-74. On the early success of Christian democracy, see Pollard, *The Papacy in the Age of Totalitarianism, 1914-1958*. 400-402.

<sup>252</sup> Cavanaugh, *Torture and Eucharist : Theology, Politics, and the Body of Christ*. 21-71. For an understanding of Liberation theology in the context of El Salvador and Nicaragua in the 1970’s and 1980’s, and the murder of Archbishop Oscar Romero, see Sigmund, *Liberation Theology at the Crossroads*. 108-133.

<sup>253</sup> Cavanaugh, *Torture and Eucharist : Theology, Politics, and the Body of Christ*. 2 [italics added].

<sup>254</sup> Ibid. 2-4. See also Engler, 'toward the 'Rights of the Poor'human Rights in Liberation Theology', (350).

<sup>255</sup> Cavanaugh, *Torture and Eucharist : Theology, Politics, and the Body of Christ*. 5-11.



*the state* did not alone include individuals to torture and disappearances, but also whole communities as bodies without means of direct resistance to the state.

The theory of indirect power, developed by Maritain, which sees lay Catholic participation in politics as a form of power, had been taken up by the Latin American Church.<sup>256</sup> This implied doing away with the political theory of the “old Christendom”, an organic unity between church and state but led to the subjugation of the church ‘by creating a sphere of purely temporal power which is by definition property of the state alone’.<sup>257</sup> In Cavanaugh’s version, the New Christendom ‘is a lay and secular civilisation’, which will infuse Christian values into the modern state, without being identified directly or exclusively with any one state culture or any one political apparatus.<sup>258</sup> The ethos is one of “prudence” or “practicality” to make a ‘secular democratic faith’ realisable in the modern liberal state.<sup>259</sup> Therefore, ‘Christian social action provides the individual Christian with principles and orientations, which can be applied in different ways to the social plane’.<sup>260</sup> However, for Cavanaugh, when this thesis is put to the test in Latin America, particularly during the Chilean dictatorship of Pinochet, where gross human rights violations occurred regularly, including torture, it led to Cavanaugh to diagnose human rights and the methodology of a “New Christendom” as a failure.<sup>261</sup> Human rights were the product of pragmatic agreement and Maritain’s ‘secular democratic faith’ had intended to baptise the language of rights but in the context of authoritarian regimes who regularly had recourse to state security, the underlying common humanism that valued human beings, was reduced ‘to practical meaninglessness’.<sup>262</sup> Maritain’s expectation that the state would protect of human rights, and as guarantor of individual rights, had not predicted the rise of

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<sup>256</sup> See for example Gutiérrez, *A Theology of Liberation: History Politics, and Salvation*. 39-46. Gutiérrez rejects the older organic model of church state relationship as having ‘become dysfunctional and engendering pastoral realities out of touch with reality’ (35). He praises Maritain’s thesis, which had replaced an earlier idea of Catholic liberalism. Following Maritain, Gutiérrez say the end of “ecclesiastical narcissism” and ‘to build a “profane Christendom”, in other words, a society inspired by Christian principles’. Gutiérrez wrote:

The task of constructing the human city would consist above all in the search for a society based upon justice, respect for the rights of others, and fellowship.

Gutiérrez had highlighted some theological problems with the idea of “indirect power”: “The acceptance of the New Christendom position entails of course a rejection of previous approaches [...] the model which distinguishes faith and temporal realities, Church and the world, leads to the perception of two missions [...]”.

<sup>257</sup> See Cavanaugh, *Torture and Eucharist : Theology, Politics, and the Body of Christ*. 161.

<sup>258</sup> See *ibid.* 167.

<sup>259</sup> *Ibid.* 168.

<sup>260</sup> *Ibid.* 172.

<sup>261</sup> *Ibid.* 177.

<sup>262</sup> *Ibid.* 178. The idea that the security state could both support human rights and restrain human rights through the use of emergency powers (i.e. states of emergency etc.), undermined the prospect that Catholic’s in civil society could participate in democratic and human rights based reforms of government. They became powerless and in limbo.

a large state bureaucratic apparatus, which would in the name of state security, violate those very rights.<sup>263</sup>

Despite the criticism of Cavanaugh, the Catholic Church had not yet properly mobilised the use of its indirect power in Latin America, to challenge and impede the state from overstepping the limits of its temporal sovereignty.<sup>264</sup> It was more often than not complacent in its position of privilege as a result of colonialism in Latin America, and had initially operated to secure obedience to state authority.<sup>265</sup> The idea that human rights and democratic accountability could be demanded and articulated by Catholics as means of influencing and making concrete the needs of justice had to be realised, a point made necessary, and palpably so, during the existential threat of authoritarian dictatorships in Latin America during the 1970's.<sup>266</sup> However slowly this realisation dawned, human rights and the need for democratisation became part of Latin American Catholicism. Moyn observed that in Latin America, 'it was Catholics who were crucial partners in the move to human rights'.<sup>267</sup> The example of NGO's, and later United Nations Commissions on human rights, 'became a matter of great importance for groups struggling in Latin America [...]'.<sup>268</sup> Just like the Catholic hierarchy, liberation theologians too began to accept the language of human rights, initially from a pragmatic and pejorative position but later because 'many of those reckoning with the daily struggle of the poor saw appeals to human rights as a potentially effective way of saving lives'.<sup>269</sup> Huntington shows that a third-wave of democracy in Latin American countries followed the democratic successes in Europe, proposing the 'third wave of the 1970's and 1980's was overwhelmingly a Catholic wave'.<sup>270</sup> This democratic

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<sup>263</sup> Ibid.190-195.

<sup>264</sup> This point is developed earlier in this thesis. See Chamedes, 'The Vatican and the Making of the Atlantic Order, 1920-1960', (266-277). See generally, Moyn, *Christian Human Rights*. See also Casanova, 'Global Catholicism and the Politics of Civil Society', (Casanova argues the Catholic Church abandoned 'the private sphere assigned to religion and enters the undifferentiated public sphere of civil society to take part in ongoing processes of normative contestation [...]').

<sup>265</sup> Daniel H. Levine, 'Assessing the Impacts of Liberation Theology in Latin America', *The Review of Politics*, 50/2 (241-63). See also Jeffrey Klaiber, 'The Catholic Church, Moral Education and Citizenship in Latin America', *Journal of Moral Education*, 38/4 (2009), 407-20. On the religious make up of Latin America see Martin, *Religion and Power: No Logos without Mythos*. Martin notes interestingly while assessing the future of Latin America, 'the world was not predestined to reproduce the laicist secularism of France or the 'mere secularity' of Sweden (23).

<sup>266</sup> See Moyn, *The Last Utopia: Human Rights in History*. 139 – 412.

<sup>267</sup> Ibid. 143.

<sup>268</sup> Engler, 'toward the 'Rights of the Poor'human Rights in Liberation Theology', (351).

<sup>269</sup> Ibid. 351 [footnote omitted]. Engler also notes that European theologians such as Jürgen Moltmann among others 'charged those who were unwilling to do so with throwing the baby of human rights out with the bathwater of imperialism'. The example of the leading German Metz was also influential as he worked to come to terms with the legacy of post-War Germany.

<sup>270</sup> Huntington, *The Third Wave: Democratization in the Late Twentieth Century*. 13. See also Jodok Troy, 'Catholic Waves' of Democratization? Roman Catholicism and Its Potential for Democratization',

movement developed reflexively much like the European counterpart, in response to a greater evil of a repressive authoritarian state. So once again, at a time of existential crisis for the Church the perfect “thesis” of a confessional state was the enemy of a good well-ordered democracy.

In Latin America the Catholic Church became embroiled in politics on two fronts, in resistance to authoritarian governments, and also in resistance to an ought right affiliation with Marxism.<sup>271</sup> The vehicle between both paths was democratisation and the pursuit of advancing the human rights project, much as it had been in Europe.<sup>272</sup> However, it remains unclear why partnership with the US government was not as clear cut as it was in post-war Europe. It can only be suggested the protest of Liberation theology, and their response to the searing poverty of their fellow citizens, turned the Latin American Church against a new post-colonial power of the United States. Initially, when dictatorships took control of many Latin American states, the Catholic Church in reaction to a communist threat, ‘perceived the military a welcome alternative to Marxism and may well have cooperated with the national security state’.<sup>273</sup> Authoritarian states had masquerade as confessional Christian societies with support from right wing clergy. The Catholic bishops had adopted the “polish solution” ‘whereby it would refrain from publicly criticizing the state in order to maintain some degree of influence on the state’ [...].<sup>274</sup> However, Dipboye observes that in the period of CELAM Conference at Medellin in 1969, the internal conflict over this view was starkly apparent.<sup>275</sup>

If the Church did not publicly dissociate itself from the growing coercive violence the self- proclaimed Christian states were levelling against an increasing number of their own people, the Church would be giving its implicit if not explicit blessing to the inhumanities of the state.

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*Democratization*, 16/6 (2009/12/01, 1093-114. See also Casanova, 'Global Catholicism and the Politics of Civil Society', (1

<sup>271</sup> Carolyn Cook Dipboye, 'The Roman Catholic Church and the Political Struggle for Human Rights in Latin America, 1968–1980', *Journal of Church and State*, 24/2 (1982). See also Juan De Onis, 'In Latin America, a Church Divided. The Social Gospel Is Preached, and the Preachers Are Shot At.', *New York Times (1923-Current file)*, July 24 1977, sec. E18 p. 1. De Onis accounts, 'At one extreme are revolutionary priests and laymen who visualise Christ as a guerrilla leader. At the other, ultra-traditionalist bishops and church going security officers believe the church is infiltrated by “Marxists”'.

<sup>272</sup> Dipboye, 'The Roman Catholic Church and the Political Struggle for Human Rights in Latin America, 1968–1980', (500.

<sup>273</sup> *Ibid.* 500.

<sup>274</sup> *Ibid.* 500.

<sup>275</sup> *Ibid.* 500. See also George Vecsey Special to the New York Times, 'Accord on Violence Eludes Latin America Bishops', *New York Times (1923-Current file)*, Feb 11 1979 p. 13.

Dipboye details the gradual transformation of Latin American Catholicism, as it became more articulate in the language of human rights against the many abuses of the security state. The Brazilian National Bishop's Conference would publish in 1973 its own proclamation titled '*A Universal Declaration of Human Rights*', which detailed guiding human rights principles.<sup>276</sup> Human rights became associated with the preaching of the gospel, or carrying the same Christian values that transcended politics, and in some pastoral letters human rights 'concretised the good news of salvation' or human rights became 'a moral judgement that upsurges from the Christian faith'.<sup>277</sup> In this appropriation of human rights within a Christian perspective, revolutionary violence and Marxism was rejected, when 'the focus of their concern after 1975 increasingly became violence perpetrated by the state'.<sup>278</sup> Only in Nicaragua in 1979 did revolutionary violence receive justification, when the Bishops' Conference issued a pastoral letter to legitimise the revolution, stating in the language of human rights, '[...] in the case of evident and prolonged tyranny that gravely threatens the fundamental rights of the person and the common good of the country'.<sup>279</sup> The Latin American appropriation of human rights had taken place against the backdrop of the security state, and the rejection by the authoritarian state of democratisation. If in European context, (Christian) democracy was prioritised before a more complete articulation of human rights could evolve, then in Latin America the reverse was the case. In Latin America human rights ideas became a language of protest and revolution against an over-

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<sup>276</sup> Dipboye, 'The Roman Catholic Church and the Political Struggle for Human Rights in Latin America, 1968–1980', (501. Dipboye records the following source: Brazilian National Bishops Conference, *A Universal Declaration of Human Rights*, LADOC 4 (October 1973): 1-7. The Latin American Catholic hierarchies published several other documents recalling the human rights of citizens, and the United States Catholic Conference, located in Washington corresponded with Inter-American Commission on Human Rights in 1973 to appeal the sentence of Father Francois Jentel to ten years in prison (May 28, 1973) on charges of subversion, viewed as "patently false".

<sup>277</sup> Ibid. 513. Dipboye records the following sources: Nicaraguan Bishops Conference, '*Renewing Christian Hope*' in Latin American Bishops Discuss Human Rights, The LADOC 'Keyhole' Series, no. 15 (Washington, D.C.: Latin America Documentation, 1977) 36, and also Salvadoran Episcopal Conference, '*The Situation Today*' in Latin American Bishops Discuss Human Rights, The LADOC 'Keyhole' Series, no. 15 (Washington, D.C.: Latin America Documentation, 1977) 57.

<sup>278</sup> Ibid. 515. On the preparation for the CELAM Conference at Puebla in 1979, see Henry Tanner Special to the New York Times, 'Pope to Take Part in Mexico Meeting. Decision Seen as Show of Support for Human-Rights Activists in Church in Latin America Concerned About Open Conflict Position on Human Rights.', *New York Times (1923-Current file)*, Dec 23 1978 p. 5.

<sup>279</sup> Dipboye, 'The Roman Catholic Church and the Political Struggle for Human Rights in Latin America, 1968–1980', (515. Alan Riding, 'Latin Church in Siege', *New York Times (1923-Current file)*, May 06 1979, sec. Magazine p. 236. See Sigmund, *Liberation Theology at the Crossroads*. 123-124. The quote of the pastoral letter comes from Pope Paul VI, '*Populorum Progressio*, AAS 59 (1967)', (§31).

Everyone knows, however, that revolutionary uprisings—*except where there is manifest, longstanding tyranny* which would do great damage to fundamental personal rights and dangerous harm to the common good of the country—engender new injustices, introduce new inequities and bring new disasters. The evil situation that exists, and it surely is evil, may not be dealt with in such a way that an even worse situation results [emphasis added].

reaching authoritarian state, fermented by a quixotic mix of Catholicism and Marxism.

In a much more radical way, liberation theologians rejected the international power brokering that occurred during the Cold War, and had instead responded to 'the discovery of institutionalized violence and the dimensions of oppression'.<sup>280</sup> Berryman identified a process of radicalisation that entered into conflict with the local power structures, and further afield as 'gradually it becomes more evident that the oppressive system [was] national and international'.<sup>281</sup> The language of the liberation had been seen as 'foreign to Christians'.<sup>282</sup> Nevertheless, the Catholic Church transformed from once being considered 'a static authoritarian institution tied to the dominant classes and incapable of promoting democratic values' to one that 'often served as the sole voice of opposition to dictatorship'.<sup>283</sup> Gill examined the uneven reality of that proposition, revealing that grass-root lay Catholic activism, often in response to proselytization by evangelical Christians, prepared the Catholic Church to respond to dictatorships, outside of traditional institutional and elite structures established in the 19<sup>th</sup> century.<sup>284</sup> In another way, Berryman points to the theology of Medellín CELAM Conference, which 'implicitly leads to an acceptance of the reality of class struggle, at least in terms of international mechanism of oppression [...]'.<sup>285</sup> The direct participation in politics was an outcome of this process, with clergy and lay Catholics taking an active lead in radical politics and 'to break away from the European conception of the Church-world relationship', and challenge the status quo that accepted the oppression of the poor, both politically and economically.<sup>286</sup> In reality, 'there soon dawned the

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<sup>280</sup> Berryman, 'Latin American Liberation Theology', (364). Dipboye notes 'the bishops addressed themselves to at least five principal issues: the nature of the person, the purpose of the state, the mission of the Church, the role of violence, and the relationship of Marxism and the Church'.

<sup>281</sup> Ibid. 364. Berryman provides an account of the various repressions under authoritarian regimes in Latin America.

<sup>282</sup> Ibid. 366. See also Gutiérrez, *A Theology of Liberation: History Politics, and Salvation*. 135. Gutiérrez turns to Thomas More's Utopia:

[...] because today there is emerging a profound aspiration for liberation – or at least there is a clearer consciousness of it – the original meaning of the expression is gaining currency. Utopian thought is taking on, in line with the initial intention, its quality of being subversive to and a driving force of history.

<sup>283</sup> A. J. Gill, 'Rendering Unto Caesar? Religious Competition and Catholic Political Strategy in Latin America, 1962-79', *American Journal of Political Science*, (1994). 403.

<sup>284</sup> Ibid. 415-416. Gill further proposes that even if the perception of Catholicism is to stress paternalism and strict obedience to authority of the state, that may not be intrinsic but 'a function of religious monopoly', which is resolved with the presence of pluralism and religious competition, an environment encouraged by democracy rather than dictatorships.

<sup>285</sup> Berryman, 'Latin American Liberation Theology', (367). Some of the factors of the Medellín Conference included a recognition of institutional violence, and repressive violence against the oppressed, the right to resistance, and active non-violence (367-368).

<sup>286</sup> Ibid. 369).

realisation that in theology and pastoral reflection the countries of the “periphery” were importing from the (European) “centre” just as in all other spheres of culture’.<sup>287</sup>

Liberation theologians came a radical conclusion, that not alone was the political structures of democracy and human rights implicated in the economic structures that kept the poor oppressed but also the theory of political Catholicism (and ecclesiology – the theory of the Church) developed in Europe was similarly and unjustly structured. Church structures would also need to be challenged as well as the ideological theory of the political form imported from European political thought.<sup>288</sup> As has been noted, the presumption of universality of ideas formed by Western powers were challenged, and for example Leonardo Boff takes up the issues of the centralising authority of the Church, the treatment of women, the rights to participation, information and opinion and debate, and the stiflingly use of canon laws, were all addressed.<sup>289</sup> If the liberal paradigm of human rights and democratisation was enculturated in the Latin American context, then for Liberation theologians the key tenet of a “preferential option for the poor” would guide their approach and analysis to all Northern hemisphere ideas.<sup>290</sup>

The impetus of liberation theology gave rise to a whole new way of looking at Catholicism for future generations, most notably through feminist theologians who advanced their theology often through the same idiom.<sup>291</sup> Liberation theology has

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<sup>287</sup> Ibid. 377.

<sup>288</sup> See Sobrino, *The True Church and the Poor*. 244. To act unjustly is to do violence to the masses; it is to persecute them, to deprive them of their basic human rights. See also Kirwan Sj, 'Liberation Theology and Catholic Social Teaching', (246-258. Leonardo Boff, *Church: Charism and Power*, trans. John W. Diercksmeier (New York: Crossroads). 32-46.

<sup>289</sup> Leonardo Boff, *Church: Charism and Power*. 32-46. See also Dulles, *Models of the Church*, Robert Imbelli, 'Model of the Church', *Commonweal*, 136/1 (01/16), 6-9. and *ibid.* 8). Dulles took up the effort to reconcile the charismatic and prophetic message of liberation theology with the an understanding of the institutional structures of the Catholic Church. See Imbelli,

Dulles was steadfast in his fidelity to Lumen gentium's insistence that the church of Christ consists of two inseparable dimensions: the charismatic and the institutional. To speak of the “institutional church” as though there were some other, purely spiritual church preserved in Platonic perfection would be fantasy. Still, Dulles held with unwavering insistence that the institutional elements of the church were for the sake and at the service of the charismatic [...]

<sup>290</sup> Engler, 'toward the 'Rights of the Poor' human Rights in Liberation Theology', (352). Engler further explains the theological context of the debate on the relevance of human rights to liberation theology, where human rights are critiqued when it sustains the status quo of economic and social injustice, for example:

[...] liberation theologians condemned as idolatrous those systems that held private property or the laws of the market to be sacred and inviolable. These systems, they argued, represented the false god of consumer capitalism, and their worshippers were sinful.

<sup>291</sup> Grey, 'Feminist Theology: A Critical Theology of Liberation'. and Ruether, 'The Development of Feminist Theology: Becoming Increasingly Global and Interfaith', (185-189) See also the very useful work, Beattie, *New Catholic Feminism: Theology and Theory*. For a general history see Donal Dorr, 'Themes and Theologies in Catholic Social Teaching over Fifty Years', *New Blackfriars*, 93/1044 (137-54.) Critical perspectives are for example, Gudorf, 'Encountering the Other: The Modern Papacy on Women'. and Rosemary Radford Ruether,

been viewed as both a revolutionary (a “theology of violence”) and highly conservative movement in equal measure.<sup>292</sup> It rejected the liberal idea that religion ought to be confined to the private sphere, and believed that the quasi-Marxist orthopraxis it encouraged would bring about the re-Christianisation of society.<sup>293</sup> Yet its Marxist overtones of economic liberation initially led its leaders into a direct confrontation with the curia of the Catholic Church, and a subject of interest for the US Central Intelligence Agency.<sup>294</sup> In the 1970’s and 1980’s the Congregation for the Doctrine of the Faith had under Cardinal Ratzinger regularly scrutinised and censored many Liberation Theology works out of concern for the Marxist influences, which it believed clouded the Christian message and sundered it to a materialistic world view.<sup>295</sup> The text of the Fifth Conference of the Latin American Episcopal Conference (CELAM 2007), brought again to the fore the principle of the preferential option for the poor.<sup>296</sup> It reiterated the statements made by Pope Benedict, stating more affirmatively ‘the preferential option for the poor is implicit in the Christological faith in the God who became poor for us, so as to enrich us with his poverty (cf. 2 Cor 8:9)’.<sup>297</sup>

The meeting of minds at CELAM in 2007 reflects the long and sometimes confrontational journey Catholicism makes to achieve a new insight into the nature of the Church both theologically and in the social and political sphere. The development of liberation theology mirrored the longstanding confrontation between Catholicism and Marxism, and in this case fought in the heart of

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'Women, Reproductive Rights and the Catholic Church', *Feminist Theology*, 16/2 (January 1, 2008, 184-93. See also Lisa Sowle Cahill, 'Theological Ethics, the Churches, and Global Politics', *Journal of Religious Ethics*, 35/3 (377-99).

<sup>292</sup> Berryman, 'Latin American Liberation Theology', ( 377.)

<sup>293</sup> Burleigh, *Sacred Causes. Religion and Politics from the European Dictators to Al Qaeda*. 3 71. See Ković, *Mayan Voices for Human Rights. Displaced Catholics in Highland Chiapas*. 102.

<sup>294</sup> Burleigh, *Sacred Causes. Religion and Politics from the European Dictators to Al Qaeda*. 371. See also see Essig and Moore, 'Us–Holy See Diplomacy: The Establishment of Formal Relations, 1984', (753).

<sup>295</sup> Twomey, *The "Preferential Option for the Poor" in Catholic Social Thought from John XXIII to John Paul II*. 213-214. Twomey notes that Pope John Paul II ‘afford Ratzinger a wide berth to impose his agenda’. In a Preliminary Note written by Ratzinger had proposed that the ‘phenomena of liberation theology [is] a fundamental threat to the Faith of the Church’ [footnote omitted]. Following this both Gutiérrez and Leonardo Boff faced doctrinal probes regarding their orthodoxy, and challenged them for “ecclesiastical relativism” and their “Marxist affinities”. For a summary of the history, especially the role of Pope John Paul II, see Hebblethwaite, 'Liberation Theology and the Roman Catholic Church'. 212-224. See also Hanson, *The Catholic Church in World Politics*. 59-61, 70-74. See further Sigmund, *Liberation Theology at the Crossroads*. 156-175.

<sup>296</sup> Consejo Episcopal Latinoamericano, 'V Conferencia General Del Episcopado Latinoamericano Y Del Caribe', (Aparacida/ Colombia: Consejo Episcopal Latinoamericano, 2007), 1-136.

<sup>297</sup> Ibid. § 8.3 [405]. See Pope Benedict XVI, 'Apostolic Journey of His Holiness Benedict XVI to Brazil on the Occasion of the Fifth General Conference of the Bishops of Latin America and the Caribbean', *Fifth General Conference Of The Bishops Of Latin America And The Caribbean* (Conference Hall, Shrine Of Aparecida: Vatican, 2007). § 3.

Catholicism for its most valued ideas.<sup>298</sup> Indeed, it is not difficult to observe that that reconciliation is more evident in the content of more recent encyclicals of Pope Francis, and has led to a form of theological reconciliation with the thought found in liberation theology.<sup>299</sup> The very use of the phrase ‘*a preferential option for the poorest*’ is in itself a milestone, considering how previous papal encyclicals were at pains to rephrase and domesticate the radical nature of the language of liberation. This particular insight will serve as the litmus tests for future theology in the Church as it addresses economic and social rights, because it ‘arises from a concrete, lived encounter with the injustice inflicted upon “the poor”—an encounter that serves as the very foundation of liberation theology’.<sup>300</sup> Similarly, liberation theology’s rejection of the universalistic morality of human rights where it is remote from the concrete participation in the struggle of the poor around the world for liberation remains a strong critique of the usefulness of rights language.<sup>301</sup>

## 5.5 Conclusion

Catholicism had presented itself as a proponent of human rights ideas in different contexts, and for many Catholics to support the nation state and international law, a form of “secular democratic faith” was still a possibility in the latter half of the 20<sup>th</sup> century. Catholic social thought offered a vocabulary that could give expression to the Christian understanding of justice and peace, and Maritain’s

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<sup>298</sup> Michael Novak, 'The Case against Liberation Theology', *New York Times (1923-Current file)*, Oct 21 1984, sec. Magazine p. 10.

<sup>299</sup> Pope Francis, 'Encyclical Letter *Laudato Si'* (on Care for Our Common Home)', *Acta Apostolicae Sedis*, (24th May. § 158.

In the present condition of global society, where injustices abound and growing numbers of people are deprived of basic human rights and considered expendable, the principle of the common good immediately becomes, logically and inevitably, a summons to solidarity and *a preferential option for the poorest* of our brothers and sisters. This option entails recognizing the implications of the universal destination of the world’s goods, but, as I mentioned in the Apostolic Exhortation *Evangelii Gaudium*, [123] it demands before all else an appreciation of *the immense dignity of the poor* in the light of our deepest convictions as believers. We need only look around us to see that, today, this option is in fact an ethical imperative essential for effectively attaining the common good [emphasis added].

See also Sigmund, *Liberation Theology at the Crossroads*. 171-172. Sigmund notes the how influential Pope John Paul II’s encyclicals on social justice influenced Gutierrez who moderated his thought on capitalism and workers’ rights to reflect a Catholic rather than outright Marxist approach. See Pope John Paul II, 'Laborem Exercens, AAS 73 (1981)', ( § 14. This encyclical accepted the existence of a conflict between capital and labour, and argued that the church had always taught the priority of labour over capital. See also Pope John Paul II, 'Sollicitudo Rei Socialis, AAS 80 (1988)', ( § 15 and 22. A human right of “economic initiative” was recognised, which must be balanced so as not to ‘accentuating the situation of wealth for some and poverty for the rest’ (§ 16). Included in its “guidelines” for development and justice the encyclical emphasised ‘the option or love of preference for the poor’ (§ 42). For a less conciliatory tone towards Marxism, see Pope Benedict XVI, 'Encyclical Letter *Deus Caritas Est*', *ibid.*96 (25 Dec, 2005), 217–79. § 27.

<sup>300</sup> Engler, 'toward the 'Rights of the Poor'human Rights in Liberation Theology', (355).

<sup>301</sup> *Ibid.* 360-261.



thesis of a “New Christendom” offered a platform for the political and civil sphere. There was a definite attempt by Catholic jurists and theologians to translate and mediate Catholic political theology into a realistic political project for the 20<sup>th</sup> century.<sup>302</sup> They had recognised the secular nature of the emerging nation state, and regarded it as a product of modernity, which furthermore culturally fashioned its political and legal arrangements. Rather than taking the seductive option of an anti-modern position, these Catholics shaped a practical political philosophy of “Civil Society” Catholicism that participated in the formation of European and Latin American political life.<sup>303</sup>

Whereas the Irish Constitution had been an opportunity to develop a new strand of Catholic political thought, and give voice to an early articulation of Christian democracy, the period of the Cold War inhibited the emergence of more clearly defined “civil society” Catholicism.<sup>304</sup> Maritain’s thesis of a secular democratic faith informed how Christian democrats could participate in a pluralistic democracy, to build a common Europe but not to replace this project with a temporal Christian utopia. However, Christian democratic parties became entrenched in Cold War politics, neo-liberal market economics, and conservative policymaking. Arguably, by the late 20<sup>th</sup> century the time had passed for Catholicism to be the guardian of civil society and its articulation of human rights ideas. The broader international human rights tradition reasserted and replaced a nascent Christian human rights movement returning it to a periphery. While not quite breaking with Christianity, secular, liberal human rights drew from different sources and continue on a path of greater liberalisation and secularisation.<sup>305</sup> Similarly, it could be said that the tensions within Catholicism about the role of the Catholic Church in the state was

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<sup>302</sup> Scott and Cavanaugh, *The Blackwell Companion to Political Theology*. Kindle Location 79-80. Scott and Cavanaugh sketch the unique contribution of political theology from that of secular discourses in politics, stating, ‘[w]hat distinguishes all political theology from other types of theology or political discourse is the explicit attempt to relate discourse about God to the organization of bodies in space and time’. See also Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy, Expanded Edition*. Kindle Locations 3141-3142:

Political theology understood as a political theory or a political doctrine that claims to be founded on the faith in divine revelation now becomes a concept of self-identification of the locus and self-characterization.

<sup>303</sup> See Bielefeldt, 'Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Counter-criticism', (65-75). Bielefeldt argues there is a clear distinction between liberal self-criticism and the arguments of those like Schmitt who is clearly anti-liberal and aligned with authoritarianism. Importantly, Bielefeldt says that Schmitt’s ‘polemic does not fit into the tradition of liberal self-criticism’. Bielefeldt argues:

Schmitt systematically undermines the liberal principle of the rule of law. He wants it to be replaced by an authoritarian version of democracy, a democracy based upon the “substantial homogeneity” of the collective unity of the people rather than one resting upon the principles of a participatory republicanism.

<sup>304</sup> Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe', (565).

<sup>305</sup> For an outline of that liberal human rights tradition see for instance Griffin, *On Human Rights*.

never completely resolved, with some proposing a return to anti-modern ideas. By contrast, in Latin America, Gutiérrez and liberation theology provided Catholicism with a critique of structural injustices “from below”, which were viewed as implicit in the Western articulation of liberal democracy and human rights. Liberation theologians challenged the claim of the universality of human rights and viewed human rights as placing civil and political rights over social and economic justice regarded the human rights project as an apology for neo-liberal economics.<sup>306</sup>

Like Maritain many had believed human rights law, democracy and international co-operation could be a sphere shaped by Christian political, social and economic ideals. Those ideals were a common lexicon in the early and mid-20<sup>th</sup> century, found among those who gravitated towards political engagement after the Second World War. It was an imperfect project measured against contemporary expectations of a political sphere without confessional politics or conservative ethics. However, that Christian democratic movement did grow out of an era of profound ideological struggle and reactionary politics and adapted to, rather than rejected, modernities greater projects. The building of democratic nation states, an international legal order with human rights protections, and a European project with the ambition of wider welfare protections is in many respects, their legacy. It was left to others to mature and reimagine, and even to rewrite those broader Cosmopolitan ambitions.

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<sup>306</sup> More recently Cardinal Marx from Germany has spoken of the need to update Catholic social thought, particularly around the question of workers rights. In his book ironically titled, *Das Kapital*, he argues for a global social economy. That theory was also proposed previously by John Paul II, in the encyclical *Centesimus Annus* who had suggested an updated communitarianism that sought a “third way” between Marxist collectivism and neo-liberal individualism and capitalism. Pope John Paul II, 'AAS 83 ', (§1 See also Robert L. Phillips, 'Communitarianism, the Vatican, and the New Global Order', *Ethics & International Affairs*, 5/1 (135-47).

## Conclusion

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The toast to conscience indeed must precede the toast to the Pope because without conscience there would not be a papacy. All power that the papacy has is power of conscience.<sup>1</sup>

Having evaluated the long trajectory and contested narrative of the relationship between Catholicism and human rights, does there remain the possibility for a broadly Catholic response to international law? The Catholic Church remains influential in shaping the processes of globalisation, offering competing ideas about the modern state, and international relations. Human rights ideals are problematic for the international community because it has become 'a place-holder for the languages of goodness and justice, solidarity and responsibility'. Christianity retains its own distinctiveness and contributes by way of an alternate critical approach to international law. That critical approach comes from a cosmopolitanism that is historically sceptical towards the state, and has been established in European culture as complementary to the use of critical reason. In the view of the Catholic Church, the ethical theory and development of the natural law is a contribution to international law, and its place is arrived at through dialogue about the nature of the relationship between faith and reason. Human rights exist not because they are a modern invention but because they are the practical realisation in law of a prolonged reflection on the just exercise of power.

### A. A "Resurgence" Of Religion?

It has been widely understood that there is now more general evidence for a "resurgence" of religion.<sup>2</sup> Yet the idea of a process of de-secularisation requires careful assessment because it possesses paradoxical and contradictory information.<sup>3</sup> For example, José Casanova has responded to the pessimistic notion

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<sup>1</sup> Ratzinger, 'Conscience and Truth'.

<sup>2</sup> Thomas, *The Global Resurgence of Religion and the Transformation of International Relations*. See also José Casanova, 'The Secular, Secularizations, Secularisms', in Craig J. Calhoun, Mark Juergensmeyer, and Jonathan VanAntwerpen (eds.), *Rethinking Secularism* (Kindle edn.; Oxford: Oxford University Press, 2011b), ix, 311 p. Casanova helpfully distinguishes between the secular, secularisations, and secularism in Secularisation refers, [...]*to actual or alleged empirical-historical patterns of transformation and differentiation of "the religious" (ecclesiastical institutions and churches) and "the secular" (state, economy, science, art, entertainment, health and welfare, etc.) institutional spheres from early-modern to contemporary societies.*

<sup>3</sup> Berger, *The Desecularization of the World : Resurgent Religion and World Politics*. Davie, *Europe - the Exceptional Case: Parameters of Faith in the Modern World*. Davie, 'Religion in 21st-Century Europe: Framing

of a clash of civilisations, which involves religions clash with secular democracies, by suggesting the application of Eisenstadt's theory of multiple modernities.<sup>4</sup> Casanova proposes this offers 'a more fruitful alternative conceptualization of processes of globalization than either theory of a secular cosmopolitan "world society" or of "the clash of civilizations"'.<sup>5</sup> He therefore argues that from this approach we can view various world religions as formative in shaping the processes of globalisation, with competing ideas about the modern state, and international relations. Under these settings, Casanova notes, 'world religions and their related civilizations become de-territorialized and are to be conceived no more as geopolitical territorial spaces but rather as interrelated communicative spaces within a single world'.<sup>6</sup> The Catholic Church is among those world religions that have been part of the process of globalisation and have been instrumental in participation in global affairs.<sup>7</sup> This role is worth considering when addressing the future of the human rights project as it strives to be accepted as normative framework for responding to injustice. Civil society actors and liminal actors on the international stage have continued to influence the shape of international law, and offered their contribution reaching back through international law's historical evolution.<sup>8</sup> Kantian cosmopolitan ethics have not alone informed the hope of international order to foster peaceful legal norms.<sup>9</sup> Religion will continue to have a complex relationship with international law, as it influences concepts and norms,

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the Debate', (279-293. Steve Bruce, 'Religious America, Secular Europe? A Theme and Variations', *Sociology of Religion*, 71/2 (June 20, 2010), 243-44.

<sup>4</sup> José Casanova, 'Cosmopolitanism, the Clash of Civilizations and Multiple Modernities', *Current Sociology*, 59/2 (March 1, 2011), 252-67. 253. Casanova has suggested the abandonment of the Euro-centric secularisation thesis because it is unrepresentative of the true descriptive presentation of the place of religion in the world today. Huntington Sp, 'The Clash of Civilizations?', *Foreign Affairs*, 72 (22. See further S. N. Eisenstadt, 'Multiple Modernities', *Daedalus*, 129/1 (2000), 1-29.

<sup>5</sup> Casanova, 'Cosmopolitanism, the Clash of Civilizations and Multiple Modernities', (253.

<sup>6</sup> Ibid. 253. Casanova remarks that it 'can be taken for granted that 'religion' is a modern category, constituted by the epistemic hegemony of 'the secular' and that the so-called 'world religions' are inventions of western secular Christian modernity'. See further Asad, *Formations of the Secular, Christianity, Islam, Modernity*. David Scott and Charles Hirschkind, *Powers of the Secular Modern : Talal Asad and His Interlocutors* (Cultural Memory in the Present; Stanford, Calif.: Stanford University Press, 2006) x, 355 p.

<sup>7</sup> Troy, 'Die Soft Power Des Heiligen Stuhls. Unsichtbare Legionen Zwischen Internationaler Gesellschaft Und Weltgesellschaft', (489-511. Troy suggests that the Catholic Church has transformed its presence on the global stage from an International Society to a global society. This position reflects the idea of Rahner who viewed Catholicism as moving through three stages of development which has resulted in Catholicism shifting from a European Church to a World Church. See Rahner, 'Towards a Fundamental Theological Interpretation of Vatican II', (716-727.

<sup>8</sup> Cecelia Lynch, 'Peace Movements, Civil Society and the Development of International Law', in Bardo Fassbender et al. (eds.), *The Oxford Handbook of the History of International Law* (Kindle edn.; Oxford: OUP Oxford, 2012). 198. Lynch proposes the narrative of international law and civil society is one of,

[...] taming sovereign States and reducing their ability to wage war, democratizing foreign policy, expanding free trade, but also challenging great-power imperialism. Kantian universalist, Whig-progressivist, critical-Marxist, and religious politics informed each other, and sometimes clashed [...].

<sup>9</sup> Ibid. 200.

relevant actors, and as a body of contestation for and against human rights.<sup>10</sup>

This thesis has focused on the transition of the Catholic Church to the modern era, and its contribution to the human rights project. It enquired into the early development of political thought up to the medieval period, engaging with natural law and the ordering of sovereignty and political power. It has examined the Church's evolution - from the period of the Reformation and Enlightenment - to its emergence as a political force in the 20<sup>th</sup> century. Catholic civil society actors materialized as if from nowhere but the long history of Catholicism and international law points to antecedent resources and practices that make their presence intelligible. As this thesis has detailed, the Catholic Church invested heavily in the project of human rights and the development of modern liberal democracies, seeing it as grounding basic Christian assumptions about the right ordering of the state.<sup>11</sup> Catholicism in the late 20<sup>th</sup> century has gradually engaged, even embraced, the democratic project and the consensus building mechanisms of international law.<sup>12</sup> In that process, it overcame a tendency in early Christian political thought to be removed from politics coupled with a post-Westphalian tendency to overwhelm the state or saturate it, to make it confessional.<sup>13</sup> In Catholic political thought, sovereignty had been held in abeyance through various strategies that acknowledged the exercise of another jurisdiction and sovereignty in the Church throughout the era of a unified Western Christendom.<sup>14</sup> As

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<sup>10</sup> Antje Von Ungern-Sternberg, 'Religion and Religious Intervention', *ibid.* 294.

<sup>11</sup> See for example Richard Rorty, Gianni Vattimo, and Santiago Zabala, *The Future of Religion* (New York: Columbia University Press) x, 91 p. 72. The philosopher Rorty proposed it might be 'just an historical accident that Christendom was where democracy was reinvented for the use of mass society, or it may be that this could only have happened within a Christian society'.

<sup>12</sup> See Cismas, *Religious Actors and International Law*. 161. Cismas has noted that 'the Holy See is credited with playing an important role in the emergence of modern international relations among sovereign states'. See also Chamedes, 'The Vatican and the Making of the Atlantic Order, 1920-1960', (1. Giuliana Chamedes has further argued that between World War I and the early 1950s, 'the Vatican shifted from the margins to the centre of European political and social affairs'.

<sup>13</sup> This was also a rejection of forms of identity based nationalism, that paralleled the rise of modern international law. See Koskenniemi, 'Expanding Histories of International Law', (107. Koskenniemi observes that international legal 'profession emerged in the late 19<sup>th</sup> century against sovereignty, associated with the expansive nationalism that was rising in Europe'.

<sup>14</sup> For instance see Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* 14. Dante had 'restated the medieval theory of man's need for two guides, temporal and spiritual' but denounced the temporal power of the Papacy. The medieval idea that all princes were equal required a further role for a sovereign with jurisdiction over all. The dispersed nature sovereignty as a basis for international law as understood by Catholicism has been influential. See Pope Pius XII, 'AAS 45 (1953)', (§II):

"Sovereignty" in the true sense means self-rule and exclusive competence concerning what has to be done and how it is to be done in regard to the affairs of a definite territory, always within the framework of international law, without however becoming dependent on the juridical system of any other state. Every state is immediately subject to international law. States which would lack this fullness of power, or whose independence of the power of any other state would not be guaranteed by international law, would not be sovereign. But no state could complain about a limitation of its sovereignty if it were denied the power of acting arbitrarily and without regard for other states.

sovereignty evolved over time, those limits were asserted in new ways, including addressing the modern state through intermediary and subsidiary institutions, including those in civil society. They became strategies that inherited the previous medieval functions from the Western European legal order, and therefore carried over ideas about the theory of a just war and transnational diplomatic contact among states. The Catholic Church had become peripheral to the concerns of the international legal ordering of emerging nation states, as they built on the exclusivity of sovereignty, established following the Westphalian treaties. In the World War II period, the establishment of the United Nations challenged the 19th century idea of a Concert of Europe, exercised in a Hobbesian balance of powers. Human rights became the prerogative, and more broadly, came under the stewardship of the emerging Christian democratic movement. Human dignity was projected as a principle of unity that co-ordinated a secular democratic faith in human rights and democracy. The Catholic Church presented itself as a vehicle for the human rights movement during the Cold War, both in Eastern Europe and Latin America. Catholicism in the 20<sup>th</sup> century negotiated a moderation of the democratic political project toward religious prerogatives and found accommodation in the idea of human rights, enabling Catholicism to move from the periphery of international law to its centre. The human rights project would protect conservative Catholic interests and values in the modern state and in the international order, and became a vehicle for its own social justice initiatives, including promoting distributive justice. The gradual transformation of Catholicism into a civil society and transnational movement in the 20<sup>th</sup> century, and especially following the Second Vatican Council, using diplomatic, Constitutional and rights based language was part of a hopeful trajectory that the Catholic Church had found through broad accommodation with philosophy belonging to the liberal and secular Enlightenment.<sup>15</sup>

However, if Catholicism had moved towards adapting to political realities of the 20<sup>th</sup> century, then the Catholic Church may have encountered entrenchment. Resistance came in contestations about the direction of the institutions that gave the modern state, and the international law of human rights, modern form. Late 20<sup>th</sup> century rejection of a religious based expression of human rights led to an erosion of the Christian utopia located in giving the modern project a foundation. José Casanova notes how modern cosmopolitanism evaluates that, '[...] religion either does not exist, or it is simply "invisible" [...] being an individualized and

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Sovereignty is not a divinization of the state, or omnipotence of the state in the Hegelian sense, or after the manner of absolute juridical positivism.

<sup>15</sup> Daniel Philpott, 'The Catholic Wave', *Journal of Democracy*, 15/2 (1).

privatized form of salvation or quest for meaning, that is irrelevant to the functioning of the primary institutions of modern society'.<sup>16</sup> Religion becomes another form of cultural identity that is viewed negatively as either 'irrelevant or reactive'.<sup>17</sup> David Kennedy writes, 'the law of international governance sees the sacred only at the margins, in the three horsemen of terrorism, fundamentalism and nationalism'.<sup>18</sup> If religion is seen as marginal, Elliott identifies how the human rights project became the venture that promised emancipation, and is seen to be 'often profoundly religious in nature' [...].<sup>19</sup> It is 'also deeply concerned with protecting individual sovereignty and bolstering the individual's capacity freely to enable not only their own deliverance but that of broader society as well'.<sup>20</sup> Nonetheless, as Martti Koskenniemi observes, appeals to international law, and to human rights, in the absence of other moral vocabularies, creates problems for the international community:

The vocabularies of moral pathos or religion find limited audiences. Institutional politics connotes party rule. For such reasons, I think, international law has suddenly become almost the only public vocabulary connected with a horizon of transcendence, the expression of a kind of secular faith.<sup>21</sup>

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<sup>16</sup> Casanova, 'Cosmopolitanism, the Clash of Civilizations and Multiple Modernities', (254. See also Martin, *Religion and Power: No Logos without Mythos* 12. David Martin writes how secularism influenced the perception of Catholicism observing,

[...] by the 1990s secularism had come to refer to a generalised indifference to transcendent perspectives and to the various ways in which the Church should be separated from the state, as well as the ways in which the Church had in fact been separated from the state. 'Ought' and 'is' travelled in tandem.

Conversely, see also Moyn, 'From Communist to Muslim: European Human Rights, the Cold War, and Religious Liberty', (63-86. Moyn has argued of the,

[...] history of Western hostility to secularism and communism. It is suggested that the principles of religious freedom developed in the mid-20th century and adopted in the European Convention were in fact intended to marginalize secularism, which was perceived to have strong associations with communism.

However, the issue may have been with a form of secularism associated with "total Humanism" as projected by certain forms of ideology which denies the place of religion in society, a trait most distinguishable in totalitarian regimes such as political communism and fascism. See Hermann, 'Total Humanism: Utopian Pointers between Coexistence and Pluralism', (361. See also Maria Hirszowicz 'The Marxist Approach to Human Rights' Round Table Meeting on Human Rights (Oxford, 11-19 November 1965). UNESCO/SS/HR/12 Paris, 29 October 1965.

<sup>17</sup> Casanova, 'Cosmopolitanism, the Clash of Civilizations and Multiple Modernities', (254.

<sup>18</sup> David Kennedy, 'Losing Faith in the Secular', in M.W. Janis and C.M. Evans (eds.), *Religion and International Law* (The Hague: Martinus Nijhoff), 309-21. 121.

<sup>19</sup> Elliott, 'Human Rights and the Triumph of the Individual in World Culture', (352). Further he notes, 'human rights are a rational-legal means of protecting and empowering the "sacred" in modern society' (353).

<sup>20</sup> *Ibid.* 352.

<sup>21</sup> Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law', (415. See also Kennedy, 'Losing Faith in the Secular'. 121. Kennedy observes, 'legal culture, in the old secular days, also knew a deeper truth about itself – that it had displaced religion, and would need to function as a religion – a civic religion, a secular faith'.

The contestations about the substantive ideas that shape the modern human rights project have led to conflict between religion and the implementation of international law. A criticism of the modern project is it's built upon the assumptions of values developed during the Enlightenment, which are often only understood as a far reaching critique and rejection of religion. For example, Bowring proposes, 'human rights are precisely those scandalous ruptures with pre-existing modes of social existence which have arisen in the context of great historical events, the French Revolution, the Russian Revolution and the decolonisation struggles of the 1960s'.<sup>22</sup> However, amidst those sometimes clashing perspectives that on some occasions turned against religion, the sociologist David Martin proposes one of the difficulties the Catholic Church faces today is 'an increasingly aggressive secularist agenda'.<sup>23</sup> Martin finds there is also an insistence that dialogue is conducted on the basis of a secularised understanding of the public sphere.<sup>24</sup> This is conducted only on terms acceptable to an understanding of political participation that might be termed "freedom from" religion.<sup>25</sup> In a curious reversion of fortunes, Martin sees 'an illiberal version of liberalism which seems to have adopted the old Catholic view that *error has no rights*, and disavows those cultural continuities of the European identity in which Christianity is profoundly implicated'.<sup>26</sup> If this is the case, this study has worked towards understanding Catholicism and human rights as complicating that narrative. The Catholic Church and Catholics on many continents have been intimately involved in elaborating the content of rights claims, and worked in partnership with civil society to take those ideas to domestic and international fora on behalf of the marginal and excluded.

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Astonishingly — and somewhat embarrassingly — philosophers such as Jürgen Habermas and Jacques Derrida or globalization critics such as Joseph Stiglitz appeal to international law. Not for this or that rule or institution but as a place-holder for the languages of goodness and justice, solidarity and responsibility. I think this is Kant's cosmopolitan project rightly understood: not an end-state or party programme but the methodological use of critical reason that measures today's state of affairs from the perspective of an ideal of universality that cannot itself be reformulated into an institution, a technique of rule, without destroying it.

<sup>22</sup> On a very different international law platform, a contemporary socialist view of emancipation from below, see the important contribution by Bowring, *The Degradation of the International Legal Order?: The Rehabilitation of Law and the Possibility of Politics*. 6. See also Moyn, *The Last Utopia: Human Rights in History*. 64. Similarly, Moyn suggest that it is to civil liberties that we turn when narrating to story of human rights between period that established the revolutionary rights bound in nature and the human rights bound in human dignity. However, due to the 20<sup>th</sup> century influence of religion on human rights they were therefore incapable of providing human rights with a substantial and useful foundation that might appeal to the later progressive and secular movements in the 1970's.

<sup>23</sup> Martin, *The Future of Christianity: Reflections on Violence and Democracy, Religion and Secularization*. 177.

<sup>24</sup> Ibid. 177.

<sup>25</sup> Malcolm Evans, 'Advancing Freedom of Religion or Belief: Agendas for Change', *Oxford Journal of Law and Religion*, 1/1 (April 1, 2012 2012), 5-14.

<sup>26</sup> Martin, *The Future of Christianity: Reflections on Violence and Democracy, Religion and Secularization*.177 [emphasis added].



## B. What has Athens to do with Jerusalem?

If the Catholic Church is peripheral to the modern human rights project, is there such thing as a Catholic theory of international law, and a modern contribution to the human rights project? The Catholic political theorist James Schall would argue that there is no specifically Catholic legal science, and no worked out political teaching similar to that found in the history of political thought.<sup>27</sup> Therefore, it may not be possible to locate a clear outline of an approach by Catholicism to international law. This may be plausibly based on one approach by the early Christian theologian Tertullian who made the now infamous observation, 'What has Athens to do with Jerusalem?' A question he poses to defend the authority and superiority of Christian scripture over philosophy. He asked '[w]hence spring those "fables and endless genealogies", and "unprofitable questions", and "words which spread like a cancer?"'<sup>28</sup> Why should Christianity be concerned with the affairs of law or politics at any point in history? Is a search for a genealogy to human rights project in the Christian and Catholic tradition worth undertaking? The papal encyclical *Fides et Ratio* reaffirmed the idea that Catholicism has no particular affinity to any one political programme or philosophy.<sup>29</sup> The unfolding of sacred history rather than temporal affairs is the concern of religion. Nevertheless, this does not appear to suggest an anti-intellectual orientation but rather that Catholic Christianity is directed by a religious perspective on political and legal projects, leading to a particular moral and critical realism about creating legal or political utopias.<sup>30</sup>

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<sup>27</sup> Schall, *Roman Catholic Political Philosophy*. 160.

<sup>28</sup> See Tertullian *De praescriptione haereticorum* (On the prescription of heretics), Chapter 7 [available online <[http://www.tertullian.org/articles/betty\\_prae/betty\\_prae.htm](http://www.tertullian.org/articles/betty_prae/betty_prae.htm)>].

What indeed has Athens to do with Jerusalem? What concord is there between the Academy and the Church? What between heretics and Christians? Our instruction comes from "the porch of Solomon," who had himself taught that "the Lord should be sought in simplicity of heart." Away with all attempts to produce a mottled Christianity of Stoic, Platonic, and dialectic composition! We want no curious disputation after possessing Christ Jesus, no inquisition after enjoying the gospel! With our faith, we desire no further belief.

See also Hubertus R. Drobner, *The Fathers of the Church. A Comprehensive Introduction*, trans. Siegfried S. Schatzmann (Massachusetts: Hendrickson Pub., 2007). 153. It is worth noting that Tertullian's radical rejection of the political life of the state included his later rejection of the Catholic Church for the Montanist sect because of its more rigorist approach.

<sup>29</sup> Schall, *Roman Catholic Political Philosophy*. 160. Pope John Paul II, 'Fides Et Ratio, AAS 91 (1999)', (§ 49 'The Church has no philosophy of her own nor does she canonize any one particular philosophy in preference to others'. Pope Pius XII, 'Encyclical Letter Humani Generis', *ibid.* 42 (12 August, 1950). See also Schall, 'Fides Et Ratio: Approaches to a Roman Catholic Political Philosophy', (1.

<sup>30</sup> On moral realism see Jeremy Waldron, 'Irrelevance of Moral Objectivity', in R.P. George (ed.), *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1994).

Christians had initially rejected identification with the state. Tertullian had proposed, *'Nobis...nec ulla magis res aliena quam publica. Unam omnium rem publicam agnoscimus, mundum'* [no-thing is more foreign to us than public matters. We acknowledge one public thing, the world].<sup>31</sup> Hamacher notes this strict distinction between the Church and the world was only previously located in the pre-Christian Greek philosophy of the Cynics. Diogenes of Sinope had recommended a preference towards the world rather than exclusively to a state, and to become instead a universal citizen of the cosmos (*kosmopolites*).<sup>32</sup> Early Christian utopianism was located in a cosmopolitan identity that transcended the world and preceded the state. That position might have been characterised as cynicism, and included accusations of atheism or at least a hatred of the world (*'odium generis humani'*).<sup>33</sup> Christianity 'presented itself as the all-encompassing anthropo-theological corporation, which could remain irrelevant to individual political forms so long as they did not threaten its internal universality'.<sup>34</sup>

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<sup>31</sup> Werner Hamacher and Ronald Mendoza-De Jesús, 'On the Right to Have Rights: Human Rights; Marx and Arendt', *CR: The New Centennial Review*, 14/2 (2014), 169-214. 169. See Tertullian's *Apology* (197 AD). On the Catholic theology of "the world" as a particularly formative source of debate at the Second Vatican Council see Tracey Rowland, 'The World in the Theology of Joseph Ratzinger/Benedict XVI', *Journal of Moral Theology*, 2/2 (109-32.), see also Heim, *Joseph Ratzinger : Life in the Church and Living Theology : Fundamentals of Ecclesiology with Reference to Lumen Gentium*. On international law and the instinct towards universalisms see also Martti Koskeniemi, 'International Law in Europe: Between Tradition and Renewal', *European Journal of International Law*, 16/1 (113-24. 116).

When Euripides has Medea slay her children or perhaps more relevantly when Dario Fo recounts the accidental death of an anarchist, particular stories, linked with very easily definable traditions emerge from their particularity towards the universal. Religion does this, too, and I often wonder to what extent international law is becoming a political theology in Europe – the concern that students, journalists, lawyers and non-lawyers nowadays have about the international legality of this or that action. Saint Paul's Christianity, as expressed in his Antiochian speeches, is offered not merely for the Jews, nor even for the Romans, but for all. Why could not tradition do this, especially tradition as narrative – perhaps a European narrative – like the stories that art and religion tell us in a way that is larger than the events recounted on their surface? (120).

<sup>32</sup> Hamacher and Mendoza-De Jesús, 'On the Right to Have Rights: Human Rights; Marx and Arendt', (169).

<sup>33</sup> See Blank, 'The Justice of God and the Humanisation of Man - the Problem of Human Rights in the New Testament', () Blank reviews biblical history for clues of rights language, identifying Hellenistic-Jewish ideas of humanity (*'philanthropia'*, in latin *'humanitas'*) traced to Philo of Alexandria, who used this language to defend the Jewish people against the abusive term *'misanthropia'* or embodying *'odium generis humani'* hatred of the human race. Later Tacitus used similar terms in an attack made against Christians (28). Further, Blank traces the concept of humanity in the life of Jesus and points to the Christian idea of justification, which surpasses the law and offers a new definition of justice 'and must surely validate inalienable human rights' (34). 'This same *ius divinum*, God's justice, law and righteousness is thus, in NT terms, not a characteristic quality of God; it is not the legal legitimation of a legal system of justice, which one perhaps claims to be divine, it is, on the contrary, dynamically understood, the *'iustitia Dei non qua ipse iustus est, sed qua nos iustos facti'* as the Council of Trent accurately formulates it' (Council of Trent Sessio VI. Decr. De iustificatione. Cap. 7) [translation: the righteousness of God, not that whereby He Himself is just, but that by which the righteous have been made].

<sup>34</sup> Hamacher and Mendoza-De Jesús, 'On the Right to Have Rights: Human Rights; Marx and Arendt', (169). See further Hans Urs Von Balthasar, *Theo-Logic, Vol. 3: The Spirit of Truth* (San Francisco: Ignatius Press, 2005). 275 – 276. Von Balthasar proposes Augustine's 'world-embracing synthesis has rightly been called the first Christian theology of history' [footnote omitted]. Von Balthasar notes the similarity with the Platonic *politeia*,

While early Christians rejected the state they had they retained an inherent natural value to the human person, which emphasised human dignity before the state's sovereign authority, while they proposed that religion had no specific doctrine on the state.<sup>35</sup> Christians were concerned by the broader concept of their relationship to the world and so, 'the human was not only a political being but additionally and, above all, a world-social being'.<sup>36</sup> All the same, human dignity could no longer be exclusively located in the ambit of the state or conferred by the state exclusively but within a social community of Christian believers. This position challenged the more ancient idea of the person as wholly part of the political community, and therefore defined by it. Aristotle's definition of the human as an essentially political animal—a *zoon politikon*, did not extend outside the *polis*. Therefore, the Christian ideal went beyond the acceptable norms and unsettled the political ordering of the state, which was in itself a political act.<sup>37</sup> Their claim to universality provided Christianity with an improbable sense of detachment from history but also a possible critical perspective upon which history might be viewed.<sup>38</sup>

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the universal *pax* of Roman Emperors Alexander and Augustus 'whose universal pax had a new religious character (Virgil)'. Similarly, Von Balthasar notes Jewish universalism 'in God's world-embracing covenant with Noah and in the covenant with Abraham, from whom they were to "bless" themselves'. In Christianity, it is the universal claims of Tertullian's *Epistle to Diognetus*, that combined with the Stoics 'in which the *civitas* and homeland was no longer the *oikumene* but the cosmos in its entirety [...]'. Von Balthasar also points to the following text Tertullian's *Epistle to Diognetus*:

They cannot be distinguished from the other men whose poleis they inhabit and whose language they speak [...], and yet manifest a strange and paradoxical behaviour in their *politaiiai*. They are at home everywhere, and every home is an exile to them. They obey the established laws, and yet, by their manner of life, they outstrip what is purely legal. They love all men and are persecuted by all. In short: what the soul is to the body, Christians are meant to be to the world. The Christians are held in the prison of the world, yet it is they who hold the world together.

<sup>35</sup> Hamacher and Mendoza-De Jesús, 'On the Right to Have Rights: Human Rights; Marx and Arendt', (169).

<sup>36</sup> Ibid. 169. See also Blank, 'The Justice of God and the Humanisation of Man - the Problem of Human Rights in the New Testament', () Blank reviews biblical history for clues of rights language, identifying Hellenistic-Jewish ideas of humanity ('*philanthropia*', in latin '*humanitas*') traced to Philo of Alexandria, who used this language to defend the Jewish people against the abusive term '*misanthropia*' or embodying '*odium generis humani*' hatred of the human race. Later Tacitus used similar terms in an attack made against Christians (28). Further, Blank traces the concept of humanity in the life of Jesus and points to the Christian idea of justification, which surpasses the law and offers a new definition of justice 'and must surely validate inalienable human rights' (34). 'This same *ius divinum*, God's justice, law and righteousness is thus, in NT terms, not a characteristic quality of God; it is not the legal legitimation of a legal system of justice, which one perhaps claims to be divine, it is, on the contrary, dynamically understood, the '*iustitia Dei non qua ipse iustus est, sed qua nos iustos facti*' as the Council of Trent accurately formulates it' (Council of Trent Sessio VI. Decr. De iustificatione. Cap. 7) [translation: the righteousness of God, not that whereby He Himself is just, but that by which the righteous have been made].

<sup>37</sup> Hamacher and Mendoza-De Jesús, 'On the Right to Have Rights: Human Rights; Marx and Arendt', (169).

<sup>38</sup> From the early Christianity's hostility to the world, often located in the dualism of Augustine between the world and the City of God, there was a gradual shift to participation. See Pope Pius XII, 'AAS 45 (1953),' (VI)

The Church must live among them and with them; she can never declare before anyone that she is "not interested." The mandate imposed upon her by her divine Founder renders it impossible for her to follow a policy of non-interference or "laissez-faire". She has the duty of teaching and educating

It could well be that Catholic political thought developed a distinctively critical approach towards the political form of the state and international order, and therefore to international law. In the first instance, that self-critical spirit was part of the Western legal culture influenced by the presence of Christianity because of its claim to universality.<sup>39</sup> The philosopher Leszek Kolakowski sees in the allocutions of Bartolomé de las Casas, to defend the native rights of the peoples of the Americas, as part of extensive efforts to offer a critique of European culture and 'to denounce the destructiveness of European expansionism'.<sup>40</sup> He observes it took the Reformation and the beginning of the religious wars 'to spread a generalised scepticism about Europe's pretensions to spiritual superiority'.<sup>41</sup> In Kolakowski's view,

[...] we might plausibly claim that Europe, at the same time as she acquired, perhaps largely thanks to the Turkish threat, a clear consciousness of her own cultural identity, also began to question the superiority of her values, thus setting in motion the process of endless self-criticism which was to become the source not only of her strength but of her various weaknesses and her vulnerability.<sup>42</sup>

Further Kolakowski suggests, this 'capacity to doubt herself, to abandon – albeit in the face of strong resistance – her self-assurance and self-satisfaction, lies at the heart of Europe's development as a spiritual force'.<sup>43</sup> The ensuing debate about the place of Christianity in European culture during the Enlightenment would preserve its achievements, even though they were 'both gripped by a sentiment of

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in all the inflexibility of truth and goodness, and with this absolute obligation she must remain and work among men and nations that in mental outlook are completely different from each other.

<sup>39</sup> See also Seyla Benhabib, 'Another Universalism: On the Unity and Diversity of Human Rights', *Proceedings and Addresses of the American Philosophical Association*, 81/2 (7-32. 8) Benhabib cautions against a 'form of Eurocentrism' located in the thought of the philosopher Husserl because he saw a duty 'to defend the legacy of philosophical rationalism since the Greeks, 'that was the particular vocation of the European project'. Benhabib moves to define the universalism which takes its foundation in the European mind and in the historical antecedents of Greek and Roman thought. Husserl's sought to recall the European project as 'the unity of spiritual life, activity, creation, with all its ends, interests, cares and endeavours, with its products of purposeful activity, institutions, organisations'. Benhabib's critique proposes that Husserl is an example of western essentialism because 'it takes the form of identifying *logos* – in his words [Husserl] - as the entelechy of humanity and to claim that other cultural life-forms, which certainly deserve respect for their achievements, are nevertheless inferior to the occidental life of *theoria* or the spirit of contemplation'.

<sup>40</sup> Leszek Kolakowski, *Modernity on Endless Trial* (London: University of Chicago Press). 18. See also Kennedy, 'Images of Religion in International Legal Theory'. 149. Kennedy writes, by 'repressing religion back to its origins, law first achieves a space to operate against the state – to inherit critique'. Yet 'by expelling religion, establishing in a continuing extra-legal field – as principle, and eventually ideology – law seems entwined with sovereignty, inseparable in its origins and practice from authoritative will' [...] 'for it is the state that split law from religion. Could there be a more familiar religious narrative?'

<sup>41</sup> Kolakowski, *Modernity on Endless Trial*. 18.

<sup>42</sup> Ibid. 18. See also Kennedy, 'Images of Religion in International Legal Theory'. 152.

<sup>43</sup> Kolakowski, *Modernity on Endless Trial*. 19.

helplessness and confusion [and] they are beginning to question their own history and their own significance'.<sup>44</sup> Kolakowski observes how European culture contributed to the nature of the debate about the relationship between ideas and the political form of governance by sustaining a self-critical spirit drawing from its spiritual and intellectual heritage. In this understanding we can locate Europe's cosmopolitan identity and its contribution to international law. Significantly, it a quality that is both internal and external to Western intellectual thought, as indicated by various critical voices throughout its history, which recognised the contribution of religions to European culture. The engagement by the Western legal tradition with the challenge of critical ideas did not end in the 19th century but is an ongoing process.

Nearing the end of World War II the philosopher Jean Paul Sartre wrote about anti-Semitism in Europe as a phenomenon that still existed.<sup>45</sup> The exclusions highlighted by Sartre are central to that process of self-admonishment and correction necessary for the possibility of a cosmopolitan and Catholic approach to international law.<sup>46</sup> Though Sartre's essay is flawed, one reading could be as an early critique of Christian democrats in the mid-20<sup>th</sup> century as they failed to fully take account of their justification of the European project of restoring post-War international order. In Michael Walzer's preface, he recounts how Sartre had observed French society had remained silent on the prospect of the returning Jews to France, or at least they 'were not pleased at the prospect'.<sup>47</sup> Sartre recognises that because of the evident discrimination, it underscored the need to further

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<sup>44</sup> Ibid. 30. Kolakowski observes,

[...] this double movement of self-questioning, is itself a continuation of the very principle upon which Europe was founded; in this sense, therefore, Europe has remained true to herself in her state of uncertainty and disarray. If she survives the pressure of the barbarians, it will not be because of any ultimate solution she might one day discover, but rather thanks to a clear consciousness that such solutions do not exist anywhere; and *that* is a Christian consciousness.

See also Casanova, 'The Secular, Secularizations, Secularisms'. Kindle Locations 1548-1550. Casanova makes an important point by suggesting,

[...] the historical process of secularization of European Latin Christendom is the one truly exceptional process, which is unlikely to be reproduced anywhere else in the world with a similar sequential arrangement and with the corresponding stadial consciousness.

<sup>45</sup> Jean-Paul Sartre, *Anti-Semite and Jew. An Exploration of the Etiology of Hate. Preface by Michael Walzer.*, trans. George J. Becker (New York: Schocken Books, [1944] 1995).

<sup>46</sup> Ibid. '[i]nstead of appreciating this spirit as an instrument of self-criticism originating spontaneously in modern society, the anti-Semite sees it as a permanent threat to national ties and French values'. See also Benhabib, 'Another Universalism: On the Unity and Diversity of Human Rights', ( 8). Benhabib locates a 'form of Eurocentrism' in the thought of the philosopher Husserl because he saw a duty 'to defend the legacy of philosophical rationalism since the Greeks ...'that was the particular vocation of the European project'.

<sup>47</sup> Sartre, *Anti-Semite and Jew. An Exploration of the Etiology of Hate. Preface by Michael Walzer.* v. Walzer recounts that there was little awareness of how many deported Jews would return to France.

See also Jean-Paul Sartre, 'Reflections on the Jewish Question, a Lecture', *October*, /87 (//Winter99 Winter99 1999), 32-46.

integrate Jews into French society, and with them African and Muslim people.<sup>48</sup> Therefore, even while Christian human rights ideas sprung from a response to World War and was developed by Christian democrats, Sartre had highlighted two significant sides to the problem: the risk of nationalistic anti-Semitism that threatened post-war Jewish integration, and also the presumptions associated with democracy and the universal rights of man.<sup>49</sup> Sartre had underscored the contribution of religious culture to the critical spirit of Western thought. Nevertheless, Sartre had emphasised '[i]nstead of appreciating this spirit as an instrument of self-criticism originating spontaneously in modern society, the anti-Semite sees it as a permanent threat to national ties and French values'.<sup>50</sup> In Sartre's reading he also detects a false universalism as endemic in post-War Europe because it treated some religious identity as problematic, and thereby Western culture failed to accept its critique.<sup>51</sup> The problem of a false universalism was because the democrat failed to accept the concrete identity of Jewish life, and 'so he fears and rejects any authentic Jewish response'.<sup>52</sup> Like the scientist, the democrat, 'fails to see the particular case; to him the individual is only an ensemble of universal traits. It follows that his defence of the Jew saves the latter as a man and annihilates him as Jew'.<sup>53</sup> Retrospectively, this critique, that marked post-war consciousness, remains valuable for contemporary concerns.

If a Catholic perspective of international law is to be located, then it must also recognise its own history that included a tendency to either support uncritical nationalism or a false universalism. Sartre had pointedly shown how a political and legal project must account for its own cultural blindspots, and remain open to internal critique and self-admonishment. The alternative is to recognise the existence of other religious and cultural traditions, who also provide a critical lens

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<sup>48</sup> Sartre, *Anti-Semite and Jew. An Exploration of the Etiology of Hate. Preface by Michael Walzer.* *ibid.* 60. Sartre recognised that even with Jewish emancipation in the 19<sup>th</sup> century, they were 'Frenchmen who have no part in the history of France. Their collective memory furnishes them only with obscure recollections of pogroms, of ghettos, of exoduses, of great monotonous sufferings, twenty centuries of repetition, not of evolution'. Sartre observes, 'the Jew remains the stranger, the intruder, the unassimilated at the very heart of our society. Everything is accessible to him and yet he possesses nothing; for, he is told what one possesses is not to be bought'.

<sup>49</sup> *Ibid.* 85. On nationalism Sartre had emphasised the contribution of religious culture, however, '[i]nstead of appreciating this spirit as an instrument of self-criticism originating spontaneously in modern society, the anti-Semite sees it as a permanent threat to national ties and French values'.

<sup>50</sup> *Ibid.* 85.

<sup>51</sup> *Ibid.* xii. Walzer also observes within 'Jewish leftism [...] its cast of mind, intellectual tenor, and modes of analysis resonated clearly with an older culture whose very existence Sartre denies'. Walzer writes, 'So the democrat's advocacy of assimilation for the Jews and classlessness for the workers, though no doubt well-intentioned, is also cruelly premature' (46). This is a more realistic account of the dynamic within religious traditions between sometimes inhospitable orthodoxy and those critical of orthodox traditions.

<sup>52</sup> *Ibid.* xii.

<sup>53</sup> *Ibid.* 40.

on contemporary values. Religion operates, as David Kennedy proposes, as a parallel system of values and interpretation of the international order.<sup>54</sup> Conversely, secular approaches to international law are similarly vulnerable to assumptions about religions place in the international and domestic sphere.<sup>55</sup> Religious voices, including those stemming from theologies that can be greatly secularised, are essential because they occasionally pierce the normative order.<sup>56</sup>

### **C. Without Justice – What Else Is the State but a Great Band of Robbers?**

The prospect of a Catholic approach to international law that is critical and reasonable also includes the outline of the natural law. Ratzinger had echoed the question asked by Augustine in the 4<sup>th</sup> century, “Without justice – what else is the state but a great band of robbers?”<sup>57</sup> Schall proposed the ‘first step in politics is to think of its form, that is, of its limits, of what makes it to be politics and not something else’.<sup>58</sup> To identify the limits law can place on political power Leszek Kolakowski turns to the natural law to approach the ‘theological riddle that may

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<sup>54</sup> Kennedy, 'Images of Religion in International Legal Theory'. 153.

<sup>55</sup> See comparatively, Kennedy, 'Losing Faith in the Secular'. 124. Kennedy writes of that false universalism of modern secularism that rejects the local and the religious:

Across the hall, liberal ecumenicalism stands guard at the door of law's empire, insisting on a penitent and persistent pluralism. All who pass murmur Yes, we have no religion. Once inside, secular cosmopolitans recognised one another in declarations of faith, in progress, in the international, in the pragmatic, and worship together in the routines of bureaucratic power. Everywhere there is culture but here, in the cosmopolis. Everywhere there is ideology, politics, passion, but not here, among the reasonable men and women of the Enlightenment, graced with infinite time, reason, and the modesty of the truly powerful. But some days it's just not enough. Terror and nation and fundament, held firmly at bay, shame us, mock us – how long can we inhabit the high road of cultural denial when we know that we too stand for something, dammit. It's not just Sudanese and Chinese and Sinhalese who have roots and religion. My grandmother read the Bible whenever she was sad – she particularly liked Ecclesiastes and Psalms.

<sup>56</sup> Those views can come from various religious traditions to challenge international law, or conversely they pierce religious orthodoxies. For instance some Islamic scholars make reference to the 'Euro-Christian underpinnings and influences on modern international law'. See Baderin, 'Religion and International Law: Friends or Foes?', (643). See generally, Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (4th edn.; Boulder, Colo.: Westview Press) xvii, 290 p. Asad, *Formations of the Secular, Christianity, Islam, Modernity*. See also Abdullahi an-Na'im and Mashood A. Baderin, *Islam and Human Rights: Selected Essays of Abdullahi an-Na'im* (Collected Essays in Law Series; Farnham, Surrey ; Burlington, VT: Ashgate) xxxix, 372 p. also An-Na'im, 'Islam and Human Rights'.

<sup>57</sup> See Pope Benedict XVI, 'The Listening Heart Reflections on the Foundations of Law', *Visit to the Bundestag. Address of His Holiness Benedict XVI*, (Apostolic Journey to Germany 22-25 September 2011; Reichstag Building, Berlin: Vatican, Holy See, 2011).

Naturally a politician will seek success, without which he would have no opportunity for effective political action at all. Yet success is subordinated to the criterion of justice, to the will to do what is right, and to the understanding of what is right. Success can also be seductive and thus can open up the path towards the falsification of what is right, towards the destruction of justice.

<sup>58</sup> Schall, *Roman Catholic Political Philosophy*. 161.

emerge from reflecting on constitutions as such'.<sup>59</sup> He described the natural law as follows:

Natural law is supposed to be law that is not invented by us, but found ready-made, independently of our conventions, customs and regulations. It provides us with supreme normative rules; and it is to these rules that our constitutions and codes have to conform if they deserve to be called *just*.<sup>60</sup>

Kolakowski's summation of the history of natural law begins with the protests of those who have rejected a common conception of justice, or followed Mill's view that the natural law theory reproduces a "naturalistic fallacy".<sup>61</sup> The response must determine 'which norms are really legitimate and how we might go about establishing their validity'.<sup>62</sup> Consequently, Kolakowski turns to Aquinas to show how human beings are endowed with reason and can almost by default participate in the knowledge of distinguishing good from evil.<sup>63</sup> That the natural law was a natural faculty was because 'the Creator had endowed us with the intellectual faculties necessary and sufficient for this purpose'.<sup>64</sup> Natural law has been viewed since the Enlightenment as a participation in the laws of a universal Reason, which is indestructible and eternal, a view that can be traced back through the medieval period to the Stoics.<sup>65</sup> More recently it has been viewed as a means to judge positive law, especially those laws that are incompatible with the natural law.<sup>66</sup> Kolakowski's further assessment leads to the question: can we still believe in

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<sup>59</sup> Leszek Kolakowski, *My Correct View on Everything*, ed. Zbigniew Kjanowski (South Bend, Indiana: St. Augustine's Press, 2005). 194.

<sup>60</sup> *ibid.* 194 [emphasis included]. See Ran Hirschl, 'Comparative Constitutional Law and Religion', in Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law* (Research Handbooks in Comparative Law; Cheltenham, UK: Edward Elgar, 2011), 442-40. Contemporary constitutions continue to wrestle with theology, and the morality inferred from it. 'In fact, all constitutions, every single one of them – from France to Iran and anywhere in between – address the issue of religion head on'. See Jeremy Waldron, 'A Religious View of the Foundations of International Law', in The 2011 Charles E. Test Lectures at Princeton University (ed.), *Public Law & Legal Theory Research Paper Series* (New York: New York University, School Of Law). 50. Waldron describes the natural law as, 'part of God's law that is accessible to reason and doesn't require revelation'. Aquinas defined: the natural law is nothing else than the rational creature's participation of the eternal law (*Summa* I-II, Q. 91, a. 2.). Aquinas had also defined law as 'nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated' (*Summa* I-II, Q. 90, a. 4). See also Donnelly, 'Natural Law and Right in Aquinas' Political Thought', (520). Donnelly notes that the 'requirement that law be made "in accord with some rule of reason" (*Summa* I-II, Q. 90.1 ad 3) is a *substantive* limitation' [emphasis included]. Donnelly's essay was written two years before Finnis' defence of the Natural law in Finnis, *Natural Law and Natural Rights*.

<sup>61</sup> Kolakowski, *My Correct View on Everything*. 194 – 196.

<sup>62</sup> *Ibid.* 195

<sup>63</sup> *Ibid.* 197.

<sup>64</sup> *Ibid.* 199.

<sup>65</sup> *Ibid.* 199.

<sup>66</sup> *Ibid.* 199.



natural law? He responds positively proposing placing it central to our understanding of our humanity:

Not only may we believe in natural law, but by denying it we deny our humanity. We may believe that good and evil, instead of being projections of our likes and dislikes, emotions, or decisions, are *real qualities* of human life – of our actions, thoughts, desires, our conflicts and our friendships.<sup>67</sup>

Kolakowski proposed that natural law might be acceptable because ‘the principles and norms of natural law reveal themselves to us gradually: that we must go through a process of slow growth before we understand certain moral truths and laws and recognise them as such’.<sup>68</sup> However, translating natural law into a constitution or legal code is complicated because by inference it cannot provide the details of governance or regulation of a state.<sup>69</sup> Therefore,

Natural law erects barriers that limit positive legislation and do not allow it to legalise attempts to infringe the indestructible dignity that is proper to every human being. *Natural law is built around human dignity.*<sup>70</sup>

In Kolakowski’s view, natural law acts pre-emptively to preserve human dignity, as ‘it invalidates legislation that, for instance, admits slavery, torture, political censorship, inequality before the law [...]’.<sup>71</sup> The cornerstone is located in a defence of human dignity, which forms the basis for the natural law argument.<sup>72</sup> Natural law therefore acts as a pre-political or pre-judicial ethical argument to restrain the

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<sup>67</sup> Ibid. 199 [emphasis included]. Kolakowski’s target had been logical empiricism that had rejected intuitions about moral experience by which we clarify moral truths. He proposed the process that removed erroneous beliefs throughout history only increases the validity of accepting the theory of a natural law.

<sup>68</sup> Ibid. 200. Kolakowski locates knowledge of natural law from ‘Seneca and Cicero, to Gratian and Suarez, to Grotius and Kant but it did not weaken their conviction that the rules of natural law are valid, no matter how often they are violated’ (201).

<sup>69</sup> This is process of assessment is similar to Pope Benedict XVI, ‘The Listening Heart Reflections on the Foundations of Law’.

Unlike other great religions, Christianity has never proposed a revealed law to the State and to society, that is to say a juridical order derived from revelation. Instead, it has pointed to nature and reason as the true sources of law – and to the harmony of objective and subjective reason, which naturally presupposes that both spheres are rooted in the creative reason of God. Christian theologians thereby aligned themselves with a philosophical and juridical movement that began to take shape in the second century B.C. In the first half of that century, the social natural law developed by the Stoic philosophers came into contact with leading teachers of Roman Law.

<sup>70</sup> Kolakowski, *My Correct View on Everything*. 201 [emphasis added]. See Donnelly, ‘Natural Law and Right in Aquinas’ Political Thought’, (521. Donnelly suggests, ‘human reason is able to grasp only certain general principles of the perfect divine reason. Therefore natural law, man’s participation in the divine reason, is restricted to general precepts. These precepts are then applied to specific and particular circumstance’.

<sup>71</sup> Kolakowski, *My Correct View on Everything*. 201.

<sup>72</sup> Ibid. 201. Kolakowski concludes his observations by stating: ‘Natural law should be like an uncompromising demon breathing down the legislators or the world’.

law from acting in a particular manner, and against human dignity.<sup>73</sup> Similarly, Jeremy Waldron has argued that ‘the natural-law position would be that there are certain principles that apply to states and restrict what it is right or permissible for them to do [...]’.<sup>74</sup> Nevertheless, Waldron also argued that ‘there is no area of international jurisprudence where natural law, standing nakedly as such, can operate directly as law, without the mediation of treaty or custom’.<sup>75</sup> In another sense, natural law explains ‘the ways in which different sources of positive law (treaty, practice, custom, judgment) resonate with deeper moral, spiritual and ontological concerns’.<sup>76</sup> The value of natural law is that it contributes to positive law’s understanding of judicial concepts like human dignity, (and indeed fundamental human rights).<sup>77</sup> This leads Waldron to define legal positivism in international law as a ‘necessarily a soft or inclusive positivism’ because it can embrace natural law thought.<sup>78</sup> Waldron rejects the idea that ‘natural law propositions can constrain states directly in international law without the mediation of treaty or custom’.<sup>79</sup> Nevertheless, Waldron has written extensively on

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<sup>73</sup> However, see Curran, *The Moral Theology of Pope John Paul II*. 113. Charles Curran, a prominent critic of catholic moral theology has questioned the certitude by which the Church Magisterium has arrived at definitions of the natural law. He notes the danger ‘that the characteristics of eternal law can be too readily transferred to what one believes is natural law’.

<sup>74</sup> Waldron, ‘A Religious View of the Foundations of International Law’. 50. ‘Natural law is there, it is ordained by God, it is not going to go away, and it helps to make sense of what we do (and what we ought to) so far as order in the world is concerned’ (50).

<sup>75</sup> *Ibid.* 50. See also John Tasioulas, ‘Custom, Jus Cogens, and Human Rights’, in Curtis A. Bradley (ed.), *Custom’s Future: International Law in a Changing World* (Cambridge: Cambridge University Press, 2016), 95-116.

[...] there is no implication here of the heavy-duty “natural law” thesis that jus cogens doctrine picks out a set of immutable norms that form part of the international legal system from its very inception, its unvarying constitutional structure, as it were. Irrespective of whether or not any such norms exist, they are not synonymous with the idea of jus cogens. For all the elevated ethical status it connotes, the latter is a form of positive law, and hence cannot be grounded exclusively in moral reasoning.

<sup>76</sup> Waldron, ‘A Religious View of the Foundations of International Law’. 52. See Pope Benedict XVI, ‘The Listening Heart Reflections on the Foundations of Law’.

The positivist approach to nature and reason, the positivist world view in general, is a most important dimension of human knowledge and capacity that we may in no way dispense with. But in and of itself it is not a sufficient culture corresponding to the full breadth of the human condition. Where positivist reason considers itself the only sufficient culture and banishes all other cultural realities to the status of subcultures, it diminishes man, indeed it threatens his humanity.

<sup>77</sup> Waldron, ‘A Religious View of the Foundations of International Law’. 52. See also Jeremy Waldron, ‘What Is Natural Law Like?’, *Public Law & Legal Theory Research Papers Series* (New York University School of Law; New York New York University School of Law). 18. Waldron therefore,

[...]emphasised the collective, civilizational aspect of this common knowledge in contrast to solitary Cartesian philosophical conceptions of natural law reasoning. Whatever our mode of access to natural law, it will be tentative and fallible. From a human point of view, we can only be governed by what we think is natural law. God’s rule in the world aside, that is all the natural law can be so far as our actions and interactions on earth are concerned.

<sup>78</sup> Waldron, ‘A Religious View of the Foundations of International Law’. 52 [footnote omitted].

<sup>79</sup> *Ibid.* 53. See further Waldron, ‘Irrelevance of Moral Objectivity’. Waldron assess the moral realism of natural law scholars against the legal positivism of the 19<sup>th</sup> century. Their disagreements over moral judgements about values, rightness and justice led to differing approaches. See also Alston, ‘Book Review. Does the Past Matter?’

natural law and human rights, to show it is possible for Christianity to participate in the idea of an overlapping consensus that supports a common understanding of justice.<sup>80</sup> In this way, the theory of natural law is a contribution to what can substantiate international justice in the human rights project. This is a position that has been reiterated in Catholic political thought in the 20<sup>th</sup> century, including by Maritain, who had proposed that the agreement of the UDHR is defined by practical ethics.<sup>81</sup> His aspiration was that a human rights community could work to collectively define universal principles and similar secondary laws that might be derived from the first principles of natural law. Natural law's contribution to the recognition of a common humanity, and the defence of human dignity, even the elaboration of what human dignity might consist, is part of the Catholic contribution to international law.

#### **D. Holding Faith and Reason in Tension**

The human rights project is populated with religious and secular actors. The philosopher Richard Rorty agreed with the Weberian concept of the “religiously unmusical”, and that response remains a factor in the communication between

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On the Origins of Human Rights', ( 2072). Alston rejects natural law and instead argues from a state centric viewpoint. Alston observes,

The norms invoked by the international [human rights] movement are not natural law norms but derive from custom and treaties made by states; the obligations are incumbent upon the state itself; and the international mechanisms to which appeals may be directed are extremely weak and themselves largely dependent upon states.

Similarly, see also Beitz, *The Idea of Human Rights*. 53. Beitz believes the natural rights model, located in Catholic natural law tradition,

[...] diverges from contemporary human rights practice, for it is explicit in the origins of this practice that human rights doctrine does not incorporate any view about the justification of human rights in an independent order of natural rights, in the natural law, or in God's commands.

Human rights are like natural rights in being critical standards whose content is not determined by the moral conventions and legal rules of any particular society, but they are unlike natural rights in not presupposing any one view about their basis or justification.

<sup>80</sup> Waldron, 'A Religious View of the Foundations of International Law'. See also Jeremy Waldron, 'Desanctification of Law and the Problem of Absolutes', *Law as Religion, Religion as Law* (Hebrew University, Israel Available at SSRN: <http://ssrn.com/abstract=2848584>).

<sup>81</sup> See Maritain, *Man and the State*. 76-107. Maritain had drawn on Thomistic argument that presented the natural law as a one that might improve in clarity and scope, and thereby contribute to human rights development. See also J. Budziszewski, *Commentary on Thomas Aquinas's Treatise on Law* (Kindle edn.; Cambridge: Cambridge University Press, 2014). Aquinas had distinguished between the immutable principles of the natural law and those that are secondary principles, which can improve the natural law.

On the other hand, as Gratian writes in the *Concordance of Discordant Canons*, natural law has been in being as long as rational creatures have been in being. It does not change over time, but abides immutably (*Summa I-II*, Q. 94, a. 5) (Kindle Locations 8510-8512).

Here is my response. A change in natural law may be taken in either of two senses. The first way is that something is added into it. Nothing prevents natural law from changing this way. Indeed, many things helpful to human life have been superadded to our natural obligations, some by Divine law, some by human (*Summa I-II*, Q. 94, a. 5) (Kindle Locations 8522-8525).

faith and reason on the question of human rights.<sup>82</sup> On understanding the human rights project, Maritain observed ‘a liberal-individualistic, a communistic, or a personalist type of society [...] will lay down on paper similar, perhaps identical, lists of the rights of man. They will not, however, play that instrument in the same way’.<sup>83</sup> Each philosophy organises rights and duties by a hierarchy of values and accords them precedence according to their ‘principle of dynamic unification’.<sup>84</sup> Maritain had proposed to return the place of religious self-understanding in how human dignity was articulated.<sup>85</sup> A central and influential debate on the relationship between religious faith and reason, and on how they influenced politics and law, occurred in 2004.<sup>86</sup> The details of the dialogue remain important because they capture the essence of the tension evident in working towards an understanding of Catholicism and human rights. The encounter revealed how polarised the debate between faith and reason had become, and how the protagonists Jürgen Habermas and the then Cardinal Ratzinger (later Pope Benedict XVI) recognized that problem and sought to model the potential for dialogue. It was a very public communication for the Catholic Church with such as central European figure, and continues to be a source of reflection about the future of religion in Europe and elsewhere.<sup>87</sup> The discussion came some years following the collapse of the Berlin Wall, and the ever growing awareness of globalisation, the place of religion in the modern world, and the post-9/11 environment.<sup>88</sup> Jürgen Habermas begins with his first query about the rule of law:

[...] now that “law” is a straightforward matter of de facto legislation—and nothing else—it is still possible in any way to provide a secular justification

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<sup>82</sup> Rorty, Vattimo, and Zabala, *The Future of Religion*. 30. On being “religiously unmusical” as an expression of agnosticism or atheism, see Rorty, ‘Anticlericalism and Atheism’ in *ibid.* See also Pope Benedict XVI, Habermas, and Schuller, *Dialectics of Secularization: On Reason and Religion*. 11. See also J. Habermas, Pope Benedict XVI, and F. Schuller, *Dialectics of Secularization: On Reason and Religion* (Kindle edn.; San Francisco: Ignatius Press). 50-51. Habermas has observed that for those who are “unmusical” there is still the obligation to critically recognise the relationship between faith and knowledge, to sustain the European project.

This is because the expectation that there will be continuing disagreement between faith and knowledge deserves to be called “rational” only when secular knowledge, too, grants that religious convictions have an epistemological status that is not purely and simply irrational.

<sup>83</sup> Maritain, *Man and the State*. 106. According to Maritain in each philosophy, human dignity has a unifying role as a ‘principle of dynamic unification’ and so ‘we are dealing with the tonality, the specific key, by virtue of which different music is being played on this same keyboard, with in harmony or discord with human dignity’.

<sup>84</sup> *Ibid.* 106.

<sup>85</sup> *Ibid.* 107.

<sup>86</sup> Habermas, Pope Benedict XVI, and Schuller, *Dialectics of Secularization: On Reason and Religion*.

<sup>87</sup> See most recently, Marta Cartabia and Andrea Simoncini, *Pope Benedict XVI’s Legal Thought: A Dialogue on the Foundation of Law* (New York: Cambridge University Press, 2015).

<sup>88</sup> Habermas, Pope Benedict XVI, and Schuller, *Dialectics of Secularization: On Reason and Religion*. 11.

of political rule, that is, a justification that is nonreligious or post-metaphysical.<sup>89</sup>

Habermas responds to this query that ‘we should understand cultural and societal secularisation as a double learning process that compels both the traditions of the Enlightenment and the religious doctrines to reflect on their own respective limits’.<sup>90</sup> Habermas described political liberalism as ‘a non-religious and post-metaphysical justification for the normative bases of the democratic constitutional state’.<sup>91</sup> It, therefore, ‘is in the tradition of a rational law that renounces the “strong” cosmological or salvation-historical assumptions of the classical and religious theories of natural law’.<sup>92</sup> He maintains the view of a progressive secularisation since the 17<sup>th</sup> and 18<sup>th</sup> centuries by philosophy to give the political form of the state a basis in “profane sources”.<sup>93</sup> Habermas is convinced that the liberal state can reproduce ‘its own motivational presuppositions on the basis of its own secular elements’.<sup>94</sup> However, difficulties emerge where bonds of solidarity are strained or where solidarity is highly abstracted because of ‘the plurality of our cultural ways of life, our world views, and our religious convictions’.<sup>95</sup> In response to this problem, Habermas proposes there can be a mutual learning process between religion and philosophy, including the ‘assimilation by philosophy of genuine Christian ideals’ (a process that is integral to the Western legal tradition).<sup>96</sup> For instance, this may include our understanding of legal concepts like “humanity” and “human dignity” or other concepts associated with international law. And yet, he maintains this process can reveal how ‘the religious shell [of those ideals are] stripped of potentially significant concepts in a manner that promotes secularisation [...]’.<sup>97</sup> However, ‘it is in the interest of the constitutional state to deal carefully with all the cultural sources that nourish its citizens’ consciousness of

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<sup>89</sup>Ibid. 22. Leading from the question does ‘the free, secularized state exist on the basis of normative presuppositions that it itself cannot guarantee?’ In Habermas view, these questions relate to Böckenförde dictum.

<sup>90</sup> Ibid. ix.

<sup>91</sup> Ibid. ix.

<sup>92</sup> Ibid. ix. Habermas understand that the Christian natural law tradition contributes to the idea of human rights. See also Jürgen Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’, *Metaphilosophy*, 41/4 (464-80).

<sup>93</sup> Habermas, Pope Benedict XVI, and Schuller, *Dialectics of Secularization: On Reason and Religion*. Ix. Habermas acknowledges that the Catholic tradition ‘is comfortable with the *lumen natural*, has no problem in principle with an autonomous justification of morality and law (that is, a justification independent of the truths of revelation)’.

<sup>94</sup> Ibid. x.

<sup>95</sup> Ibid. x.

<sup>96</sup> Ibid. xii -xiii.

<sup>97</sup> Ibid. xiii.

norms and their solidarity'.<sup>98</sup> Habermas describes this recognition of the engagement with religious ideals to support democracy as the turn to a "post-secular society".<sup>99</sup> While this does appear somewhat contradictory, if Habermas expects religious concepts to become "religious shells", he does propose the potential for 'a complementary learning process' that build a positive legal and political culture.<sup>100</sup>

Habermas had proposed that the standard for participation in public sphere was to conform to shared rational standards.<sup>101</sup> This would imply a level of toleration in pluralistic societies, which will encounter a palatable level of dissent on general issues of morality, and implies a level of neutrality by the state.<sup>102</sup> That recommendation of an egalitarian secularisation in a post-secular society gave rise to the hope of pluralism in public discourse and political and cultural engagement, including the translation of theological concepts 'into a language that is accessible to the public as a whole'.<sup>103</sup> Nevertheless, that utopia does seem to waver in the light of serious political clashes over the role of religion. This comes in response to political violence carried out in the name of religion, influencing the reception of religious interventions in the human rights project.

Against this backdrop, Ratzinger proposed that power 'as structured by law, and at the services of law, is the antithesis of violence, which is a lawless power that opposes law'.<sup>104</sup> However, he leans in toward natural law, and proposes that even if law is meant to serve the common good, 'the majority principle always leaves open the question of the ethical foundations of law'.<sup>105</sup> Further, he asks, 'whether there is something that is of its very nature inalienable in law, something that is antecedent to every majority decision and must be respected by all such decisions'.<sup>106</sup> Here, Ratzinger turns to human rights declarations that have 'withdrawn these from subjections to the vagaries [of inalienable rights] of

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<sup>98</sup> Ibid. xiii.

<sup>99</sup> Ibid. xiii [footnote omitted]. See also Jürgen Habermas, 'Notes on Post-Secular Society', *New Perspectives Quarterly*, 25/4 (Fall 2008,), 17-29.

<sup>100</sup> Habermas, Pope Benedict XVI, and Schuller, *Dialectics of Secularization: On Reason and Religion*. xiii.

<sup>101</sup> Ibid. xiii. See also Martin, *Religion and Power: No Logos without Mythos* 13. See Habermas, *Between Naturalism and Religion: Philosophical Essays*.

<sup>102</sup> Habermas, Pope Benedict XVI, and Schuller, *Dialectics of Secularization: On Reason and Religion*. Xiii. See also Evaldo Xavier Gomes, 'Church-State Relations from a Catholic Perspective: General Considerations on Nicolas Sarkozy's New Concept of Laicite Positive', *Journal of Catholic Legal Studies*, 48 (1

<sup>103</sup> Habermas, Pope Benedict XVI, and Schuller, *Dialectics of Secularization: On Reason and Religion*. xiii [footnote omitted]

<sup>104</sup> Ibid. 58.

<sup>105</sup> Ibid. 60.

<sup>106</sup> Ibid. 60.

majorities'.<sup>107</sup> He then suggests there are 'self-subsistent values that flow from the essence of what it is to be a man, and are therefore inviolable: no other man can infringe them'.<sup>108</sup> To that self-evident nature of inviolable rights he also acknowledges the necessity of the particularities of culture that gives risk to identifying rights.<sup>109</sup>

Ratzinger makes two observations, which mirrors some of the writing of Kolakowski. First, the encounter of the Western legal culture with non-Europeans, and also the post-reformation formation of a natural law 'that transcended the confessional borders of faith by establishing reason as the instrument whereby law can be posited in common'.<sup>110</sup> Secondly, he observes, the natural law 'has remained (especially in the Catholic Church) the key issue in dialogues with secular society and with other communities of faith in order to appeal to the reason we share in common and to seek the basis for consensus about the ethical principles of law in a secular pluralist society'.<sup>111</sup> However, he believes the natural law is often unavailable to Catholicism because the natural law has failed to be recognised as a universal foundation to international law, except for the evident appeal of human rights.<sup>112</sup> In his view, human rights retains the signature of the natural law because the human 'being bears within itself values and norms that must be discovered—but not invented'.<sup>113</sup>

It would seem that some of the apprehensions of Catholic Church are revealed in the dialogue between Jürgen Habermas and the then Cardinal Ratzinger. Clearly, Ratzinger emphasises the idea of a legal tradition being open to new intellectual encounters to reform and develop its values. Catholic human rights tradition is also required to be open to discover its foundation in an objective moral ideal located in the natural law.<sup>114</sup> Yet Ratzinger is realistic that a cosmopolitan "world ethos" remains an abstraction and is very much depended on the Western tradition of encounter between faith and reason.<sup>115</sup> Another disquieting concern is that Catholicism in the future may fail to preserve the experience of the Church in Europe over the last millennium as an interaction between faith and reason. It is

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<sup>107</sup> Ibid. 60.

<sup>108</sup> Ibid. 60.

<sup>109</sup> Ibid. 60.

<sup>110</sup> Ibid. 67. Ratzinger points to the natural law writing of Hugo Grotius and Samuel Puffendorf.

<sup>111</sup> Ibid. 69.

<sup>112</sup> Ibid. 69.

<sup>113</sup> Ibid. 71.

<sup>114</sup> See also International Theological Commission, 'In Search of a Universal Ethic: A New Look at the Natural Law'.

<sup>115</sup> Habermas, Pope Benedict XVI, and Schuller, *Dialectics of Secularization: On Reason and Religion*. 69.

more evidently necessary to retain this memory as the Catholic Church moves to become a “world” church rather than identified with Europe.<sup>116</sup> This historical encounter between faith and reason denotes a learnt commitment to critical reason (and also right reason). That immersion of Catholicism in Western political thought stands in opposition to a restoration of political theology, which could provide a justification for a concentrated political power, or lead to returns to forms of religious fundamentalism. The use of law to justify those movements, and runs contrary to the European experience, is implicated in that concern. In 2006 Pope Benedict delivered a lecture in Regensburg, Germany on the nature of faith and reason, as it impacts on the State, speaking particularly on state’s the relationship to religion, including Islam.<sup>117</sup> In that communication he proposed that the Catholic Church must retain the lessons of that encounter with the Enlightenment. He also promoted that experience to other religions, suggesting controversially that Islam too learns those lessons.<sup>118</sup> In a later important 2006 address, Pope Benedict (Ratzinger) continued his reflection on the relationship between the Enlightenment and Christianity proposing,

It is a question of the attitude that the community of the faithful must adopt in the face of the convictions and demands that were strengthened in the Enlightenment. On the one hand, one must counter a dictatorship of positivist reason that excludes God from the life of the community and from public organizations, thereby depriving man of his specific criteria of judgment. On the other, one must welcome the true conquests of the Enlightenment, human rights and especially the freedom of faith and its

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<sup>116</sup> See on Justice and the relationship between Church and state: Pope Benedict XVI, *Deus Caritas Est—Encyclical Letter, Benedict XVI, VATICAN* (Dec. 25, 2005), 28(a). Renczes remarks that, ‘one can detect Ratzinger’s well-known programmatic emphasis on the Christian option for reason and rationality that has become, especially after his 2006 Regensburg address, his signature thought: “In principio erat Verbum”— at the beginning of all things is the creative power of reason.” see also Philipp Gabriel Renczes, ‘Grace Reloaded : “Caritas in Veritate’s Theological Anthropology’, *Theological Studies*, 71/2 (273-90). See also Zucca on variations of secularism, on aggressive secularism versus inclusive secularism ‘A Secular Europe: Law and Religion in the European Constitutional Landscape’ Lorenzo Zucca (OUP 2012)

<sup>117</sup> See Yvonne Yazbeck Haddad and Jane I. Smith, ‘The Quest for ‘a Common Word’: Initial Christian Responses to a Muslim Initiative’, *Islam and Christian–Muslim Relations*, 20/4 (2009/10/01, 369-88. See also Troy, ‘Die Soft Power Des Heiligen Stuhls. Unsichtbare Legionen Zwischen Internationaler Gesellschaft Und Weltgesellschaft’, (489-511. See also Nathan Schlueter, ‘Leo Strauss and Benedict XVI on the Crisis of the West’, (55: Intercollegiate Studies Institute), 22-33.

<sup>118</sup> See Haddad and Smith, ‘The Quest for ‘a Common Word’: Initial Christian Responses to a Muslim Initiative’, (369):

In his talk he quoted Byzantine Emperor Manuel II Paleologus, who apparently made derogatory remarks about Islam during the siege of Constantinople by Muslims in the fifteenth century. ‘Show me what Mohammed brought that was new’, the Emperor purportedly said, ‘and there you will find things only evil and inhuman, such as his command to spread by the sword the faith he preached’. The emperor, clarified the Pope, was saying that violence is incompatible with the nature of God and of the soul.



practice, and recognize these also as being essential elements for the authenticity of religion.<sup>119</sup>

### **E. *Summum Ius, Summa Iniuria.***

If economists and liberal theorists have failed to provide a broader global society that progresses distributive justice, social fairness and equality, then it may possibly be left to international lawyers to support the human rights project.<sup>120</sup> In the 21<sup>st</sup> century, the process may well be underway, where international law is used to return the state to its domesticated staple of the legal certainty located in the Westphalian nation state. States may look to a time when the U.N. Security Council had solely focused on protecting international peace and security, without deference to human rights concerns.<sup>121</sup> States may look to a time when they are not accountable to international judicial mechanisms such as the International Criminal Court.<sup>122</sup> There may also be a longing to return to an era of pure legal positivism, and a time when the only consideration was *raison d'état*, when a balance of great global powers held sway.

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<sup>119</sup> Pope Benedict XVI, 'Address of His Holiness Benedict XVI', in To the Members of the Roman Curia (ed.), *The Traditional Exchange Of Christmas Greetings* (Clementine Hall, Vatican, Rome: Holy See, 2006). This quotation was prefaced and postfaced by the following two paragraphs.

In a dialogue to be intensified with Islam, we must bear in mind the fact that the Muslim world today is finding itself faced with an urgent task. This task is very similar to the one that has been imposed upon Christians since the Enlightenment, and to which the Second Vatican Council, as the fruit of long and difficult research, found real solutions for the Catholic Church.

As in the Christian community, where there has been a long search to find the correct position of faith in relation to such beliefs - a search that will certainly never be concluded once and for all -, so also the Islamic world with its own tradition faces the immense task of finding the appropriate solutions in this regard.

See also Pope Benedict XVI, 'Caritas in Veritate, AAS 101 (2009)', (§1. In a similarly constructed statement, Pope Benedict XVI stated,

Secularism and fundamentalism exclude the possibility of fruitful dialogue and effective cooperation between reason and religious faith. *Reason always stands in need of being purified by faith*: this also holds true for political reason, which must not consider itself omnipotent. For its part, *religion always needs to be purified by reason* in order to show its authentically human face. Any breach in this dialogue comes only at an enormous price to human development.

<sup>120</sup> David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Kindle ed.; Princeton: Princeton University Press, 2016). 198.

On a larger scale, the idea that religion is part of the prehistory of international law helps consign religious ideas and institutions to the margins of international politics, just as international law's understanding that the commercial world of the market and the private world of the family lie outside its purview distributes power over families to states while disempowering states relative to the global economy.

See also Mazower, *Governing the World: The History of an Idea* Kennedy, 'Law and the Political Economy of the World', (7-48. See also Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism', (147.

<sup>121</sup> Ingrid Wuerth, 'International Law in the Age of Trump: A Post-Human Rights Agenda', in Benjamin Wittes (ed.), *Lawfare* (2016; Washington DC: The Brookings Institution, 2016).

<sup>122</sup> Shaun Walker and Owen Bowcott, 'Russia Withdraws Signature from International Criminal Court Statute', *The Guardian*, Wednesday 16 November 2016.

If the modern human rights project has a future, then the values that underpin those rights, could draw from multiple traditions or as Alston has proposed from human rights *polycentric* nature.<sup>123</sup> The history of human rights reveals a process of cultivating moderate legal opinion and custom, and by reaching back into human history we can bring forward into the present by what means humanity has reach consensus about our deepest values. The remarkable success of that process is perceptible in how those customs of duties and rights had found their way into contemporary international law. In detecting a post-human rights era have critics failed to recognise how human rights restrain the temptation to concentrate power, and holds it to account?<sup>124</sup> Human rights exist, not because they are a modern invention but because they are the practical realisation in law of a prolonged reflection on the just exercise of power. The contribution of religion may well be necessary to contribute to the foundations of international law. As recounted, Christianity once encouraged the human rights project, and pointed to the centrality of human dignity, in the light of the events of 1930's and 1940's Europe. On the future of law and religion, David Kennedy wrote,

If law and religion are indeed back, I pray we embrace this moment of delirium. Perhaps just for an instant we can glimpse together the pieties of power and the power of piety, the two sides of the liberal coin raised up against one another, a critical second of vertiginous equipoise, before one or the other is routinized as rebellion.<sup>125</sup>

The opposition over genealogies of human rights appear quickened by the failure of regional and global accountability. Nevertheless, the need to assert the multiplicity of human rights sources, do not yet offer an antidote to the contemporary rejection of political accountability through international law.<sup>126</sup> However, religious

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<sup>123</sup> Alston, 'Book Review. Does the Past Matter? On the Origins of Human Rights', (2018).

<sup>124</sup> See interestingly Giorgio Agamben, *The Church and the Kingdom* (London: Seagull Books, 2012). In a speech delivered in Paris' Notre-Dame Cathedral in the presence of the Bishop of Paris, Agamben asked enigmatically about the Catholic Church's political theology and the future of legitimate authority:

Will the Church finally grasp its messianic vocation? If it does not, the risk is clear enough: it will be swept away by the disaster menacing every government and every institution on earth.

The crisis - the states of permanent exception and emergency - that the governments of the world continually proclaim are in reality a secularised parody of the Church's incessant deferral of the Last Judgement. With the eclipse of the messianic experience of the culmination of the law and of time comes an unprecedented hypertrophy of law - one that, under the guise of legislating everything, betrays its legitimacy through legalistic excess. I say the following with words carefully weighed: nowhere on earth today is a legitimate power to be found; even the powerful are convinced of their own illegitimacy.

<sup>125</sup> Kennedy, 'Losing Faith in the Secular'. 127.

<sup>126</sup> Lynn Hunt, 'The Long and the Short of the History of Human Rights', *Past & Present*, 233/1 (2016), 323-31. Hunt has observed how locating the point in time when human rights vocabulary began is itself often deeply complex. For instance, that, 'that the history of human rights must be first and foremost a political history in

expressions of human rights can also give salience to the need for alternative moral vocabularies, and challenge the dominance of politics and law to offer the last word on the just society.

It may be possible to recognise a Catholic theory of international law by evaluating how it contributed to the formation of the modern cosmopolitan project of human rights. Nevertheless, Catholicism contributes from the periphery, through its working out of a theory about natural law, and by offering a critical perspective on international law. In working towards an understanding of Catholicism and human rights it is possible to locate openness in the Catholic tradition, which provides a bridge to mutual responsibility for our world. This research has indicated there is the belief that there exists a common understanding of justice, and a way to principled accommodation or in Maritain's phrase, a common secular and democratic faith. This position makes the potential for ongoing dialogue between faith and reason possible, on common concerns of human dignity and human rights but this also demands epistemological humility. It requires openness to critical responses both from historical and contemporary challenges. For the Catholic Church there remains a temptation to overstep the reach of Christianity and to reject the proper autonomy of law in the modern world. However, we recall the Christian tradition of indirect action (*potestas indirecta*) limiting that engagement to concerns for the common good. It is recognition that restraint and principled accommodation is necessary between religion and law. For the human rights project to thrive in the future there may be a need to reimagine Maritain's common secular and democratic faith but also to recognise that as law and religion interact, a belief in a need for supreme justice, can lead to supreme injustice (*summum ius, summa iniuria*).<sup>127</sup>

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the most old-fashioned sense, that is, a history of diplomacy (covenants) and warfare (interventions)' (323) or alternatively, 'one of the key elements in my version of the 'moral narrative': people are more likely to get rights when they demand them' (327). On human rights from below, see especially, Bowring, *The Degradation of the International Legal Order?: The Rehabilitation of Law and the Possibility of Politics*.

<sup>127</sup> From Cicero (De officiis, I, 10, 33) Cicero and Zetzel, *Cicero: On the Commonwealth and on the Laws*.

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