

LAW IN THE CHURCH

THEOLOGICAL REFLECTIONS

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IN ITS DECLARATION on religious freedom, the second vatican council had much to say on the rights, the inviolability, the freedom from coercion, of a man's conscience vis-à-vis the legal framework of society¹. There was also an admission that, in the past, the Church herself had not been blameless in using her power in forcing men to act against their conscience.² In none of these cases, however, is the relationship between the Church's own law and the individual conscience the point at issue. In fact, the subject of canon law figures hardly at all in the pages of the council documents. And yet the 'freedom of the children of God', and the education to this freedom – itself the subject of a special declaration of the council,³ demands above all a true and right proportion between the dictates of the individual conscience and the external statutes and structures of that society whose guides and guardians stand in the place of Christ, its head, and exercise his power of binding and loosing.

Conscience and its dictates mean nothing except in so far as they refer to the human and christian life of the individual person. Similarly, the laws or norms of the Church as christian community are meaningless except in relationship to the actual life of the Church. If (canon) law has anything to say to the personal conscience of God's people, it must be known and understood as life. We maintain that there is a legal aspect of the Church's life, even as there is a social and a liturgical aspect, each of which can be distinguished from the rest, though they all are interwoven as parts of the unity.

Many factors contribute to the unity of the Church; they are neither equal nor similar. The holy Spirit is one; he brings many individual persons together to form a community, he feeds this community with his graces and with the word of God. Our humanity is another; all that can contribute to the community's well-being in a human way is important. Canon law falls into this category. When we look for the precise role of law in the christian community, we

¹ *Dignitatis Humanae*, 2-4.

² *Ibid.*, 12.

³ The Declaration on Christian Education – *Gravissimum Educationis*.

are really looking for the overall balance of all the factors that give unity to the community. When this overall balance is found, then the role of law can be determined.

The role that law is expected to play can be distorted in either of two ways. If more is expected from law than it can give, the community will drift into legalism. Legalism is the symptom of a disease in the social body; disproportionate advantages given to law in shaping the life of the community causes the law to invade the territory of higher values. Where law falls into disrepute, then disorder or even chaos may follow.

At this point some preliminary principles can be usefully stated.

1. *The legal (canonical) life of the Church is part of the humanity of the Church*

The Church is composed of a divine and human element. Canon law is part of the human element: a human endeavour to contribute to the existence and the well-being of the ecclesial community. To deprive the Church of the benefit of wise laws would be to deprive the Church of its humanity. No human community can remain in existence without laws that coordinate the activity of the members and the working of various dynamic forces. No one disputes the need for laws in a human community. Those who would see a Church so spiritual that no room is left in it for human institutions are depriving the Church of its humanity. Any apology for law is an apology for the humanity of the Church. Furthermore, the truth of christian faith can be better presented when its internal coherence and beauty is shown forth than when its credibility is defended with elaborate argument. Similarly, the need for the existence of law in the Church is better perceived from the coherence and liberating effect of a wisely construed theology of law than by a collection of rational arguments for the existence of law. Those who have a problem with the existence of the law of the Church have a more basic problem with accepting the humanity of the Church. A solution cannot be offered to them in the context of the law only. It has to be in the context of the theology of the incarnation and the theology of the Church.

As the human aspect of the Church in general is integrated with divine gifts to form a whole, so canon law in particular must be integrated with the whole life of the Church. A theology of canon law serves precisely such integration.

2. *Canon law shares the quality of a sacramental sign*

A sacrament shares the complexity of our human life. It has an external and internal element. The external element is the sign that can be perceived and discerned by our human faculties; it is always part of our visible and tangible world situated in a religious context. The internal element is the grace that the holy Spirit gives through the operation of the sign: it is part of God's mysterious world that no man has seen. The original sacrament of our redemption is the humanity of Christ. The Church grew out of the redeeming deeds of Christ; through the Church the mystery of incarnation is prolonged, sacramentally.

The visible sign of God's presence in the Church is the human community; through the existence and activities of the community the gospel is proclaimed and grace is given to the world. Now laws, rules and customs are an integral part of the life of the human community. So it is that canon law, in ordering the life of the community, contributes to the existence of the sign.

A warning, however, is necessary. We do not say that the laws, rules and customs of the Church are sacraments, as some writers have suggested in the past. We say only that the life of the community is a sacramental sign and canon law shares this life. Consequently, it shares the character of a sign.

Canon law belongs to the humanity of the Church; it remains as fragile and changeable as this humanity. It represents that indispensable element of human wisdom in the Church, which is to be integrated into divine wisdom.

3. *Canon law shares the limitations of the human community*

The pilgrim Church is essentially imperfect, in that it is in progress toward the eschatological perfection of the kingdom. So the christian community as a whole is imperfect, and so are its members. Canon law shares all the imperfections of a pilgrim community. The legal life of the Church is always subject to improvement.

This theological imperfection of the law comes from the very nature of the Church; it cannot be avoided. Since the Church is a community of sinners, its law will be marked by this imperfect condition.

There is another type of limitation that is intrinsic to the law. Its source is in the general and abstract character of law, which can never cover particular concrete circumstances. For these reasons canon law will always be in need of revision and reform.

After these initial and general remarks we are ready for a closer examination of the legal (canonical) life of the Church. In the rest of this article we shall attend to two aspects of legal life: the first, the creation of canon law in the Church: the second, the reception by the community of the law when promulgated. We shall be concerned with the ideal and the real in trying to combine vision with the art of the possible.

THE CREATION OF CANON LAW

- (a) *The creation of a good legal system for the Church, and in particular the creation of good canon law, must be the concern of the whole community*

This general principle follows from the organic unity of the Church. Each member of the community, with his own gifts, is called to contribute to the life of the whole. There are, of course, many qualifications to this principle, which are both theoretical and practical. From the organic structure of the community it follows that not all members have the same function; it also follows that their participation in the legislative process will also be different. Further, participation need not be the same at every stage of the process, which involves inspiration, consultation, planning and finally the authoritative promulgation of law. In particular, the responsibility and power of the episcopate must be distinguished from the responsibility and power of the other members. The bishops can translate the inspirations and planning of others into formal laws by their power to bind and to loose. There is a shared responsibility on the part of the whole Church in the law-making process, exercised according to the charism of each member in the body.

The ideals of participation and shared responsibility have to be balanced against the practical need of having qualified persons to take the larger part in the law-making process. General suggestions can and must come from many directions. But those who actually formulate the laws have to be closely acquainted with the facts that warrant legislation, with the ideas that can help to make the proposed laws suitable for the circumstances and with the technical skill of drafting laws. The extensive use of experts is necessary.

Perhaps it is only realistic to admit that at present not many have the necessary qualifications for participation or for shared responsibility in legislation; nor does it seem that there will ever be a time when every single member of the Church will be so qualified. However, wherever the extent of participation is reduced for lack of

qualification, the duty arises to help and educate the people to take a more active part in the life of the Church: to raise them to a level on which they can make their own contribution.

Sometimes the subject matter of the law itself imposes a limit on participation. For example, when the projected legislation concerns technicalities that can be dealt with by specialists only, it would not be right to weaken the quality of the law by calling on those who are not competent to make a good contribution.

The actual extent of the participation can be regulated by the principle of subsidiarity. It is clear that only that section of the community which is really needed should take part in the law-making process. If, for example, norms can be created on the diocesan level, and the interest of the universal Church is not involved, the participation should be on the diocesan level only. Many analogous examples could be quoted. In general, the application of the principle of subsidiarity will assure a certain economy and even parsimony in using the energies of the Church.

At present, laws for the universal Church are created through the authority of the pope; no one else has a similar role in legislative power. In the pope, as in other legislators, we should distinguish the capacity to bind and loose from the duty to make good laws for the community. The capacity to bind and loose, that is, to make valid laws, flows from his authority as vicar of Christ. This authority is circumscribed by certain minimal requirements. A minimum purposefulness in the law is required, and is enough, to make it valid. But nothing in the law should contradict or harm the christian way of life; otherwise it would be invalid.

The duty of making good laws compels the pope to act in union with the entire Church, more particularly with the episcopal college to which he belongs and of which he is the head. In the law-making process this unity means that he is morally bound to engage in close consultation with the college before the promulgation of laws of major importance. This is because the pope's own legislative act is the actuation of the power of the college.

For the universal Church the pope is likely to remain the legislator, not only in theory but in practice. To help him in his task, it is important that the consultative process between himself and the universal Church, and especially the episcopate, should be stabilized and receive the form of a legal institution.

Let us note that there can hardly be consultation without representation. Genuine consultation means to learn about the mind of

another person. This can be done only if the other person is able himself to speak, or through a representative chosen by him. It is clear that the mind of the universal episcopate should be made known to the pope frequently. This can happen only if the bishops elect some among themselves to speak for them.

(b) *Canon law should not interfere with the law of the Spirit*

Having discussed the making of the law, we must set the bounds of the law. The temptation to extend the field of law beyond due limits is a constant. Yet the holy Spirit also gives norms of action to christians, though in a broader sense. His law is stronger than human law; it is traditionally called the law of the Spirit.

The Church as a community is under the guidance of the Spirit. His inspirations become particularly valuable when they are recognized and stated by the episcopal college, or the pope, its head. Now the inspirations of the Spirit to the community should not be hampered, disturbed or interfered with by legislation. Laws cannot do more and must not attempt more than to build a framework for facilitating the operation of the holy Spirit and the reception of his graces.

The inspirations of the Spirit should be respected also in individual persons. A christian may receive a charism, a mandate to carry out a particular mission. Where this happens, he owes absolute obedience to the law of the Spirit rather than to any man-made law. Yet this absolute duty has to be qualified: it, too, is subject to human limitation. In interpreting a divine gift we remain fallible human beings. So we have the paradox: we are bound to follow the guidance of the Spirit, yet we are bound to keep in mind the possibility of failing to interpret it aright.

(c) *Canon law should not take the place of the word of God*

The word of God, or the evangelical law, is absolutely binding on the community and on every person in it. This law is expressed in the gospel and in our later traditions. It comprises the basic precepts of christian faith and morality, the law of following Christ, that is, the law of charity. Although there is some necessary vagueness in such moral guidance in comparison with precise legal rules, this law has precedence over any human law.

The word of God includes the mandate given to the Church to announce the kingdom and to demonstrate its presence by deeds to the whole world. This mandate is absolute; it expresses the purpose

of the existence of the Church. All man-made laws have to serve this purpose directly or indirectly. Wherever they harm it, they are to be considered null and void.

(d) *Canon law comprizes customs and usages*

A norm of action can be created for the community through customs and usages: a less structured process than formal legislation. The terminology is fluid and should not be interpreted literally: but as a guideline it can be stated that customs are norms of action having a binding force for the community; so that they are equivalent to duly promulgated laws. Usages mean customs in process of development, not universally accepted: and consequently not yet strong enough to have binding force. Both customs and usages arise through the repeated actions of the community. The strength of the habit of the community also determines their strength. There is no essential difference between customs and laws except in the way they are produced. Customs (like laws) can be universal or particular. They are universal when they are accepted by the whole community and not just part of it.

The code of canon law states that customs obtain their legal validity with the approval of the legislator. Theologically, it would be more correct to say that customs obtain their validity when the legislator in union with the subject acknowledges them as law. It is not so much a question of formal approval (which would really cancel out the character of custom) but unified action by the whole community including the legislator himself.

Customs play an important balancing force in the legal system. There should be a favourable climate for their emergence and existence. Initially they should not be rashly suppressed, nor should the conditions for acknowledging their legal existence be so stringent that they simply could not satisfy the conditions of legal validity: as is the case with customs as considered by the code. A certain encouragement toward customary laws can be given by the executive office. Tribunals can contribute also by taking judicial notice of the existence of customs. Customs should have a fair parity with laws; rules arrived at through formal legislative process should not be given such priority that divergent customs simply cannot emerge.

Admittedly, it is always difficult to distinguish between incipient customs that are a positive contribution to the legal system and the beginnings of abuses that tend to destroy peace and order. Yet the truth remains that, for the good health of the community, the devel-

opment of customs should be encouraged. The public authority will need a great deal of discretion to separate the wheat from the chaff.

(e) *Canon law comprizes imperfect laws*

The criteria for legally binding valid laws are not identical with the criteria of perfect laws. There is a minimum amount of goodness that has to be present in every law in order to bind the subjects. Not only does it have to go through the prescribed legislative process but it must be reasonably useful and it must conform to christian morality. Yet not all laws that fulfil such conditions are perfect laws. Not all laws carry that amount of wisdom which the given circumstances require.

While the Church in general, and the episcopal college in particular, has been granted the charism of fidelity to the word of God, they have not been granted the charism of highest prudence or deepest wisdom in law-making or in practical government. The Church is substantially developing into the fulness of the kingdom; but its movement can be slowed down by directions and actions lacking in wisdom and prudence. Part of the mystery of the Church is that it simply cannot be perfect on a practical level. Its imperfection is most manifest in its laws.

THE RECEPTION OF THE LAWS BY THE COMMUNITY

In the legal life of the community there is a dialectical movement between the legislator and the community at large. The part of the legislator is intellectual, on the level of ideas; he makes the laws. The part of the community is practical, on the level of action; it gives life to the abstract norms by observing them. This translation of ideas into action is the final acceptance of the laws. It is an existential re-affirmation by the members that they do belong, and want to belong, to the community. They really affirm their unity with the authority which has published the laws.

The community collectively and each member individually has the duty to accept the laws if they want to belong to the community, provided that the laws are the product of legitimate procedure and their content does not destroy or harm the community. This duty is integral with the duty of maintaining the unity of the community. Its parallel rights are the right of the group to affirm their collective identity, and the rights that flow from membership.

It is the right and duty of the community collectively and individually to examine the usefulness and purposefulness of the laws

promulgated. This is not to ratify the laws, it is to contribute to the improvement of the laws. Inquiries into the quality of the laws and suggestions for their improvement are simply participation in the legal life of the Church.

These are general considerations that apply to the community and to individual members. Further reflections on the duty of the individual member to accept the laws are necessary.

- (a) *Since every human law is concerned with universal ideas on an abstract level, it simply cannot suit all individual and concrete situations*

The law, because it is universal, can cover many cases. It cannot cover some individual cases because it is not individual. Aristotle knew this when he introduced the doctrine of *epikeia* into his general legal philosophy as an integral part of it, allowing exceptions for cases that do not fall into the general and abstract pattern of the law. St Thomas followed Aristotle and built into his philosophy the concept of *epikeia*; at the same time, following the fathers of the Church, he advocated that laws should be applied with christian mercy. Thus, at least in theory, within the general and abstract legal system he keeps the important balancing factor of individual and concrete solutions that may be outside or even against the law. The code itself takes theoretical cognizance of this problem; it does not exclude *epikeia* and re-affirms canonical equity, although it leaves little scope for their practical application.

The general qualities of all human laws remain in the christian community, too; the members have a right to apply *epikeia*, and give consideration to *equity*.

- (b) *The internal inspiration of the holy Spirit granted to an individual may, and from time to time does, come into conflict with the external legislation*

Such conflict is not a rare occurrence in our human Church. When conflict arises there is need for discernment and delicate procedure. On the one side, the public order of the community should not be easily disturbed; laws should not be easily set aside. On the other hand, priority should be given to the inspirations of the holy Spirit. If a charismatic inspiration to all intents and purposes carries the mark of authenticity, those in authority have a duty to use discretion and work for harmony between the internal inspiration and the external laws. Sometimes even an individual person could take the responsibility and follow an inspiration, apparently or really against the laws. The mark of authenticity of his

inspiration will be a sense of proportion in his endeavours and a deep attachment to the community. These attitudes will be good guarantees that he is not about to abuse the laws but to use the grace of God.

(c) *The response to so-called unreasonable laws can be a specific problem*

These are not morally wrong or completely useless; for then they would be simply invalid. They are laws that do not reach high standards. There is some purposefulness in them but not enough. They fall short of good standards. There can be a tendency to reject such rules: a simplistic solution. They should be considered in the context of the unity of the community. To uphold this unity can be such a value for the existence of the community that in some circumstances to accept and to tolerate lower standards in legislation is supremely reasonable. In practice, the alternative would be to break up the unity of the community by breaking the laws. Also these so-called unreasonable laws give a right and generate a duty to work for their improvement or change. The community is not automatically exempted from accepting them.

In the whole process a sense of proportion must be kept. The importance of the subject matter should be weighed. The more important the subject matter of a law the less disobedience is justified.

(d) *As far as possible, the legislator should avoid sanctions in the form of declaring non-observance of the law to be sinful*

Whether or not sin is committed in the case of the non-observance of the law should be left to the consideration of moral theologians and confessors. It should not be the concern of the legislator. Sin affects the relationship of a person with God; the best the legislator can do about this relationship is to abstain from interfering with it. If he does not follow this policy, his law will become an instrument of condemnation and not an instrument of salvation: a situation that St Paul condemned strongly.

The members of the community can assume that canon law never binds under serious sin unless there is overwhelming proof that the Church wanted so to bind its members. Such proof, if proffered, must be tested with full theological and legal critical apparatus. It would rarely, if ever, survive such critical examination.

CONCLUSION

Since the Church is an organic community, with its members having different gifts in different degrees, it cannot function well and fulfil its purpose unless all the resources of the Church are used. Each member is responsible for the whole and has the right and duty to contribute to the welfare of the whole. In the practical order, this means participation of the whole community in the legislative process, not in the sense that each one would have a right to interfere all the time, but that each one should have the possibility of offering his creative thought and helpful action in the creation of laws.

The reception of the laws is a complex process. The community translates the written words into living actions. While we should acknowledge authority in the legislators, it is of importance that we should give scope to the corrective activity of the community in receiving the laws. Most of the time the legislator does not have the gift of making a perfect law. He moves on the level of fallibility; therefore, the response of the community fulfils a necessary purpose, by accepting the law and at the same time working for its improvement through customs and through other legislative processes.

We may not yet be ready for this ideal situation, but there is no doubt that we have to strive for it. The Church will reach full maturity only when this is realized to a high degree.