

Moves towards Authentic Freedom. Church and State in Switzerland, and Beyond

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Abstract: Many of the Swiss Cantons have regulated the relations between church and state by establishing, in their public law, corporations at the levels of the municipality and of the canton. The role and the rights of these corporations, especially obligatory membership in them, is the object of ongoing political and legal debate. Both on the side of the courts and of the church, the present system has come under scrutiny, while the corporation representatives and also a majority of the population seem intent on maintaining it. This paper explains and examines the presently valid church-state relations, focusing on the Canton of Zurich, and looks at the suggestions for reform elaborated by an experts' commission instituted by the Conference of Swiss Bishops. In conclusion, it presents some more general reflections on the challenges to individual and corporative religious freedom today, in Switzerland and beyond.

1. Introduction

If you were to ask someone how the relations between church and state are regulated in Switzerland, you would very likely obtain the classically Swiss answer: they are different in every canton and very complicated. This answer is kind of cliché, but no lie—though many might interpret it as another attempt not to reveal the state of financial affairs in the church.

For understanding the history and the present situation of Swiss church-state relationships, we have to remember that European states up until fairly recently were confessional. In Switzerland, the *Sonderbundskrieg*, where the frontlines followed confessional divisions, occurred as late as 1847. State control over religion was one of the goals in this war, on the part of the more liberal and more protestant side—which prevailed in the end, establishing the new Swiss Confederation after its victory over the more conservative, Catholic cantons that wanted to hold on to their sovereignty.¹

Most of these issues were resolved in the Swiss federal constitution (*Bundesverfassung*) of 1849, revised by popular referendum in 1999.² Swiss law puts particular emphasis on safeguarding religious and confessional peace. Traditionally, rulings of the highest court have looked at fundamental rights as pertaining to the individual as a free person. In general, the cantons have jurisdiction in matters of church and state; the federation's role is subsidiary, but federal law has precedence.³

¹ See the very reliable article on “Sonderbund” in *Historisches Lexikon der Schweiz*, online at <http://www.hls-dhs-dss.ch/textes/d/D17241.php>, available in German, French and Italian.

² Cfr. Art. 15, *Bundesverfassung der Schweizer Eidgenossenschaft (BV)* of 18 April 1999, online at <http://www.admin.ch/opc/de/classified-compilation/19995395/index.html#a15>.

³ Cfr. Peter Leisching, “Kirche und Staat in der Schweiz,” *Staatslexikon, Recht – Wirtschaft – Gesellschaft*. Ed. Görres-Gesellschaft, 7th ed. (Freiburg: Herder 1995), vol. 3, 505-508, 505.

As the more detailed regulations are left to the constitutions and laws of the various cantons, there is a significant diversity: some cantons to this day have a system where civil and church administration and finances are undivided; others observe a strict *laïcité* according to the French model; the majority of the (German-speaking) cantons, however, follow what is sometimes called the “dual” or “dualistic system.” This characteristically Swiss arrangement, exemplified by Zurich, the largest canton, will be the object of this paper.

This very particular state-church law (*Staatskirchenrecht*) has evolved within a profoundly democratic and liberal society, showing how wide the spectrum of functioning relations between democratic states and religious associations really is. Modern societies approach similar problems with sometimes surprisingly dissimilar legal structures. At the same time, systems that appear fundamentally different at the theoretical level can produce quite similar practical solutions. Therefore, a comparison of German Swiss *Staatskirchenrecht* with other arrangements can yield both a theoretical and a practical gain: it helps to distinguish more clearly between the (universal) demands of religious freedom and its (particular) implementation, and it offers a concrete example, with its own problems and advantages, from which other systems can learn how (not) to do things—or how to do them better.

2. The Law of Switzerland

The Constitution of Zurich “recognizes as corporations of public right” the Reformed Church, the Roman Catholic Corporation (each with the local communities, the so-called *Kirchgemeinden*) and the Christ-Catholic (i.e., Old Catholic) community. We will later see how the exact wording of this paragraph is highly significant. Analogously, two Jewish communities are recognized. This system implies a need to declare religious affiliation to the state. The religious corporations are established in public law, rather than in private law. In this way, corporative or collective aspects of religious freedom are powerfully affirmed, or at least so it appears. In particular, the Zurich constitution guarantees the autonomy of these corporations within the limits of law, and foresees a special law concerning their internal elections, organization, their right to collect taxes, state subsidies, and the procedures for the elections of pastors as well as their terms of office. The canton exercises superintendence over these corporations.⁴

⁴ *Verfassung des Kantons Zürich*, Art. 130:

1 Der Kanton anerkennt als selbstständige Körperschaften des öffentlichen Rechts:

- a. die evangelisch-reformierte Landeskirche und ihre Kirchgemeinden;
- b. die römisch-katholische Körperschaft und ihre Kirchgemeinden;
- c. die christkatholische Kirchgemeinde.

2 Die evangelisch-reformierte Landeskirche, die römisch-katholische Körperschaft und die christkatholische Kirchgemeinde sind im Rahmen des kantonalen Rechts autonom. Sie regeln:

- a. das Stimm- und Wahlrecht in ihren eigenen Angelegenheiten nach rechtsstaatlichen und demokratischen Grundsätzen in einem Erlass, welcher dem obligatorischen Referendum untersteht;
- b. die Zuständigkeit für die Neubildung, den Zusammenschluss und die Auflösung von Kirchgemeinden.

3 Das Gesetz regelt:

- a. die Grundzüge der Organisation der kirchlichen Körperschaften;

The crucial and problematic point is this: rather than recognizing the canonical juridical persons, the law of the canton actually establishes corporations at the level of the parish (the so-called *Kirchgemeinde*) and of the canton (which has no corresponding figure in canon law). It is these corporations that have the rights of property, tax collection and acting in the sphere of public law, while the parish, e.g., has no juridical existence, at least not directly and explicitly. The corporations, or rather their (publicly elected) executive and legislative authorities, constitute a kind of parallel hierarchy within the Catholic community, which nowadays is all too often poised against the Church's own hierarchy. Obviously, no state needs to be concerned with such intra-ecclesial affairs. A democratic state, upholding the rule of law, however, needs to treat religious societies as what they are. The state must not create something else in their place. In fact, the "Church . . . is not a relief organization, an enterprise or an NGO,"⁵ to quote Pope Francis, admittedly out of context; but the sentence has legal implications, in the sense that "the social and public dimension of the religious reality must be recognized in the secular realm."⁶ This recognition necessitates that the legal means employed are in accordance with how a religious society understands itself and is internally structured, included its will and ability to be a player in the larger society.

With "trusteeism" of the 18th and 19th century and with more recent developments in Catholic colleges and universities, North Americans have lived through problems and conflicts that in many aspects are similar to the ongoing tensions in Switzerland. In both cases, institutional, theological, political and financial elements make for a fairly complex situation.⁷

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- b. die Befugnis zur Erhebung von Steuern;
 - c. die staatlichen Leistungen;
 - d. die Zuständigkeit und das Verfahren für die Wahl der Pfarrerrinnen und Pfarrer sowie deren Amtsdauer.

4 Es kann vorsehen, dass ein Teil der Steuererträge einer negativen Zweckbindung unterstellt wird.

5 Der Kanton hat die Oberaufsicht über die kirchlichen Körperschaften.

Weitere Religionsgemeinschaften

Art. 131

1 Von den weiteren Religionsgemeinschaften sind die Israelitische Cultusgemeinde und die Jüdische Liberale Gemeinde vom Kanton anerkannt.

2 Diese ordnen die Mitwirkung ihrer Mitglieder nach rechtsstaatlichen und demokratischen Grundsätzen.

3 Das Gesetz regelt unter Wahrung der verfassungsrechtlichen Autonomie der Religionsgemeinschaften:

- a. die Wirkungen der Anerkennung;

- b. die Aufsicht.

(The text of the Zurich Constitution, most recently revised in 2006, is online at http://www.zh.ch/internet/de/rechtliche_grundlagen/kantonsverfassung.html)

⁵ Pope Francis, *Message for the World Day of Missions 2013* (19 May 2013): http://www.vatican.va/holy_father/francesco/messages/missions/documents/papa-francesco_20130519_giornata-missionaria2013_en.html.

⁶ Words from the preface (Prefazione) by the President of Italy Giorgio Napolitano to the book *La legge di re Salomone. Ragione e diritto nei discorsi di Benedetto XVI*, ed. M. Cartabia and A. Simoncini (Milan: BUR, 2013), ii. For an introduction into the debate in Italy see also F. Casazza, *Libertà religiosa e laicità tra cronaca, leggi e magistero*, Itinerari etici (Roma: Città Nuova, 2012).

⁷ Cfr. Martin Grichting, *Das Verfügungsrecht über das Kirchenvermögen auf den Ebenen von Diözese und Pfarrei*, Münchener Theologische Studien, Kanonistische Abteilung 62 (St. Ottilien: EOS, 2007), 373–472.

According to the Swiss mentality, even among less theologically inclined churchmen, there often prevails a certain pragmatism according to which things are not to be touched as long as they work. Nevertheless, also due to changes introduced by Pope Benedict XVI in 2009,⁸ recently there has been some movement: gradually, the Swiss bishops and the Supreme Court (with two recent decisions⁹) came to agree substantially that Catholic citizens can, in fact, distinguish membership in the church from membership in the corporation, remaining Catholics in good standing without paying the church tax (which actually is collected by the corporation). Whether this is a desirable situation for a Catholic to be in remains a disputed question, even among the bishops.

3. Evaluation of the Present Swiss System

In contrast to Germany, the bishops in Switzerland have never given a high degree of formal recognition to the present legislation, and the Holy See has never more than tolerated it. The crucial difference is this: in Germany, very strong legal and financial autonomy is given to the church herself (i.e., the diocese and the bishop), whereas in Switzerland, the dioceses and parishes find themselves in a weak position, compared to the “recognized,” well-organized and well-funded corporations, both at the cantonal and the parish level.

According to the laws of Zurich and other cantons, the parish corporation is the employer of the pastor and all other parish staff; generally, the corporation has the right of electing the pastor; the canton corporation frequently runs specialized pastoral services, oversees religious education in public schools, and claims to act as the representative of the Catholic Church before civil authorities and of the Catholic people before the bishop. In many instances, the corporation applies to itself and its agencies names and terminology that have a well-defined and different meaning in Catholic ecclesiology and canon law (e.g., calling itself “church,” its parliament a “synod”)—such a manner of speech has led to a widespread misconception about the nature and function of the ecclesiastical corporations, originally created for merely administrative and financial purposes.

The present church-state arrangement in Switzerland is the object of ongoing political debate. In a referendum on 10 June 2001, Art. 72 Abs. 3 *BV*, the so-called *Bistumsartikel* was abrogated, although only two years earlier it had been maintained in the revised Federal Constitution. This article had stipulated that new Catholic dioceses could be erected only with the consent of the federal government. More recently, there have been initiatives at the level of the cantons to introduce at least some changes: but in a referendum in the Canton of Zurich on 18

⁸ Pope Benedict XVI, *Motu proprio Omnium in mentem* (26 October 2009): http://www.vatican.va/holy_father/benedict_xvi/apost_letters/documents/hf_ben-xvi_apl_20091026_codex-iuris-canonici_en.html.

⁹ The texts of the court decisions are at <http://relevancy.bger.ch/cgi-bin/JumpCGI?id=BGE-134-I-75&lang=de&zoom=OUT&system=clir> and at http://www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2011/Entscheide_2C_2011/2C.406__2011.html.

May 2014, an overwhelming majority of the citizens rejected the proposal to abolish church taxes for juridical persons.¹⁰

Within the church, however, doubt is growing about whether the present legal arrangement continues to serve the interests of the Catholic Church and whether it adequately respects the fundamental right to religious freedom, especially its corporative aspect.¹¹ The representatives of the corporations, as may be obvious, are the sternest defenders of the present “dual” system.¹² Besides historical and pragmatic arguments, its supporters use the theological argument that corporations offer to the laity a way of being involved in the church and express the fact that all members of the Body of Christ constitute the church. As Daniel Kosch points out, in the Swiss dual system, while the corporations are at the service of the church, church hierarchy and corporations operate side by side and with each other.¹³ Critical observers stress that in too many instances hierarchy and corporation authorities actually operate without or even against the other, using—or rather abusing—their relative powers in order to push their respective theologies and ecclesiological agendas. One real question the present situation poses is this: What holds the two sides together—beyond the formal claim to be Catholic?

The mere affirmation that the “structures of the Catholic Church in Switzerland” are twofold, namely “canonical structures” (*kirchenrechtliche Strukturen*) and “structures according to state-church law” (*staatskirchenrechtliche Strukturen*), is in fact problematic. The problem persists when the thing that holds them together is said to be the “dual system,” whose functioning, as Kosch rightly claims, requires good cooperation.¹⁴ The latter of these requisites seems obvious: all cooperation, even between the constitutional entities of a democratic state, requires good will in order to function properly. At the same time, structures of government and

¹⁰ 71,84% voted against the proposal of abolition, 55,44% of the citizens participated in the referendum: these numbers show how dedicated the citizens of Zurich are to direct democracy and to the present arrangement between church and state; for the result of the referendum, see <http://www.zh.kath.ch/news/ablehnung-der-kirchensteuer-vorlage-erfreut-und-bestaerkt>; for the preceding political debate see <http://www.nzz.ch/aktuell/zuernich/uebersicht/firmen-sollen-weiterhin-kirchensteuern-zahlen-1.18220086> and <http://zh.kath.ch/news/kirchensteuer-initiative/aktuell/breite-front-gegen-kirchensteuerinitiative>.

¹¹ The “corporative” aspect, in the sense of the rights religious societies and institutions possess, should be distinguished from the “collective” dimension, which is the right of single persons to form associations, and thus part of their individual right to religious freedom. Cfr. Antonius Liedhegener, “Religionsfreiheit als individuelles, kollektives und korporatives Grundrecht im liberalen Verfassungsstaat – für alle! Eine Erwiderung,” *Salzkörner* 18 (2012), 10-12, online at <http://www.zdk.de/veroeffentlichungen/salzkoerner/ausgabe/18-Jg-Nr-1-84M/>; Gerhard Czermak, *Religions- und Weltanschauungsrecht: Eine Einführung*, with E. Hilgendorf (Berlin-Heidelberg: Springer, 2008), paragraph 178; for a brief overview of recent European jurisprudence, see Christoph Grabenwarter, “La libertà religiosa – il contributo di Benedetto XVI a una garanzia universale da una prospettiva europea,” *La legge di re Salomone* 68–84, 81–2.

¹² For more information on the “dual system,” see <http://rkz.ch/index.php?&na=5,0,0,0,d>, the webpage of the *Römisch-katholische Zentralkonferenz* (RKZ), the federal association of Church corporations (of which only the Corporation of Schwyz is not a member). This webpage presents the official position of the RKZ on the present regulation and their eventual modification. For a different viewpoint, see <http://homepage.bluewin.ch/libertas-ecclesiae>, run by the Vicars General of the (arch) dioceses of Vaduz and Chur.

¹³ Cfr. Daniel Kosch, “Con tutti—aufs Zusammenspiel kommt’s an. Kirchenleitung in der Schweiz im Mit- und Nebeneinander,” *forum: Pfarrblatt der katholischen Kirche im Kanton Zürich*, Nr. 19/2009, available online at <http://www.rkz.ch/upload/20090820143106.pdf>. Kosch is the current secretary general of the RKZ (see note 12).

¹⁴ Cfr. the official RKZ webpage at <http://rkz.ch/index.php?&na=5,0,0,0,d>.

administration must be designed in such a way as to function, be it less perfectly, even if the office holders are not simply good-willed, not supremely intelligent, or, in Christian terms, not saintly. This indeed is the quality test for structures of leadership. Besides this more pragmatic consideration, and more importantly, the “dual system” is a system that works much better for the Reformed Churches for which it was devised initially; in this sense it could be called unjust and discriminatory against the Catholic Church. Making it work for the Catholic Church, with its claim to be a visible church and with its hierarchical nature, has always been a stretch, somewhat artificial, and under the conditions of today it creates more and more difficulties. The democratic spirit behind the “dual system” must be appreciated, and it has indeed guaranteed financial safety for the church in Switzerland (though even its proponents lament a certain stinginess of the local corporations against the needs of the canton corporation, the diocese and the Conference of Swiss bishops, never mind the universal church and the Apostolic See—to which they have a canonical obligation to support by reason of a bond of unity and charity, see can. 1271 *CIC*). The same democratic spirit, however, becomes a problem when the corporations go beyond their own competencies, release declarations on theological or liturgical matters and try to influence the pastors and bishops by withholding or giving money according to the theological preferences of the corporations’ executives or parliaments (“synods”). For the church, as for any religious group, the right to determine its internal structure of governance belongs to the contents of religious freedom as much as the right to public activity, missionary outreach and social engagement included.

Recent decisions of the Swiss Supreme Court (*Bundesgericht*) have introduced significant changes into the previously fairly stable jurisprudence.¹⁵ According to the position previously upheld by the courts, every Catholic residing in a specific town and canton automatically and inevitably was a member of the relative corporation. Obligatory and automatic membership was judged constitutional because everyone had the unlimited right to leave the church; the relatively minor infringement on the church’s own freedom was deemed acceptable as the church had always tolerated, if not defended, this form of dual membership. According to the new Supreme Court decisions, Catholics can leave the corporation while continuing to be considered Catholics. The decisions emphasize the right not to reveal your religious affiliation, which is in fact at the heart of religious freedom.

As long as the principles of fundamental human rights are observed, various systems of church-state relations are able to uphold religious freedom. Therefore, the reality that in Switzerland church and corporation are not the same thing is not simply illegitimate, but needs to

¹⁵ The two fundamental decisions (*Leitentscheide*) are *BGE 134 I 75* and *BGE 129 I 68*, see http://www.polyreg.ch/d/informationen/bgeleitentscheide/Band_134_2008/BGE_134_I_75.html, http://www.polyreg.ch/d/informationen/bgeleitentscheide/Band_129_2003/BGE_129_I_68.html. The following examination of these court decisions owes a lot to, but does not simply agree with, the late Prof. Yvo Hanggarnter, a leading expert on Swiss constitutional and public law, see especially his review “Bundesgericht, II. Öffentlich-rechtliche Abteilung, 9.7.2012, X. c. Römisch-katholische Landeskirche des Kantons Luzern und Katholische Kirchgemeinde Luzern, Beschwerde in öffentlich-rechtlichen Angelegenheiten gegen das Urteil des Verwaltungsgerichts des Kantons Luzern vom 11.4.2011 (2C_406/2011),” *Aktuelle Juristische Praxis* 11 (2012): 1636–1643.

be regulated in a way fully compatible with religious freedom. On the one hand, this concretely means that, according to the state's public law, withdrawing from the church entails leaving the corporation, but not the other way round. And on the other hand, within the church's canonical order, the principle *semel catholicus semper catholicus* ("once a Catholic, always a Catholic") can remain in place, according to which it is impossible for a Catholic simply to sever all ties to the church.¹⁶

The arguments given by the Swiss Supreme Court reveal a certain difficulty, on the part of the Court, with fully understanding the position of a Catholic as opposed to a Protestant. For Protestants, corporation and visible church are one and the same thing. But the situation is different for the Catholics, as they make an essential distinction between the visible church and the state-sanctioned corporation. The *Bundesgericht* appears to be influenced by a reformed-protestant view of membership in the church, according to which membership in the corporation (*Landeskirche*) is itself membership in a religious society (cf. Art. 15 *BV*). For Catholics, the *Bundesgericht* should base its decision on Art. 36 *BV*,¹⁷ clarifying that obligatory membership in the corporation is a disproportionate and thus unconstitutional limitation of religious freedom. The debate, certainly, is not only about the money, as the *Bundesgericht* itself stressed, but about the legitimacy of the present legal system itself.

4. Into the Future

The Conference of Swiss Bishops and the Holy See decided to address these issues by organizing a big academic conference, held in Lugano in 2008,¹⁸ and by convoking a commission of experts. In 2012, the commission submitted its final report, summarized in a short booklet, called *Vademecum*.¹⁹ The *Vademecum* concentrates on four areas: 1) the use of adequate language in civil law and in corporation regulations; 2) the proper role of the corporations as a

¹⁶ This rule de facto underlies Pope Benedict's *Motu proprio Omnium in mentem*.

¹⁷ Art. 36 *BV* Einschränkungen von Grundrechten

1 Einschränkungen von Grundrechten bedürfen einer gesetzlichen Grundlage. Schwerwiegende Einschränkungen müssen im Gesetz selbst vorgesehen sein. Ausgenommen sind Fälle ernster, unmittelbarer und nicht anders abwendbarer Gefahr.

2 Einschränkungen von Grundrechten müssen durch ein öffentliches Interesse oder durch den Schutz von Grundrechten Dritter gerechtfertigt sein.

3 Einschränkungen von Grundrechten müssen verhältnismässig sein.

4 Der Kerngehalt der Grundrechte ist unantastbar.

(For a more detailed discussion on the application of the two constitutional articles, see the above-cited article by Hangartner, "Bundesgericht, II. Öffentlich-rechtliche Abteilung, 9.7.2012.")

¹⁸ The acts of this symposium have been published by Libero Gerosa in three languages: *Chiesa cattolica e Stato in Svizzera: atti del Convegno della Conferenza dei vescovi svizzeri, Lugano, 3-4 novembre 2008* (Lugano: EUPress FTL; Locarno: A. Dadò, 2009); *Katholische Kirche und Staat in der Schweiz*, Kirchenrechtliche Bibliothek 14 (Wien, Zürich, Berlin, Münster: Lit, 2010); *Église catholique et état en Suisse*, Freiburger Veröffentlichungen zum Religionsrecht 25 (Genève, Zurich, Bâle: Schulthess, 2010).

¹⁹ German and Italian text online at <http://www.bistum-chur.ch/amtliche-mitteilungen/schweizer-bischofskonferenz-sbk-vademecum-fuer-die-zusammenarbeit-von-katholischer-kirche-und-staatskirchenrechtlichen-koerperschaften-in-der-schweiz/>. A complete publication of the commission's work is *Staatskirchenrechtliche Körperschaften im Dienst an der kirchlichen Sendung der Katholischen Kirche in der Schweiz*, ed. Libero Gerosa, Kirchenrechtliche Bibliothek 15 (Münster: LIT, 2014).

civil entity at the service of the church; 3) structures and procedures for better cooperation between dioceses and corporations, 4) questions related to the practice of electing pastors.

The Swiss bishops have generally welcomed the proposals of the commission,²⁰ whereas on the part of the corporations the reaction to the suggested modifications was rather cool.²¹ What the *Vademecum* is proposing may sound like a compromise, but it actually is not. The *Vademecum* opts for evolutionary changes to the present system, aware of the fact that canon law is actually pretty flexible, especially when it comes to dealing with the limits imposed by civil law and to issues of church funding. The *Vademecum*'s contents can be summarized in the following four (4) points:

1. Language makes a difference and therefore the ecclesiastical corporations should adopt a terminology that is coherent with how the church speaks, in theology and canon law, both in and outside Switzerland. If something is called “church” or “ecclesial,” it must be an institution of the church; if something is referred to as “Catholic,” it must be in accord with the church’s teaching; if a word already has a specific meaning, like “synod,” it should not be used to designate an assembly of an altogether different nature.
2. The proper function of the corporations is to guarantee adequate funding, professional administration and financial transparency. The corporations are not to take over services, ministries and institutions that are of the church. Whoever works in pastoral services must respond to the bishop who is the proper shepherd of that portion of God’s people in whose name these services are being offered. To use an extreme but real example: whether to collaborate with an agency whose stance on abortion is less than transparent is not a decision that can be made against the bishop’s explicit judgment.²²
3. The corporations are not one of two columns that hold up the church—an image often used to illustrate the dual/dualistic Swiss model; instead, the corporations can have their place *in* the church only if they rediscover their auxiliary function in the administrative and financial sector. Equally, they should not be depicted as the principal place of lay involvement in the church—by now, the whole world should have learned from Pope Francis that in the church it is not all about the money. What needs to be avoided at all cost is the scenario (or possibility) that the corporations can blackmail pastors and bishops by withholding funds. In order to avoid such clashes and to foster better cooperation, appropriate structures and effective procedures must be put in place at the diocesan level. Finally, the life of the church cannot be legislated on, not even by a synod or a council, in the same way the life of a state can be legislated on by direct or representative democratic mechanisms. At first sight, this may be hard to grasp for people who live in successful democratic societies; but it may be hard only because they have forgotten that those same societies rest on meta-democratic principles, convictions and (natural) laws. It seems to

²⁰ See official statement (<http://www.bischoefe.ch/dokumente/anordnungen/vademecum>) of 23 August 2013 and the subsequent, more cautious statement by Bishop M. Büchel on 26 August 2013 (<http://www.bischoefe.ch/dokumente/communiqués/erklärung-von-bischof-buechel-zum-vademecum>).

²¹ See the official RKZ statement at <http://www.rkz.ch/upload/20131204104327.pdf>.

²² Cf. the years of debate and litigation, before the administrative court of Graubünden, between the Diocese of Chur and the Catholic Corporation of the Canton Graubünden (*Corpus Catholicum*) regarding subsidies for the „Adebar“ counseling service, see <http://www.kipa-apic.ch/k259519>.

me that today the church in its entirety is more than ever called to explain and defend the principles and limits of democratic decision-making.

4. The Swiss parishes and corporations have to find new methods for selecting pastors which respect the decisive role of the bishop, as demanded by the Second Vatican Council 50 years ago.²³ The bishops are called to take the consultative bodies, presbyteral and pastoral councils, very seriously; but they need to protect their own freedom of decision-making. At the basis of all leadership in the church lies the faith, which itself requires authentic freedom, a freedom that must be respected and protected by the secular authorities. The freedom of the church, similar to that of an individual person, is the freedom to be herself and live autonomously.

5. Reflections and Conclusions beyond Switzerland

Looking at the dual system as presently in force in many Swiss cantons is often quite shocking for people who are familiar with a pronounced separation of church and state as traditionally associated with the French or the US American constitutions. The Swiss laws appear as a direct contradiction to the letter and the spirit of the First Amendment to the US Constitution, prescribing that “Congress shall make no law respecting an establishment of religion.” Shock or at least surprise about the Swiss situation is generally shared by both religious and secularly minded people; the religious side fears the state’s overbearing influence on the religious societies, the secular party has the exactly opposite preoccupation.

A brief comparison between the actual situation of churches in nations with systems as different as Switzerland and the US reveals how utterly dissimilar theoretical and legal foundations (establishment in public law—prohibition of any establishment of religion) can produce surprisingly similar results and problems. On the other hand, this should be expected from nations that in many other aspects are so much alike, as liberal democracies, federally structured, and in whose very formation religious communities played a major role.

The basic reason why there needs to be a strict separation between church and state is frequently summarized under the slogan “religion is a private matter.” Popular and obvious as this phrase may sound, it is not so simple, because actually religion is not only a private, but also a public affair. When an interlocutor, often quite dogmatically, affirms that religion is a private matter, the simple answer must be: “Says who?,” for the affirmation is by no means self-explanatory or universally accepted. Instead, declaring religion an exclusively private affair is an act of reductionism: it declares an essential part of religion to be the only legitimate one. In theological terms, you could call it a dogmatic or, if this language is still allowed, you could even label it a heretical affirmation: it takes a part and makes it absolute. Rhetorically speaking, it is a

²³ Vatican II spoke against any limitations on the bishop regarding clerical appointments in his diocese: “In order to distribute more equitably and properly the sacred ministries among his priests, the bishop should possess a necessary freedom in bestowing offices and benefices. Therefore, rights or privileges which in any way limit this freedom are to be suppressed” (*Christus Dominus* 28, cfr. n. 20, on the nomination of bishops). The *Code of Canon Law* is more cautious and foresees “free conferral, unless someone has the right of presentation or election” (can. 523).

conversation stopper or even a killer phrase that needs to be turned into a conversation starter, precisely by pointing out its lack of foundation and one-sidedness. In similar ways, what are often called the “privileges” of churches or religions need to be viewed with less partiality as their rights, legitimately acquired and much more defensible than it seems to many convincingly secular minds.

Real progress in situating religious associations in the legal structure of any given nation will be made when we recognize that, besides the realm of private life and public life (in the sense of government activities), there is another form of public life, namely that of the civil society (we cannot here discuss further its complex relations to the state and its powers). In this third area—which is much wider than the space of government agency—a place has to be reserved for religious groups and associations. Religions convictions are present in all segments of society, cultural, economic, academic, to name but a few important ones. The state has to be vigilant lest any person or institution abuse the power it holds in order to impose its own religious views on others, thus violating their freedom of conscience and religion; at the same time, state governments and institutions need to be careful not to impose their own views on the citizens. These views, in fact, are inevitably partial or reductive precisely because the secular state cannot embrace a religion and thus never fully know it from within. Consequently, the secular nature of the state, with its secular approach to religion, must never be viewed—or, rather, abused—as a religion in itself, and as such, be it subtly, imposed on the people. Clarity and coherence on this point will protect the state from any totalitarian tendencies, about which its postmodern citizens are legitimately vigilant.

From a formal-judicial point of view, it cannot be considered an elegant solution if protecting the place of religious groups within society requires a long series of “exemptions.” This might be a pragmatic way of dealing with particular problems, but if adopted too frequently it reveals that the general provisions are inadequate to the rights and lawful demands of religious communities and institutions. If accommodating the biggest religious groups presents a constant problem, the relative laws are certainly not ideal. Moreover, the problem with exemptions is that they are not very well protected and easily are perceived as concessions or privileges. A well-made law does not need many exemptions, and does not use them where important issues are at stake. Considering the nature and the importance of religious societies and institutions, sometimes in virtue of their sheer size, laws need to be made in such a way as to respect their rights, and possibly even to assist their beneficial activities without creating the need for exceptions in order to make it work.

Such more comprehensive and truly pluralist views of religion should become understandable and more acceptable if we start thinking about religion from where we encounter it, which is not only in religious individuals, but also in religious families, associations, institutions, buildings, works of art, literature, and other documents of religious culture. Denying all that is not only counterintuitive, but actually ideological, not based on an immediate perception of the religious reality, but already a first reaction and interpretation of this reality. It is a position that starts from a concept of religion rather from an unprejudiced encounter with the

religious reality—palpable, visible, and of public interest as it is, as the very public debates and most of the media coverage on it demonstrate. The debate, both philosophical and political, will move forward if the horizon in which it moves it not closed off from the beginning so that the result of the debate is decided before it actually happens.

The modern state, in particular, faces religion not only in religious citizens, but also in religious groups and societies, foundations and institutions, some of which precede the state's own formation in time. In our increasingly globalized and plural cities and states, these juridical persons are interlocutors of the political authorities at least as often as the individual citizen *qua* religious. Debates about religious freedom, both philosophical and political, can no longer be situated within a reductive frame of ideas. As the late J. J. O'Donnell rightly summarizes, "the philosophy of subjectivity which has dominated Western thinking in the last two hundred years is individualistic. In the center stands the lonely individual with self-consciousness, self-knowledge and the lonely burden of freedom."²⁴ The concept of religious freedom, understood as a fundamental right of the individual, is the product of a long and complex history, beginning with the protestant church reformers and some humanists, continuing through enlightenment and idealism, up to the liberal thinkers of our day—many of them with an undeniable anti-Catholic bias. This history was predominantly concerned with religious freedom as an individual right. The thorniest problem today, however, seems to be the correct understanding and definition of the collective and corporative aspects of religious freedom, traditionally underrated both in theoretical debates and juridical provisions.

While politicians and judges in general may shy away from more abstract and philosophical discussions, such conversations are in fact necessary, also because—even if initially they are carried on in apparently restricted academic circles—they turn out to be substantially more inclusive than debates conditioned by a shallow political correctness. Ultimately, the legislative assemblies and supreme courts that are charged with making decisions in this matter will have to be informed by philosophical ways of reasoning, in order to draw up fair terms and appropriate limits of religious freedom in their jurisdictions, and to know their own limits in this process. A reliable juridical and institutional framework is in fact essential for any common practice of religion. That means individual religious freedom remains a hollow declaration if collective and corporative freedom is neglected.²⁵ Conversely, philosophical debates need to value the realism many juridical arrangements demonstrate: many legal provisions, in fact, deal with and appreciate religious reality, be it individual, collective, or corporative, recognizing it as it is—and not as it allegedly should be, according to some

²⁴ John J. O'Donnell, *Hans Urs von Balthasar*, Outstanding Christian Thinkers (Collegeville MA: Liturgical Press, 1992), 119.

²⁵ According to the *Bundesverfassungsgericht* (decision of 5 February 1991, *BVerfGE* 83, 341, C.II.1-2, online <http://www.servat.unibe.ch/dfr/bv083341.html#353>), the German constitution (*Grundgesetz*) intends to protect not only partial aspects of religious liberty but to recognize all religious rights and freedoms as they evolved in history and were included in the Weimar Constitution. Specifically, this regards the right to form religious associations (*Religionsgesellschaften*), which, in turn, are entitled to organize themselves as juridical persons, in private or public law, according to their self-understanding. For this purpose, the legal criteria for recognizing religious associations need to be interpreted favorably.

(covertly) religious or secular theory. In this sense, philosophical and legal debates on questions of church and state are connected and mutually corrective and enriching.

Not only between libertarian and communitarian philosophers, but also between cultures and groups of people (who are looking for fruitful ways of inhabiting the same planet, and often the same city and state), the debate on how to understand and treat human persons as individuals and as groups appears to be more widely open than it has been for a long time. Consequently, modern states, aspiring to be truly liberal and democratic, should not simply hold on to limited patterns of thinking inherited from the history of western thought, and often conditioned by the (formerly) predominant religions; western societies and states should look further back into their own Christian tradition and beyond it, especially beyond the dominant, classically protestant views that had little time for players other than God, the individual, and the state—views that current protestant theology itself has mostly abandoned. But these views now resurface, without God, in secular dress. No one, I trust, will categorically exclude that certain associations and groups, which are not themselves political entities, can and should be given a public place, both effectively and legally, according to their relevance and self-understanding. Once this requirement is agreed upon, obvious as it may seem for a modern civil society, religious associations cannot per se be barred from public recognition and effective legal protection. Not even the argument of “sectarianism” can be cogently made, because all groups need conditions of inclusion and exclusion in order to be recognizable; to banish religious criteria as conditions of group formation would again be discriminatory.

For a democratic state, overcoming any partial views is a necessary step towards genuine religious neutrality, towards recognizing its own foundations and limits, and towards more authentic inclusion and tolerance. Historically, Switzerland was looking for an arrangement that treated the two majority confessions equally, preserving their position in public law, and later on including smaller Christian and Jewish groups; the US, on the other hand, started from the principle of non-establishment of any church. But both systems share many common objectives. The rule of law must not become the rule of one view on religion (this is, in fact, a totalitarian mindset) but instead embrace the most inclusive understanding of the religious reality. Therefore, religious freedom is not only to be viewed and defended as an individual human right, but also as the right of religious societies and institutions. This, actually, is not a privilege that the secular state can decide to grant or withhold for pragmatic or traditional considerations. Rather, the state is called to show appropriate respect towards the groups, religious and other, present among its citizens, some of which may be older than the state itself and include people beyond its boundaries.²⁶ On the one hand, if laws were made for a certain set of religions and later revised in order to accommodate others, this has an intrinsic, be it somehow inevitable, danger of partiality in favor of the formally predominant and generally larger groups. On the other hand, there are discriminating factors, like size and stability of religious groups, which the law of the state can legitimately take into account; and the differences between religions can be so great that what one

²⁶ For a non-religious example that also can be difficult to handle, think of native peoples, structured in ancient tribal societies, which have been migrating through territories that encompass more than one state. It would not only be politically incorrect but unjust to force these people into the corsage of modern, and often arbitrary, borderlines.

group needs in order to survive, another group may not need or may even reject. All these elements suggest that it might be better if the state offers more than one legal “container,” so as to ensure the best possible fit. Analogously, this already is the case in the business world where we have different models of ownership. Unjust discrimination will best be avoided if the state, as much as possible, leaves it to the religious groups which form or legal organization it wants to choose, even if this may create a somewhat more complicated legal situation. Problems arise if a religious group cannot find any legal structure that really fits its needs and thus is forced accept an ill-suited container just in order to get legal status.

The protection of individual religious freedom itself remains incomplete and to a degree ineffectual unless corporate and collective rights are adequately protected. In order to recognize its obligation to respect the rights of religious societies, a state and its laws at the purely philosophical level does not have to side with either the libertarian or the communitarian view on the nature of the human person and the human society. For the purpose of just legislation and jurisdiction, it will be sufficient to recognize that both the individual and the institutional side need the full protection of the law, regardless of how exactly you put the two together in a philosophical anthropology.

In this sense, recognizing corporate expressions of religion in adequate juridical terms, i.e. as juridical persons, either in public or in private law, is not a limitation of religious freedom, but a way of respecting both its individual and corporative aspect. Recent political developments in the USA, culminating in law suits brought to the highest federal courts, indicate how a constitutional system originally designed to guarantee religious freedom in the highest degree has come into crisis, and now the government’s way of interpreting that system is perceived by many as a threat to fundamental human rights. On the spectrum of legal systems for the organization of church-state relations, Switzerland and the USA are close to the two extreme ends. This does not make either system illiberal or illegitimate, but it requires that in both cases the appropriate balances are put in place and strengthened, and it does not exclude the possibility that both systems might be able to learn from one another, even from the other’s defects. For Switzerland with its strong tradition of publically organized and recognized religion, the challenge is to fully respect, within the conditions of this set-up, the religious freedom of its individual citizens and also of the religious societies themselves, not only the state-sanctioned parallel bodies. The task set before the USA, on the other hand, seems to be a fuller recognition of corporative religious freedom, which regards the strong presence of religion-based social and academic institutions, and which is in fact necessary in order to guarantee authentically individual religious freedom in a modern and pluralistic society.

6. Philosophical and Theological Resources for the Future

According to her self-understanding, the Catholic Church has never accepted that the religious reality be confined exclusively in the realm of the private. Such views are inadequate for understanding what religion is and, consequently, for legislating on religious matters. Embracing a religion must be allowed to include individual and corporate, personal and

institutional, private and public aspects. Defining religion as a merely private matter is a view an individual must be allowed to hold, but not a view that a state or an international body may dogmatically impose on everyone, be it covertly or explicitly. Such an attempt would constitute a severe infringement on religious liberty and, at closer inspection, would itself be conditioned either by (perhaps unconscious) religious views or by inadequate attempts to define, from outside, what religion has to be. All this would be far from authentically recognizing religions as what they are, or what they can be.

The secular state, in fact, would be ill advised to seek a univocal definition and, consequently, one and the same legal status for all forms of religion; instead, religious citizens have the right to constitute religious societies and institute them as legal entities, but they have no duty to do so or to use the very same juridical forms that other religious societies (which may have a significantly different self-understanding) may have used traditionally.²⁷ Neither national nor international laws and declarations on religious liberty have a need for a specific definition of religion, as all creeds have to be equally protected, whether officially recognized and organized in an individual nation, or not.²⁸ Rather than forcing all the different religions into one and the same juridical form, it is more appropriate for the state to provide different legal “containers” for different religious societies. Requiring certain stability or membership in order to obtain a particular legal status²⁹ is not in itself a violation of corporative religious freedom, as long as the reasons for not granting the status are not in fact discriminatory. If a religious society requests a certain legal status and the competent civil authority is not willing to grant it, it will be up to the courts to decide on a case by case basis. Systems that establish the proverbial “wall of separation” between church and state are generally strong in guaranteeing individual, private religious freedom, while they tend to undervalue the corporative, public aspects; the opposite is true for systems that create a space for religious societies in public law. But in both cases individual and corporative religious freedom can be fully respected if the appropriate precautions are applied. The aim must always be to guarantee the exercise of fundamental rights and to foster religious freedom in all its dimensions.

Defining and defending the visible church as a free agent not only in the private but also in the public realm can be considered the central tenet of the traditional catholic *Ius Publicum Ecclesiasticum*, the old way of looking at church-state relations and setting up concordats, which should not be dismissed too quickly as outdated.³⁰ The sheer existence and acceptance of the

²⁷ Cfr. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 9 (online at <http://conventions.coe.int/treaty/en/treaties/html/005.htm>), as interpreted by the *European Court of Human Rights*, see C. Grabenwarter, “La libertà religiosa—il contributo di Benedetto XVI a una garanzia universale da una prospettiva europea,” *La legge di re Salomone* 68–84, 81–2.

²⁸ Cfr. Grabenwarter, “La libertà religiosa,” 77–8.

²⁹ Cfr. Art. 137 *Weimarer Reichsverfassung*, incorporated into Art. 140 *Grundgesetz*, online at <http://www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/index.html>.

³⁰ Cfr. the partially problematic remarks by J. Listl in *Handbuch des katholischen Kirchenrechts*, zweite, grundlegend neubearbeitete Auflage, ed. Joseph Listl und Heribert Schmitz (Pustet: Regensburg 1999), 1239. The last monumental publication in this tradition was Alafriidus (Alfredo) Ottaviani, *Ius Publicum Ecclesiasticum*, with Iosephus (Giuseppe) Damizia, 4th ed., 2 vols. (Vatican 1958 and 1960); for the ongoing debate on the Second Vatican Council’s view on (individual) religious liberty cfr., on the one side, Heribert F. Koeck, “A Paradigmatic

Holy See and the Vatican City State as juridical persons of international law is the most visible testimony of the Catholic Church's near universal recognition as a global player, on par with nation states and international organizations. The fact that there are legal contracts or at least official contacts between states and churches (or other religious organizations) rests on a mutual respect between partners that are autonomous and thus by right have a place in the legal order, public and private, national and international.

More fundamentally yet, states and civil legislation cannot disregard a conviction shared by a great number of people, globally speaking by a huge majority: according to their conviction, religion is a good, to which both individuals and groups have a right and which deserves legal protection. Even if there are some who deny the very claim that religion is a good, this protection needs to be maintained, for two reasons: the state cannot simply side with one particular, in this case negative, view on religion; and the state needs to respect acquired rights and treaties—*pacta sunt servanda*, unless it wants to revert to a kind of democratic absolutism, which in fact would be democratic only by name. Philosophically speaking, the minimum requirement for a state is to acknowledge that the religious reality is one of the systems and languages that for some of its citizens and their associations is a significant part of their experience and self-definition, which helps them order their lives and make sense of them.³¹ Beyond this insight, derived from social systems theory,³² however, lies the more complicated issue: religion itself claims to offer not only one, but the ultimate and complete account of reality, in which all realities find their place and meaning. This is also true for atheistic theories providing an account of human rights and of the meaning of the universe, and it applies also to theories, religious and not, which are based on the conviction that there is no single one true theory or religion: such an explanation, or conscientious lack of explanation, is another form of what I call the religious claim of being the ultimate account, in the sense of the best and most comprehensive account, of reality we can attain. In this admittedly very broad sense, religion claims not only to create one way, but the definite and right way of understanding, ordering and celebrating human life, and to bring it to its flourishing, both in this world and beyond. The broadest possible concept of religion is the best way of appreciating the whole spectrum of religions and the basis for suggesting a variety of legal containers for religious groups. Again, this view is based on the natural law, not a way of

Change: Religious Liberty from Alfredo Ottaviani to Dignitatis humanae,” *Persona y Derecho* 65 (2011–12): 141–158, and, on the other, Florian Kolffhaus, *Pastorale Lehrverkündigung—Grundmotiv des Zweiten Vatikanischen Konzils, Untersuchungen zu ‘Unitatis redintegratio’, ‘Dignitatis humanae’ und ‘Nostra aetate’*, *Theologia mundi ex urbe* 2 (Münster: Lit, 2010), 125–170

³¹ The German supreme court *Bundesverfassungsgericht* explicitly affirms such a comprehensive definition of religion as protected by the right to religious freedom, in a decision of 19 October 1971, see *BVerfGE* 32, 98, B.II.2: “Dazu gehört auch das Recht des Einzelnen, sein gesamtes Verhalten an den Lehren seines Glaubens auszurichten und seiner inneren Glaubensüberzeugung gemäß zu handeln. Dabei sind nicht nur Überzeugungen, die auf imperativen Glaubenssätzen beruhen, durch die Glaubensfreiheit geschützt. Vielmehr umspannt sie auch religiöse Überzeugungen, die für eine konkrete Lebenssituation eine ausschließlich religiöse Reaktion zwar nicht zwingend fordern, diese Reaktion aber für das beste und adäquate Mittel halten, um die Lebenslage nach der Glaubenshaltung zu bewältigen. Andernfalls würde das Grundrecht der Glaubensfreiheit sich nicht voll entfalten können,” online at <http://www.servat.unibe.ch/dfr/bv032098.html#106>.

³² Cf. Georg Kneer & Armin Nassehi, *Niklas Luhmanns Theorie sozialer Systeme*, 4th ed., UTB 1751 (München: Fink, 2000), 135.

imposing a Catholic viewpoint on the state. In fact, any authentically Catholic way of understanding the human person, with its rights and dignities, has itself to be measured according to natural law principles. It may be necessary or at least opportune to look for language that avoids creating antagonism against this concept. I am convinced, however, that without preserving the essence of what traditionally has been called the natural law, liberal democracy itself is in danger and risks losing the ability to defend itself, intellectually and actually.³³ The strength of the traditional Catholic position must be preserved; and this strength is to assign to reason a place with a double function: one inside the Catholic community, its worldview, and faith, and one as a bridge to thinkers and groups of other or no religion.

A place in the public sphere, with adequate legal status and protection, cannot be denied to a religion simply because some or even a majority of people disagree with many of its core teachings. A good example for this is the fact that Zurich, with its overwhelmingly Christian or secular population, recognizes relatively small Jewish groups and the minuscule Christ-Catholic community as corporations of public law, just as the much larger Christian churches. Moreover, the fact that some religions and individual citizens hold the view that religion is a private matter and therefore needs to be excluded from public life is itself a private opinion. Imposing this one-sided interpretation by law, via the courts or democratic processes, would violate principles that the state itself is bound to uphold; and finally, it would violate values the state itself presupposes and lives by, while it cannot produce them.³⁴ Limiting religious freedom, denying public recognition and legal status to religious associations, is only legitimate and fair if such freedom and status are openly abused, for example for economic purposes or for political agitation, that is, in cases where public order and safety are in danger. Cases of abusive behavior have to be examined individually, and, as masterfully formulated in the Swiss Federal Constitution, any limitation on religious freedom must have a formally legal basis and materially be justified by public interest or the protection of fundamental rights of others; in any case, limitations have to be proportionate and can never touch the substance of the fundamental right to religious liberty.³⁵

For the state, a very comprehensive understanding of religion is appropriate, recognizing that religion is an analogous term and, in reality, appears in an extremely wide variety of forms. Abstract definitions of religions tend to be prejudiced and, at best, are constructs; imposing such definitions, and the consequent legal treatment, on all religious entities and persons, without due discretion, will end up disrespecting the diversity of religions and religious liberty. Respecting rights will always be somewhat onerous and complicated, but in general both European and

³³ Cf. the provisions of Art. 10,2; 11,2; 18; 21; 73; 87a,4; 91,1 of the German *Grundgesetz* on defending the „*freiheitliche demokratische Grundordnung*“ (the basic free and democratic constitutional order).

³⁴ “Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann”; this sentence is the so-called ‘Böckenförde-Paradoxon’, see Ernst-Wolfgang Böckenförde, “Die Entstehung des Staates als Vorgang der Säkularisation,” Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht* (Frankfurt: Suhrkamp, 1976), 42-64, 60. It has its own Wikipedia entry (<http://de.wikipedia.org/wiki/Böckenförde-Diktum>) and continues to generate intensive debate. Böckenförde is a leading legal scholar, he sat on the German supreme court (*Bundesverfassungsgericht*) from 1983 to 1996. The famous phrase does not mean the state is not responsible for these conditions, quite the opposite.

³⁵ Cfr. Art. 36 *BV* (quoted above in note 17).

American legal experience suggests that the states are able to put sufficient protection in place against those who attempt to further business or political interests under religious disguise.

Looking at the present Swiss situation should help us appreciate the potential of true freedom that the traditional Catholic viewpoint possesses. I am not arguing that no other viewpoints have a similar potential. In any case, the strength of the Catholic concept has a lot to do with its appreciation of history and of natural law: it is both sensitive to authentic human progress and holds fast to enduring principles; principles that are known and worked out in history and without which it would be difficult to discern whether a change is in fact a progress. Theologies who view the human person as totally fallen, having lost all its original, natural capacities, by their very nature cannot produce such a positive view of human beings and of their most basic ability to know and follow (without the assistance of some kind of divine illumination) the principles and precepts they discern—as individuals and as societies. At present, there is some opposition to the term “natural law” among intellectuals who conceive it as a construct designed to curtail the individual’s aspirations. It cannot be denied that such misinterpretations and misapplications have happened; on the other hand, we run into theoretical and practical problems if an absolute individualism or a democratic absolutism is our only basis of moral thought and operation. For this reason, we should be very careful about relegating the natural law simply to the history of philosophical, theological, and political thought. For what else is there, as the ultimate basis for those human rights and liberties which receive so much praise and cheer today. The alternative to the traditional concept of a law, with rights and duties that are by nature inherent in who we are, is that all rights and freedoms are ultimately given to us by someone else, presumably in virtue of a majority decision. This is not only in practice much more complicated and dangerous than it may seem; it also introduces a questionable vision of the human person—one certainly incompatible with the US founding fathers. This new kind of absolutism of the democratic majority may be a slight progress compared to the absolutism of a single monarch, but it is a fragile one. Ultimately, even democratic majorities with formally impeccable methods and structures of legislating, governing, and jurisdiction, have to realize and respect the limits of their deliberating and decision-making powers. And the limits of these powers are precisely the rights and liberties of the human persons and the human societies who need to be respected and treated as who and as what they are.

The Catholic model was never content with looking only at individual rights (here lies its weak point), but it rightly emphasized the corporative dimension of religious freedom and the public, visible aspect of a religious society. This is the aspect where the grand old concept of *societas perfecta* has its place, emphasizing the visible, institutional dimension of the church as a body of its own right, independent of the state and (only) in that sense perfect, i.e., complete. Just as with the individual human person, so also in the case of the church, the state does not grant, but respects and protects its rights. Legal systems that are intent on upholding human rights cannot be content with embracing a concept of religious freedom that does not fully and systematically respect the corporative dimension of this particular fundamental human right. Reductive positions are rooted, ultimately, in an incomplete, individualistic view of the human person, often as a relic of religious views, thus deeply embedded in legal cultures and mentalities.

If church and state are to cooperate, they first need to be distinct and respect each other fully. Precisely because the human person is in principle and from the beginning a social animal,³⁶ not only the individual must be guaranteed freedom of religion, but also the religious society; in our case, the church deserves by right, not by privilege, true *libertas Ecclesiae*.

³⁶ See the magisterial analyses and reflections by Alistair C. MacIntyre, *Dependent Rational Animals. Why Human Beings Need the Virtues*. The Paul Carus Lecture Series 20 (Chicago & La Salle, IL: Open Court, 1999).