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THE DEVELOPMENT OF THE IDEA OF RELIGIOUS FREEDOM IN MODERN TIMES

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I. INTRODUCTION

In Article 18 of the Universal Declaration of Human Rights 1948 we read,

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 9 section 1 of the European Convention of Human Rights 1950 is identical, but a second section on the limits of this freedom is added,

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public order, health or morals, or for the protection of the rights and freedoms of others.

The constitutional states of a West European and North American mould contain similar clauses on the protection of religious freedom,[1] and this freedom is guaranteed by independent courts.

What are the historical sources of this religious freedom, a freedom that is both individual and corporate? When one considers the development of the idea of religious freedom in modern times, it would appear in the final analysis to be a late outcome of the *reaction to confessional division* and to be both theoretically and practically promoted by *enlightenment philosophy*. In other words, we are concerned as much with historical events and their pragmatic, step for step, legal resolutions, as with philosophical reflection released, or at

1 Cf. also Art. 18 International Convenant on Civil and Political Rights dtd. 19th Dec. 1966.

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least accelerated, by those events. As a rule, legal pragmatism trails behind philosophical reflection, since law must be enacted and recognised. This often demands complex processes of communication and power. But on the other hand, law stabilises and creates reliable foundations for the peaceful development of philosophical thought. The road to modern religious freedom was a rough one, with many crossroads and without obvious signposts. I want to recount the story of this road, not in a great novel, but in a mere sketch. We will start with the guarantee of confessional parity (II), moving through toleration (III) to modern religious freedom (IV) with its separation of church and state (V).

The guiding forces at the crossroads were the surfeit of war and the human desire for peace; of this there can be no doubt. But these pressures alone could not produce the structures that were to guide the political will and successfully direct developments. These structures came from earlier phases of Christian thought. And it is not only the development of religious freedom that can be traced to this source. The constitutional state itself, which respects human rights and represents the necessary precondition for the separation of the secular and the ecclesiastical, also flows from this source. I will conclude with an attempt to expose these factors (VI).

II. Confessional Parity in Fundamental Law

During the first half of the sixteenth century, the Reformation led to confessional division. This inflicted deep wounds on the mediaeval unity of secular power and religion. One can only appreciate the effect of the Reformation if one constantly keeps in mind the close intellectual and institutional interlocking of secular authority and the Christian faith.[2] The Reformation, which was itself deeply divided theologically between Luther and Calvin, faced the old Church, which had gathered, regenerated and entrenched itself in the Synod of Trent (1545-63). The protestant imperial estates, which had expressed their faith by the Confessio Augustana of 1530, formed themselves into a defensive alliance against the Emperor in the federation of Schmalkalden. Charles V sought his own way of compromise that was supposed to lead to religious reunification, but this compromise went too far for the Catholics and not far enough for the Protestants.[3]

The Peace of Augsburg was concluded in 1555 between the imperial estates and the emperor. Under this treaty, those Protestants conforming to the

2 Martin Heckel, *Deutschland im konfessionellen Zeitalter*, 1983, pp. 9 ff.

3 Heckel (n. 2), pp. 38 f.

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Augsburg confession were granted equality with Catholics under imperial law. Calvinists, Baptists and other sects remained excluded. However the freedom to choose one's faith was not granted to the individual Christian, but to the imperial estates. Their *ius reformandi* meant the right to establish a confession in law for their subjects: *cuius regio eius religio*. Thus the Peace of Augsburg represented the first steps to religious freedom. That meant religious autonomy for the rulers of the principalities, who were able to choose between the old Church and the Augsburg Confession. But at the level of those individual principalities, the traditional institutional interlocking of secular authority and religion continued. The goal was thus the confessional integrity of each territory. Nonetheless, the subject was granted a right to emigrate, if he could not in good conscience follow the confession of his prince. Of course, this *ius emigrandi* was barely realisable, given the general immobility of the population.

One hundred years later, after the thirty years war, the first movement towards religious freedom was extended by the Peace of Westfalia of 1648. The *Instrumentum Pacis Osnabrugense* recognised the reformed (that is, Calvinist) confession as a third religious party. Subjects not sharing the faith of their catholic, lutheran or reformed rulers in the base year of 1624 were permitted to continue exercising their own faith. For others, the right to emigrate was preserved. But if these did not emigrate, they were to be tolerated (patienter tolerentur), that is, they could conduct household worship in freedom of conscience and publicly confess their faith in neighbouring territories. The right of private worship was further extended in that it could be exercised by several families together and a cleric could be brought in from outside the territory.

Thus the religious autonomy of the territorial princes was limited under imperial law in favour of the first hints of individual freedom of religion. Significantly, this freedom is termed freedom of conscience[4] in the *Instrumentum Pacis*. Religion is still understood as the Christian faith, transmitted through one of three confessions, and binding on the secular order. The regulations of the *Instrumentum Pacis* are understood as temporary for the establishment of peace until the unity of religion is restored. For at that time, a unified faith was still seen as the necessary precondition for secular authority. From this point of view, individual freedom of religion is not in issue; it is for the sake of peace that parity is extended to a third religious party. Nonetheless, the individual believer does feature in the *Instrumentum Pacis*, for the toleration that was imperially encouraged contained the first movement towards individual religious freedom, albeit only for members of the three recognised confessions and through the corporate rights of these confessions.

4 *Conscientia libera* (I.P.O. V § 34).

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Thus confessional division was not the direct cause of religious freedom. Rather, in a totally pragmatic fashion, imperial confessional parity recognised the existing positions of power of the territorial princes and on a territorial level preserved and guaranteed the unity of secular authority and religion.[5] In the existing culture of the substantial unity of secular authority and religion, Germany (as distinct from France) could only remain confessionally divided, because public authority in Germany was largely territorial authority, and became increasingly so. France, which had become a unified state and wanted to remain so, lacked these institutional preconditions.

III. Enlightenment and Toleration

Let us now look at the further development of modern religious freedom in Prussia, a German principality that became a leading European power. After 1614, the ruling family was Calvinist, and governed a largely Lutheran country with strong Catholic minorities. It thus had an interest in the peaceful co-existence of the confessions, and went further than the toleration encouraged throughout the Empire. The need for internal peace and the desire to develop the country, as well as the intellectual heritage of the Enlightenment, affected administrative practice in matters of religion. Toleration was exercised towards small Christian communities such as Mennonites and Baptists, and so on, as well as towards other sects. This administrative practice was anchored in law by the Edict on Religions of 1788, and a few years later was further developed in the Prussian General Law of 1794 (Part 2 Chapter 11). This provided that the three imperially recognised confessions had equal rights in the public exercise of religion (§ 17 ff). Progress was also made in the area of individual freedom. Each inhabitant was assured complete freedom of faith and conscience (§ 2), and none was required to accept any directive of the state as regarded his private opinion in matters of religion (§ 3). As regards civil rights, at least in administrative practice, equality was assured, although for the Jews this came later.[6] Gerhard Anschütz recognised in the Prussian religious legislation the legal roots of later German religious freedom.[7] In comparison with other European states and German principalities, Prussian legal practice and legislation was distinguished by a high degree of toleration.

5 Dietmar Willoweit, Das landesherrliche Kirchenregiment, in: Jeserich/Pohl/v. Unruh (eds.), *Deutsche Verwaltungsgeschichte*, Vol. I, 1983, pp. 363 f.

6 Cf. Edikt betreffend die bürgerlichen Verhältnisse der Juden in dem Preußischen Staate (1812); accordingly later Art. 16 Deutsche Bundesakte (1815); § 29 s. 2 Constitution Kurfürstentum Hessen (1831).

7 Gerhard Anschütz, Die Religionsfreiheit, in: *Handbuch des Deutschen Staatsrechts*, Vol. II, 1932, pp. 675, 677; as to the preceding remarks see p. 678.

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The development in Prussia exemplifies the new conception of religious freedom of the 18th century Enlightenment. Confessional thinking and the legal guarantee of confessional parity were pushed aside, while the legal position of the individual gradually shifted to the fore. In Kant's words (1783), mankind stepped "out of his self-inflicted minority". That is Enlightenment. Political philosophy already understood religious freedom as an individual human right held not only against the state, but also against the church. These ideas affected and moulded the law, albeit without fully penetrating it. The development in Prussia we have just considered is an example of this. The idea of the unity of state and religion, and the concept of an established church, became gradually less convincing.

The preservation of peace between the confessions was now seen as a function of the state. Pufendorf (1632-1694) and Thomasius (1655-1728) taught —most progressively— that worldly authority had no jurisdiction over matters of faith.[8] In social contract theory, individuals retained their natural right to freedom of religion and did not transfer it to government. And so the authorities had no right to determine the religion (*ius reformandi*), but rather a duty to tolerate it (*officium tolerandi*). Frederick the Great saw toleration —after Voltaire—[9] as *un apanage d'humanité*, which would enrich all of society. He had this expressed such that in his state each could become holy after his own façon.[10]

These conceptions undermined the religio-legal status quo of the Peace of Westfalia and the unity of secular authority and religion. Enlightened absolutism powerfully promoted the secularisation of the state. More accurately, it was rather a matter of the deconfessionalisation of worldly authority; for the moral foundations of the state as inherited from the Christian religion were expressly recognised. Thus as stated by Frederick the Great: since as regards morality, no religion differs significantly from any other, all could be equally acceptable to government. Government required from the individual no more than that he be a good citizen. Kant expressed himself similarly in 1798: Government, which is not responsible for the future blessedness of its subjects, is only concerned that through the faith of the church it has "tractable and morally upright subjects".[11] That could have come straight from the Prussian General Law, which obligated the churches "to teach their members respect towards God, obedience towards the laws, faithfulness to the state and benevolence to their fellow-citizens" (§13). Thus the state was still interested in the moral education of the churches, which to this extent it kept under its authority. The Prussian

8 Christoph Link, *Herrschaftsordnung und bürgerliche Freiheit*, 1979, pp. 294 ff., 310 ff.
9 Dictionnaire philosophique (ed. Paris 1858), Tolérance, section II.
10 Thus also Kant, *Der Streit der Facultäten* (1798), 1st Sect., Part II, general notes, at the end.
11 Ibid.

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General Law regulated the rights and duties of the churches in over 1200 paragraphs and thus set out state religious authority. By contrast, in questions of religious dogma, an individual freedom is guaranteed that stretches far further than the corporate freedom of the confessions.

Thus the confessional division of the Reformation and the later multiplication of confessions and sects broke the unity of worldly authority and religion in a long process that played itself out differently in different states. The state, which has to ensure peace between citizens, was over time forced to administer religious toleration itself and secure it between citizens. The state maintenance of peace was simplified and at root first made possible by the Enlightenment, which was itself a philosophical product of the confessional division. The enlightened relativising of religious confession internalised the confessional split and secularised the role of the state.

The religious toleration which the state —still itself tied to religion— granted to those of other faiths already expressed an individual freedom which has its roots in Christianity; in the course of the Reformation, these roots were exposed: it is the individual who stands despite of his membership in the Christian communion in a covenant relationship with God. In spite of all ecclesiastical and confessional gloss, this is theological individualism. At the time, the idea of individual religious freedom had an anticonfessional effect, but it comes from Christianity itself and is thus not antichristian. In the worldview of the Enlightenment, the issue was no longer protecting the confessions. On the contrary, the "absolutist" state had the duty to protect the faith and conscience of the individual from the confessional churches.

As I have already mentioned, these ideas had their strongest influence on the Prussian tolerance legislation at the end of the 18th century. The edicts of Toleration in the Habsburg states[12] and in France —even just before the Revolution there—[13] reflected rather the preference of the Catholic church. Only those confessions were tolerated which had shown themselves in other countries to be at least not harmful to the moral foundations of the state.

IV. Freedom of Religion as a Human Right

1. *North America* is generally regarded as the country in which religious freedom reigned from the start of the European settlement. After all, many immigrants had left their home country precisely on grounds of religion. This is of course true, but it did not lead to the immediate establishment of religious

12 Toleranz-Patent of Joseph II dtd. 13th Oct. 1781.

13 Edict of tolerance dtd. 28th Nov. 1787.

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freedom. The Europeans who emigrated for religious reasons were not inclined to toleration, but still clung to the unity of worldly authority and religion.[14] In most of the thirteen North American colonies, there was a close connection between government and religion, which was familiar to the immigrants from Europe. The english Puritans in their states demonstrated the utmost impatience with all other faiths, and the Church of England had a similar effect in the South. In Virginia, the established church even persecuted the Baptists (1765-1770).

It was only the Revolution that prompted the breakthrough in North America that led to religious freedom as a human right. In the Virginia Bill of Rights (1776), the last article reads "that... religion can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience;[15] and that it is the mutual duty of all to practise Christian forebearance, love and charity towards each other". The reference to Christian duty in a state legal document shows that only Christian confessions and sects were to be included. This guarantee of religious freedom was not in the first instance directed against England; it had nothing to do with independence from England, but lots to do with the situation in North America, which was to be altered.

The first amendment of the Constitution of the United States from 1791 reads that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". These two clauses, which at first bound only Congress, that is, the[16] Federation, guarantee freedom of religion on the basis of a strong separation of church and state. The old European tradition of the unity of worldly authority and religion, which was also maintained in the North American colonies, was expressly abandoned on the federal level, and free exercise of religion was guaranteed. State authority was founded on the people, and as a consequence, no religion, not even that of the majority, was privileged. On the contrary, religion and its exercise were separated from government business and transferred to societal bodies. Political rule is for legal reasons religiously blind. With this, the religious toleration of the modern state still involved in matters of faith was swallowed up in the religious neutrality of the state with constitutionally guaranteed freedom of religion.

2. In *France* it was Gallicanism that established a particularly strong link between the monarchical state and the Catholic church. The movement from

14 Cf. on what follows also Justus Hashagen, Zur Entstehungsgeschichte der nordamerikanischen Erklärungen der Menschenrechte (1924), in: R. Schnur (ed.), *Zur Geschichte der Erklärung der Menschenrechte*, 1964, p. 129, 131 f.

15 Accordingly Art. II of Pennsylvania Bill of Rights (1776), Art. II Massachusetts Bill of Rights (1780); hidden in Art. III privilegion of protestants.

16 For the extension to the states see Laurence H. Tribe, *American Constitutional Law*, 1978, p. 814 note 5, p. 819.

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mere religious toleration to a state guarantee of religious freedom took place in the course of the Revolution. Article 10 of the Declaration of the Rights of Man and the Citizen from 1789 says that, no one shall be disturbed on account of his opinion, even religious, provided its manifestation does not disturb the public order established by law.

Expressed positively, the French Constitution of 1791 grants (in Titel I no. 3) "liberty to every man ... to follow the religious worship to which he is attached."

The idea expressed in this text was discussed in the constitutional convention,[17] where some deputies were of the opinion that it would be sufficient to tolerate non-Catholics. To this, Mirabeau answered, I have not come to preach toleration. In my eyes freedom of belief is such a sacrosanct right that the word "toleration", which seeks to express it, seems to me somewhat tyrannical, since the authority which must be tolerant attacks freedom of thought precisely in the fact that it tolerates and would thus be capable of intolerance.

In the course of French constitutional development —apart from the confusion of the second phase of the French revolution— the guarantee of religious freedom was maintained. All the same, the constitution of 1814 protected the Catholic faith as the state religion alongside religious freedom (Arts. 5, 6), while the constitution of 1830 promised the ministers of Catholic and other Christian denominations a state salary (Art. 6).[18] This was all ended by the statute concerning the separation of church and state of 9th December 1905, which is valid to this day.[19] It secures freedom of conscience and guarantees the free exercise of religion within the limits of public ordre (Art. 1). The idea that the Republic does not recognise, remunerate or support any religion (Art. 2) is the vague and specifically French formulation of the separation of church and state, which is capable of a variety of interpretations. It was treated at first as a call for a militant laïcism, which itself was a worldview standing in competition to religion, constructed out of elements of the Enlightenment and turn-of-the-century positivism. The same statute of separation is understood today as a liberal laïcité,[20] that starts from a dualism between church and state, without denying the fact that the subjects of the state have religious needs. Religious activities can be undertaken by believers in public within the limits of public ordre.

3. In *Germany*, as we have already seen, Prussia was at the forefront of the protection of religious freedom. Prussia kept its leading position when it adopted

17 Cf. Gerhard Besier, Art. "Toleranz XI", in: *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 6, 1990, p. 509.

18 Accordingly constitution of 1848, Art. 7 cl. 2.

19 Established on constitutional level since 1946 (Art. 1), Constitution of 1958 (Art. 2 s. 1).

20 Cf. on this Georges Burdeau, *Les libertés publiques*, 4th ed. 1972, pp. 341 ff; Axel v. Campenhausen, *Staat und Kirche in Frankreich*, 1962, pp. 67 ff.

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the major provisions of the Reich Constitution of 1849 relating to religion (§ 144 ff) into its own constitution of 1850 (Art. 12 ff).[21] These were the right to communal private and public exercise of religion for all confessions, the right of association into religious societies, and the enjoyment of civil and political rights independently of religious conviction. Only disestablishment of the state church, as intended by § 147 section 2 of the Reich Constitution (1849) was not adopted by Prussia. Some of the South German states followed these developments. Full legal equality of all confessions, which was still lacking in most German states, was finally introduced in the Act of the North German Federation concerning the legal equality of confessions in civil and political matters of 3rd July 1869, which from 1871 applied as a Federal statute.[22]

The German shift from toleration to religious freedom took place gradually and it varied from country to country; religious freedom was only secure after the cultural battle against the Catholic church had ended. Of course, until 1918 religious freedom for the protestant churches was bound up with establishment, and was thus not religious freedom in the full sense of the word.[23] While the Catholic church used its freedom corporately and achieved full autonomy, the protestant church remained bound together with the state in the person of the monarch as Summus Episcopus. Leading ecclesiastical lawyers such as Emil Friedberg (1837-1910) and Rudolf Sohm (1841-1917) lent their support to this situation.[24]

The Weimar Reich Constitution of 1919 disestablished the church (Art. 137 Section 1) and guaranteed modern religious freedom in its full sense by way of three individual freedoms: freedom of profession, freedom of religious exercise, and freedom of association into religious societies and their freedom of activity. According to Gerhard Anschütz,[25] religious freedom was "the legal power guaranteed to the individual by the state, to determine at will his position on all religious issues, to live according to his religious, non-religious or anti-religious convictions, to do everything these convictions require, and desist from everything they forbid, in all these matters to be free from state pressure —but on the condition of obedience to the general laws." The term "general laws" excluded all laws which "were directed against a religion, confession, indeed any religiously related opinion (religious or anti-religious) *as such*.[26] If one

21 Cf. Peter Landau, Die Entstehung des neueren Staatskirchenrechts in der deutschen Rechtswissenschaft der zweiten Hälfte des 19. Jahrhunderts, in: Wolfgang Schieder (ed.), *Religion und Gesellschaft im 19. Jahrhundert*, 1993, pp. 29, 33 ff.

22 Concerning the other German states see Martin Heckel, *Gesammelte Schriften*, 1989, Vol. I, pp. 391 ff.

23 Cf. on this Heckel (n. 22), pp. 394 f.

24 Landau (n. 21), pp. 42 - 51.

25 Anschütz (n. 7), p. 681.

26 Anschütz (n. 7), p. 683.

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regards disestablishment as a necessary part of full religious freedom, this only pertained in Germany after 1918.

V. THE SEPARATION OF CHURCH AND STATE AS THE BASIS OF RELIGIOUS FREEDOM

The development of the idea of religious freedom is accompanied by the stressful relationship between state and church, or state and religion. We have seen that after the confessional division attempts were made to maintain the unity of state authority and religion. On the basis of this unity, the experiences of religious wars and the fruit of the Enlightenment gave birth to the idea of toleration. Toleration was supposed to govern the relationship between the state and those of other faiths; the state, bound up as it was with the truth-claims of one religion, was obligated to tolerate others. State toleration presupposes an established church, if you like, a religious position, which the state must legally adopt. If there are no truth-claims, there can be no toleration!

Now, as soon as the conviction takes root in a state that religious matters do not belong to the functions of the state, and that in particular the state must be religiously neutral, the age of modern religious freedom has begun. Toleration is swallowed up in religious freedom, since the state, which manages worldly matters and is blind to religious distinction, can no longer be tolerant. A paradigm-shift from state-granted toleration to state-guaranteed freedom has taken place. Toleration can now only be a civic virtue of one believer towards another of a different creed.

But how then does one structure the relationship between church and state in an age of modern religious freedom? Religious neutrality of the state means that it no longer worries about the human religious needs of those it governs, that it no longer adopts a religious position. Religion is guaranteed as a fundamental right and thus excluded from the realm of state functions. Unless, of course, it is a matter of setting limits to freedom for the sake of the public ordre.[27]

This protection of religious freedom is often connected with the thought that religion is a private matter. Such an attitude has regard only for the individual believer, who fulfils his religious needs in privacy. But the fact of religious need, and the religious interests of humans, can only be partially understood as a private matter. It is, of course, true that at least in all the monotheistic religions the relationship between God and the individual is something highly personal and individual. But this personal and individual element has —particularly in

27 Thus correctly Landau (n. 21), p. 60.

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the community of the believers— a complex institutional foundation, which most people find necessary for the satisfaction of their religious needs and interests. If the modern state is no longer able to provide this foundation either alone or in conjunction with the churches, as the development of the idea of religious freedom would indicate, these institutional conditions can only be created and maintained by specifically religious associations.

Thus the requirement of state religious neutrality gives rise to its interest in the existence of independent religious institutions. These are the support to the individual believer, which the state cannot provide. These institutions promote the social contact, common worship, and common business that are part of the rule of life of most faiths. They thereby show that religious interests are public interests.

On the basis of these reflections, the state must not only guarantee religious freedom, but also control its distance from the churches. This is expressed by Article 4 of the constitution of Baden-Württemberg (1953) as follows:

(1) Churches and recognised religious associations are to develop in the fulfilment of their religious functions free from state interference.

(2) Their significance for the maintenance and strengthening of the religious and moral foundations of human life is to be recognised.

In Germany, then, the development of the idea of religious freedom has given rise to this positive view of the role of churches and other religious communities. It is the basis of a friendly relationship between the state and religious associations, which is also expressed in the Basic Law, the German Federal Constitution. In other countries, the separation of church and state is structured - for their own particular reasons - defensively, or even inimically. But the amiable separation of church and state thoroughly suits the circumstance that the citizen, for whom the state exists, is generally also a believer. The state cannot serve him in this capacity, and so privileges suitable extra-governmental institutions, without taking a position for any particular religion or on any particular question of religious truth.

This is worked out in German federal or Land constitutional law in the following way.[28] For example:

— Churches and religious associations are granted the status of public law corporations, which brings with it a right to autonomous administration within the framework of general laws applying to all.

— Churches have the right to raise taxes from their members, with the administrative support of the state.

28 Cf. Art. 140 German Basic Law in connection with Art. 136 ff. of Weimar Constitution.

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— Churches are permitted to undertake religious exercises without compulsion in public establishments such as the military, hospitals and prisons insofar as there is a need.

— Questions of common interest can be regulated by treaty between the state and religious associations.

— Religious education is a guaranteed part of the general curriculum in state schools, whereby the churches determine the content of the lessons, but noone is forced either to give or participate in such lessons.

— Finally, there is a guarantee of confessional theological faculties in the Universities.

These guarantees expand the guarantee of religious freedom, in that the religious interests of the citizens are institutionally supported without the state becoming involved in issues of theological substance.

VI. Biblical and Mediaeval Elements of Modern Religious Freedom

I want finally to return to the advance notice I gave you, and to try to expose the sources of modern religious freedom and its connected separation of church and state in earlier strands of Christian thought.

1. *Secularized theological individualism*

Biblical theology sees man notwith handing his membership in the Christian communion in his relationship to God as an individual. As I have already mentioned, this view was strengthened during the Reformation. The uniqueness of the human individual is expressed theologically in the immortality of the soul and his personal responsibility before God. Man is a subject to God. Freedom, as a central concept of the Christian message, is thus individual freedom. The many-sided Christian concept of freedom which considers he membership of the individual person in the Crhistian communion has as the theological foundation to all its aspects the individual and personal relationship of the human being with God. On this basis human freedom is worked out in mediaeval philosophy as a metaphysical concept.

If one divorces this conception of man from its theological foundation and secularises the idea, one gets the position of man as a legal subject vis-a-vis the state. It gives one a point of contact for human rights against the state. In the final analysis, this is the root of the idea of constitutionalism. The idea consists of the belief that the individual, and eventually corporate bodies, possess legal positions as against the state, and that these legal positions must be secured by

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a separation of powers. Modern religious freedom, which is a significant human right,[29] has its foundation in Christianity. The biblical and theological sources of the constitutional conception of freedom also explain why other cultures not influenced by Christianity —or at least not influenced by monotheism— have not produced the concept of individual human freedom. Not in China, nor in Japan, nor in India has such a concept been developed.

Incidentally, religious freedom has also recently been grounded on this theological individualism within the Catholic church. In the second part of the declaration concerning religious freedom of the Second Vatican Synod of 7th December 1965, it is stated:[30]

> The declaration of this Vatican Synod on the right of man to religious freedom has its foundation in the dignity of the person. The requirements of this dignity have come to be more adequately known to human reason through centuries of experience. What is more, this doctrine of freedom has its roots in divine revelation, and for this reason Christians are bound to respect it all the more conscientiously. Revelation does not indeed affirm in so many words the right of man to immunity from external coercion in matters religious. It does, however, disclose the dignity of the human person in its full dimensions. It gives evidence of the respect which Christ showed toward the freedom with which man is to fulfil his duty of belief in the Word of God. It gives us lessons too in the spirit which disciples of such a Master ought to make their own and to follow in every situation...It is one of the major tenets of Catholic doctrine that man's response to God in faith must be free. Therefore no one is to be forced to embrace the Christian faith against his own will. This doctrine is contained in the Word of God and it was constantly proclaimed by the Fathers of the Church. The act of faith is of its very nature a free act.

In spite of the ancestral connections, one cannot simply talk of a harmony between Christian and constitutional freedom. State guaranteed freedom is above all "freedom from". State freedom does not, and may not, require freedom to be exercised in a certain direction, or with a certain tendency. Thus state guaranteed religious freedom is not connected with any duty other than to remain in the bounds of legally required public ordre. But religious and the other freedoms enable the Christian to act and speak according to his own beliefs and conception of that freedom. By contrast the *libertas christiana* that applies within the church to be guided by revealed truth.

29 This does not mean that freedom of religion is origin of the idea of human rights, thus Georg Jellinek, Die Erklärung der Menschen- und Bürgerrechte (1919), in: R. Schnur (ed.), *Zur Geschichte der Erklärung der Menschenrechte*, 1964, pp. 39 ff.; on the contrary Emile Boutmy, ibid., pp. 78 ff. and Hans Welzel, ibid., pp. 238 ff.

30 No. 9 and 10.

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2. *The Dualism between Regnum and Sacerdotium*

Modern religious freedom has not only biblical theological roots, but also rests on structures which were developed in the High Middle Ages in the course of the battle between worldly authority and the church. As a result of this battle, the Church was liberated in a quite revolutionary manner[31] from its subjection to worldly authority that went back to late Roman antiquity and the era of the Ottonian Empire. From the middle of the 11th century, a driving force of this revolution was the monk Hildebrand, who after his election as Pope Gregory VII demanded the subjection of temporal to spiritual authority in his dictatus Papae (1075). This ecclesiastical position, which was adopted by successive popes, and in particular by the ecclesiastical policy of Cluny, was never completely successful. Apart from an honorary superiority, the priesthood never achieved lasting power over the kingship. Nonetheless, Church and Pope acquired a high degree of organisational strength and independence from temporal authority. This was expressed in particular in the completion of a church hierarchy that survived individual kingly reign, and the creation of the Church's own system of canon law.[32] Thus was founded the worldly basis of the *libertas ecclesiae*[33] that led back to Christ.

The papal revolution of Gregory VII took away the claim of worldly authorities to rule directly under God, and established this claim exclusively for the Church. This established a dualism that has influenced the history of the Christian West ever since.[34] At the time this dualism did not lead to a strong separation of church and state, for worldly authority was bound up with religion, and thus in many ways influenced by the Church. In reverse, worldly authorities also had an influence on ecclesiastical offices. But the Church built itself an organisation in anticipation of the modern state, with a central legislation, an administrative hierarchy to execute the laws, and a system of courts along with a rational system of jurisprudence in canon law.[35] These facts together with the international character of the Church ensured its organisational division from worldly authority, and in turn distinguished the western Latin church from the Caesaro-papism built into the Greek-Byzantine church, which still has its effect today.

31 With this therm Harold J. Berman, *Recht und Revolution*, 1991, pp. 83, 144 ff. with further references to corresponding interpretations: pp. 147 f., footnote 1.

32 Friedrich Kempf, in: Hubert Jeden (ed.), *Handbuch der Kirchengeschichte*, Vol. III/1, 1985, pp. 500 f.; Berman (n. 31), pp. 144 ff., 190 ff., 234 ff.

33 Gerd Tellenbach, *Libertas. Kirche und Weltordnung im Zeitalter des Investiturstreites*, 1936, pp. 151 ff., 164 ff.

34 The doctrine of two swords, founded by Gelasius I and which he formulated in a letter to Anastasios I, is a preceding doctrine, cf. Tellenbach (n. 33), pp. 42 ff.; Ernst Wolf, Libertas christiana und libertas ecclesiae, in: *Evangelische Theologie* 9 (1945/50), pp. 133 ff.

35 Authoritatively Gratian, *Concordantia discordantium canonum (1140)*.

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The papal revolution of the 11th century impregnated Latin Christendom in such a way as to immunise it from a complete unity of church and state, and was to lead in due course to their separation and the secularisation of the state.[36] We can see now that the Gregorian revolution in the High Middle Ages was perhaps more significant for the development of modern religious freedom than the Lutheran Reformation, which tended rather towards the old "pre-revolutionary" concept of unity, reviving it in the Summus Episcopus, and establishing it for more than 300 years.

The development of canon law to regulate temporalities within the church not only strengthened the internal structure of the church and hindered its involvement with worldly authority, but it also protected faith and religion from pure Pietism and Enthusiasm. The separation of civil and canon law, expressed in the concept of *ius utrumque* created early on a functional basis for the separation of worldly authority and Church. Later, it was also able to function as the basis for a separation of state and religion, and thus as a basis for modern religious freedom. The liberality of democratic constitutionalism has an important source here. For the development of modern religious freedom was accompanied by the idea of the democratic constitutional state. And the functions and duties of this state are in principle limited, as I have tried to show by the example of religious freedom.

VII. CONCLUSION

I have told you a tangled tale. Allow me, in closing, one more thought, which is directed to the future. One must understand what has happened in the past in order to assess its significance for the present and, if one wishes, to protect it for the future. There are forces which threaten religious freedom, and which at times appear in the name of that freedom. Religious fundamentalism of all sorts questions the separation of the temporal from the spiritual, when it desires to formulate policies and laws which exert religious pressure on fellow citizens of other faiths or of none at all. But this separation is also threatened by the state that promises salvation through welfare and education, and indeed by every totalitarian state that gives itself spiritual jurisdiction or raises atheism to an ideological principle. Such threats to the separation of church and state are attacks on democratic constitutionalism. But with the tools of jurisprudence they may be analysed and recognised for what they are, and then with the tools of the constitutional state they may be resisted and conquered.

36 Berman (n. 31), p. 193; Wolf (n. 34), p. 136.

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