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Canon Law in New Dimensions

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CANON LAW IN NEW DIMENSIONS

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WITHIN THE CATHOLIC CHURCH there have been three distinct movements during the present century which should not be looked at separately, but rather must be read in context, in reviewing the relation of the Church and Law. These are: (1) the completion of the *Codex Iuris Canonici,* 1904-1917; (2) the continual emphasis on justice in the Encyclical Letters of the Popes, especially since 1891; and (3) the juridical implications of the renewed reliance on conscience in the work of Vatican Council II, which was brought to a close December 8, 1965.

First of all, the completion of the *Codex Iuris Canonici* itself marked an extraordinary innovation and a remarkable achievement, completed, as it was, within thirteen years. It was an extraordinary innovation, since no previous codification had ever been attempted in the nineteen centuries of the Church's existence. It was a tremendous achievement, since few other efforts at "the harmonization of divergent canons,"—to use Gratian's phrase—had been made during the millennium that had all but passed between the flowering of juridical studies marked by the publication of the *Decretum Gratiani,* and the promulgation of the *Codex.* It signified a new movement in the ancient Church to resurvey the latter's position in the modern world from the standpoint of juridical structure, by undertaking to separate rules still having vigor from those which had become irrelevant to current needs. By concentrating on the law that *is* instead of the law that *was*—on the present rather than the past—it reinforced the foundations, and made ready for the jurists

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who follow to build along new lines, in the continuous effort to give more suitable shape to the law as it *ought* to be.

The second development, with juridical implications of the very greatest importance, came with the Encyclical Letters, and the Allocutions, of all the modern Popes, from Leo XIII to Paul VI. These direct attention repeatedly to the function of justice in improving the conditions of human life. Especially the four so-called "social Encyclicals"—*Rerum Novarum,* on the Reconstruction of the Social Order, by Pope Leo, May 15, 1891; *Quadragesimo Anno,* issued Forty Years After, by Pope Pius XI, May 15, 1931; *Mater et Magistra,* or Mother and Teacher, by Pope John XXIII, dated May 15, 1961; and *Pacem in Terris,* Peace on Earth, by Pope John XXIII, April 11, 1963—have inaugurated and paralleled a twentieth century revolution in thought about the social conditions of human living, which perhaps has not always been acknowledged, nor even consciously recognized, by those jurists who have been challenged or encouraged to devote their own efforts toward peace and justice through improvements in the law. If the guidance provided by these four Encyclicals be supplemented by that given by Pope Saint Pius X in his *Motu Proprio* of March 19, 1904, which established the Commission for the Codification of the Canon Law, under the presidency of Cardinal Gasparri; by Pope Benedict XV, who promulgated the *Codex* in 1917, to take effect one year later; by Pope Pius XII, whose references to law and justice were so frequent in all his addresses that he will doubtless be referred to in history as the Jurist-Pope; and by Pope Paul VI, whose emphasis on the dynamic in place of the static in thought has especial significance for law, the existence and direction of a new flowering of juridical studies may be seen as already well under way.

The third factor in the advance has been the as yet unmeasurable contribution of the Ecumenical Council of 1961-1965. A total of sixteen documents have been issued, among them a Declaration devoted to liberty of *conscience.* Although concerned primarily with religious belief, the latter nevertheless has especial value for law as well, for it, together with most of the other Conciliar documents, puts new emphasis on the importance of knowledge in arriving at responsible decisions. The emphasis may seem strange in the scientific age to which the Declaration is addressed, but the doctrine is not novel. It was implicit in the canonization in 1935 of the greatest lawyer in the Anglo-American system, the Lord Chancellor Thomas More. And it had been stated with particular clarity years earlier by Thomas Aquinas when he said that one cannot choose what one does not know. This carefully thought out divergence of Saint Thomas from the earlier view of Saint Anselm, who had inverted the order by giving primacy to faith over reason in the acquisition of knowledge, is even more striking in a pluralistic society like the present than it was when everyone in Europe confessed one creed, or none. Acknowledging the function of conscience in decision-making, as reaffirmed by the Council, is not at all the same thing as saying that man is the

measure of all things. Quite the contrary, all things, that is, the existent universe, as created by God, measure man through the use he makes of its resources. His *judgments* are subject to continual revision through the verification of new facts, and his *determinations,* which are dependent for their validity upon his judgments, are subject to appraisal at his peril. By reasserting the importance of conscience in the modern world, the Council restores the all-but-forgotten function of *judgment* in law in a manner comparable to that in which the Encyclicals have revived the all-but-repudiated function of *justice.*

With a Papal program which has done so much to shift the juridical outlook away from the past and toward the present and future, it is puzzling to encounter occasional criticism directed at a so-called "juridically organized church" which is said to rely upon a rigid legalism to maintain its hierarchical structure. Part of the difficulty is undoubtedly attributable to a perennial equivocation in the use of legal terminology. This suggests the need for communication with, and clarification for, people who look at law from different backgrounds. The difficulty appears to lie deeper, however, than in the use of words. Early training is also involved. There are some who never think of law except as a fearsome code of prohibitions, which are imposed by force, or threats of force. Although this is classified as positivism, it is an essentially negative view, which eventually looks outside the law for guidance, and for justice. It prevailed to a large extent throughout the nineteenth century, when the vogue for codification was dominant, but has come to be increasingly supplanted in the twentieth, as inadequate for an age of dynamic development. Another group exists, fewer in numbers, perhaps, as yet, who think of law constructively, as the foundation of the living order which guides men toward the minimum of socially acceptable conduct. These note that even the Mosaic Code begins with affirmative directions, and only later spells out prohibitions by way of clarification. This group is often troubled, moreover, by the narrow interpretations and rigid conceptualisms in juridical thought, which, sometimes in the very name of God, tend to usurp His place as Creator of an on-moving universe. Looking upon the law as concerned with a sequence of actualities rather than assumptions, they find in the universe challenges to comprehension far beyond the reach of a goodly number of the man-made concepts which prevail. In the vision of the Popes, both the positivists and the dynamists, within the Church and without, are urged to work together in harmony, for needed stability as well as change in law, in such a way as to reflect the different rates of movement manifest on the terrestrial sphere.

Before considering specifically whether the current situation of the Canon Law may be usefully subdivided into public and private, it is necessary to turn attention toward the relations of law with civil governments to see what trends are discernible. Here the most striking phenomenon is the proliferation of new states since World War I, and the replacement of hereditary monarchs as centers

of rule-making authority. With the participation of more and more people in various stages of governmental responsibility, the terminology of law itself changes, and new categories inevitably spring up.

Public law is the term that has generally been applied to laws concerning the state, or to cases in which the state is a party. All the rest have been included under the category of private law. When the kings were centers of legal authority, the identification of royal with public interests was fairly simple. Following the growth of constitutional governments, the situation has become much more complicated. First of all, constitutional law has itself become vast. A comparable growth characterizes the new field of administrative law. The latest innovation is the distinctive and expanding subject of *human rights law*. All these developments represent such an interlocking of public and private interests that the matter of classification becomes as difficult as the situations in which they arise.

If to these constitutional aspects there be added: (1) the tendency of modern governments to take ownership of shares in what were once considered private *corporations,* created under government charter; or (2) the latest practice of devising an *interstate* system of law, suitable for an agency like the European Common Market; or (3) the expansion of the rule-making authority of the United Nations itself, and its specialized and cooperating agencies; the problem of separating public from private interests becomes formidable indeed, since many of the legal questions with which governmental institutions are concerned arise through private claims. Unlike the days when kings could not properly be cited to appear on one side or another in adversary litigation before courts conducted under their authority, and so, as was facetiously said, "could do no wrong"; or when successor states were unsuable without their consent; today sovereign immunity from suit is being recognized more and more as an anachronism. Private litigants can frequently present their cases on ostensibly equal terms with government attorneys in the new administrative tribunals, or before courts with comparable jurisdiction. Even in the field of criminal law, formerly a branch where the state's interest was treated as predominant, the use of extraordinary writs, like habeas corpus, or injunction, to test the validity of the proceedings in an ever-increasing number of cases has tended to give public interests the appearance of privacy. Less obvious, perhaps, but no less effective in shifting categories in the opposite direction, is the growing practice of state intervention, through briefs *amicus curiae,* in litigation ostensibly involving only private parties, in order to protect the public interest in later cases which could be affected unfavorably by the establishment of a precedent in the instant situation without having had the right to be heard. Under such developing practices as these, the attempt to divide cases neatly as either public or private would seem not only unnecessarily difficult, but also undesirable on that account, at the present time.

Many of the cases which raise the

issue of classification in both secular and canon law systems are considered in modern canonical treatises under the heading of public ecclesiastical law. Their subject-matter is that which historically has been covered by the *concordats,* and includes marriage law, education, public worship, church property, and the unique dignity accorded ecclesiastical persons. Although private rights are basic in these fields, the public interest is so extensive also that the duty as well as the right of governments to be heard has been acknowledged with impressive legal formalities by the Church. History is an important prerequisite to the understanding of the customary provisions. In countries where the monarchy officially retained the Catholic faith, tradition guaranteed full recognition and often exclusive privileges under state law. In countries where the monarchy and some of the people came to profess religious beliefs other than Catholic, the technique of treaty-making was adopted from international law practice, and the agreements negotiated were called concordats, indicating their distinctive character. In the newer countries without hereditary monarchies, in which the people often manifest religious beliefs even more various than the political views represented in their governments, the concordat technique presents complications from the juridical standpoint. Undoubtedly the high-point in public ecclesiastical law was reached in the unique Lateran Treaty, between Pope Pius XI and the Government of Italy, signed February 11, 1929, which is much more comprehensive in content than the usual concordat, and constitutes an extraordinary diplomatic achievement on both sides.

With many modern governments, no attempt to formalize a *modus vivendi* has been attempted. This does not mean that Church interests, or the rights of individual Catholics, have been left entirely unprotected. On the contrary, situations, which under different circumstances might have given rise to grave controversy, may have been resolved more or less informally with such fairness manifested on both sides when they arose, that a formalization of the procedure would appear inadvisable because of the possibility of multiplying technical problems without adding any necessary factor to their solution. The fact is that the changes that have taken place between nineteenth century conditions and twentieth, both with respect to juridical thinking within the Church and to the organization of juridical responsibilities within the new governments, have been so far-reaching, that the very term of public ecclesiastical law begins to appear dated.

To take note of a transition under way is not to deny the continuing existence of matters customarily handled in this field, nor to minimize their importance. Rather it is in recognition of their expansion in number and depth that the search for a broader base appears necessary. Today not only monarchies, or successors to monarchies, in Europe may be involved, as was the case once upon a time, but there are well over a hundred states, not in Europe alone, but throughout the world, within whose territories the Church is established. In any of them, legal

questions, extending all the way from a children's religious procession in the streets, or a traffic ticket to a clergyman, to the right of succession to church property of a newly appointed bishop, can arise. Judicial determinations may have to be reached through the familiar procedures of the classical Roman tradition, or in any of the legal systems in force anywhere. Possibly an issue could even be carried to the International Court of Justice, or the European Court of Human Rights. Nor is it essential that either state or church be an actual party litigant. Quite possibly a situation involving the right of a private person could be so affected with a religious interest of broad public concern that either state or church might consider it advisable to record that interest formally as *amicus curiae*. Indeed some of the most important decisions of the United States Supreme Court forbidding coercion by the state in matters involving religious belief have been raised by individuals, some being members of comparatively small sects, or of none, but their constitutional effect has extended far beyond the parties immediately involved.

From what has been said so far the question of whether the classification of public and private law is suitable for canon law has focused attention on some of the most significant problems confronted by contemporary jurists. Development of new aspects of corporation law, administrative law, and human rights law, are of special importance in disclosing the shift from private to public on one side, and from public to private on the other, with undercurrents of public interest in cases still denominated private, and of private cases which set precedents of public concern. Changes in the status of persons acting as heads of state moreover, have modified the rules regarding immunity from suit, thereby affecting the function of the state as party litigant. Although not mentioned hitherto, because more obvious, another far-reaching change is the gradual abandonment of the use of state force to coerce in matters of religious belief. Notwithstanding the survivals still to be found on this point in important areas, there has been an unmistakable trend which brings liberty of conscience forward in a juridically significant way.

Paralleling, and to a large extent initiating, the juridical advance, have been the continual efforts of the Popes to clear away obsolete practices and inadequate concepts. The concentration of the *Codex* on the law that is; the recommendation of the Encyclicals that the law should be beforehand and prevent troubles, especially through denial of justice, from arising; and the renewed emphasis on personal responsibility in arriving at judgments and making decisions, points up a dynamic approach attuned to the manifold movements disclosed by contemporary science in time and space.

With the changes taking place in the function of the state, and the changes adopted in the attitude of the Church, the juridical formulas that have hitherto been developed in the relationship between the two can hardly remain unchanged. The fact is that instead of disappearing along with hereditary rulers

and state churches, the church-state problems have shifted in interest from institutions to *persons*. This has increased the cases in breadth and depth enormously. It is not too much to say that today the church-state situation in law presents about the most difficult hurdle that confronts the legal mind. From the standpoint of civilization, its potential scope is second to none. Here the past is of much less significance than the prospect.

The revolution in the American colonies —not against law, but *for law,* as opposed to tyranny—which was given legal expression in 1789, in the first written constitution ever devised, was a tremendous leap forward toward *political* freedom. A century later it began to become obvious that political freedom amounted to little more than a paper achievement if it was not also accompanied by *economic* freedom. As spelled out in the direct language of Mr. Justice Louis Brandeis, this meant nothing more nor less than that the test of character is met in the spending of the dollar. Through the revolution for economic freedom which is under way at present there has been a shift in interest from producers to consumers in coordinating supply with demand in the market. This has called forth new thinking on the old problem of just price. Further evidence comes from the explosion in property-holding, which finds increasingly wide distribution of shares in corporate industrial investment. The expanded opportunities for utilizing savings in investment have tended to develop a wide awareness of the responsibilities of management. The invention of consumer financing devices which encourage saving in advance in order to procure a desired object on credit, instead of the old idea of merely accumulating unproductive surplus funds, has further emphasized the importance of consumption in the economy, and the irrelevance of the historical concept of usury to present conditions. The manifestation of *personal* values by the use to which income is put provides one kind of measure for the degree of civilization achieved.

Another kind of measure is found in turning from material wants to the needs of the spirit. In this area, when religion was too closely identified with the political fortunes of heads of state, and when governmental force was brought to bear coercively in matters of public worship, there was little scope for freedom of conscience. Much suffering in spirit, even if not always in body, has been recorded. Rebellion has taken many forms, but none perhaps more eloquent than that marked by emigration to areas where compulsion in affairs of the spirit is less frequent. The ancient habits inculcated by the maintenance of a state church have not been easy to overcome, but once it was seen that the church often suffered more than the state when the political revolution arrived, the urgent need for a more human arrangement speeded up the movement for greater religious freedom. Liberty in matters of conscience is still so new that church-state cases in law must be adjudicated step by cautious step. The fact that cases involving religious beliefs are multiplying rather than decreasing suggests that concern over things of the

spirit is very much alive, however, even in an era where economic interests appear predominant.

Ultimately the changing relations between church and state are juridical in nature, but they can hardly remain unaffected by the economic revolution that conditions legal decisions in other areas. The basic problem is financial support. As a matter of fact, the church has never been entirely free from governmental regulation, precisely because of its dependence upon adequate economic support, or at least cooperation, for its existence. In the days of feudalism, church activities had to rely on the goodwill of the landlords. To secure a certain amount of freedom of action, independent ownership became necessary and has continued to be so. In an economy where landholding has been increasingly subordinated to industrial activity as a source of income, however, the support of church activities has not received adequate consideration from the economists as yet. Voluntary contributions from the many have replaced the benefactions of the royal and feudal lords. They have been sufficiently large to indicate the very great concern of the people in things of the spirit. But there have been no widespread provisions made by most modern states to take official action with respect to the support of spiritual activities. The subject has been so emotionally charged that modern democracies either tend to ignore it completely, or to eliminate governmental aid gradually in any form, direct or indirect. The issue is becoming crucial, especially regarding the use of tax monies in the educational field in such a way as to protect freedom of religious belief. It promises to be no less so with respect to the support of churches, hospitals, social agencies, and other traditional church activities in the future unless met squarely by legal provisions that take into account the interdependent relations of *economic* freedom to *political* freedom and to freedom of *conscience*.

More properly a legislative rather than a judicial matter, the problem of financial support for the various church activities is so far-reaching for all the people that settlement of individual cases by court decisions is properly not private law but public in the fullest sense. Not one religion is affected, but all. Not one country is concerned, but all of the growing number of constitutional democracies. The problem goes far beyond the objection to state monopoly of education. It involves the right to speak, preach, teach, assemble, and worship freely, without discrimination, which are among the basic human rights that the modern state is expected to guarantee. This situation has changed so completely from the days of national churches, or of concordats, that nothing less than a secret ballot from all the people, in each nation, indicating their religious preference, or none, in the support of religious activities with the help of state funds, will meet the present situation.

The matter can no longer be confined within the limits of public ecclesiastical law, and considered of interest only to specially trained canonists. Judges and officials in governments everywhere are confronted with the problem. It is an

entirely new area of constitutional law, no less important than the new fields of administrative law, corporation law, labor law, planning law (including zoning aspects), and human rights law. The specialists in church-state law in the future will require as much competence in general law practice, not only in the civil law system traditional in Europe, but also in the common law of the Anglo-American system, as the practitioners in property, or corporation law, must have in order to be successful at the present time. The shift from a legal concern for the preservation of established institutions, or status quo, toward the view of law as *service* for human beings in their basic needs, physical and spiritual, makes serious demands upon professional skills. In accord with the growing recognition that the state exists for the *person*—not the other way around—and that the church exists to serve the person, it must be increasingly acknowledged that the law has no greater purpose than to aid and protect human beings in their social life. In the jurisprudence of the future—as distinct from that of the past—instead of dividing law into public and private, it is more likely that legal provisions of all systems will coalesce on guidance toward the fuller development of personality in each individual, and that a professional mastery of *comparative law* will be required, to break down discriminatory barriers, and to build up facilities and institutions that will help to make life more fully human. The qualifications of all lawyers working in a field like church-state law will need to be adequate for professional practice in tribunals of the highest rank everywhere in the world.

Instead of the classification of law into public and private, with special reference to canon law, it might be preferable to reconsider the more ancient classification of the Roman Law, into persons, things, procedure, crimes and penalties. The Roman categories had the merit of putting first things first, by giving to *persons* over property in considering rights and duties. The fundamental issue in church-state cases is no longer, if it ever was, a matter of protecting vested interests. The new jurisprudence has moved a long way from property preferences in its approach to social justice. What is at stake is the guidance of human beings in making effective choices between such alternatives as may be presented. A legal order which looks backward for its justifications to times when laboring people were looked upon as a commodity, and misses the significance of the world movement toward protection of human rights in the current revolution of rising expectations, is unlikely to function with honor much longer, or even to be consulted. The law of the future must be certain to put first things first, and this necessarily includes things of the spirit.

The canon law is in a unique position at present for unusual development along lines of social justice. Through the codification, the law that *is* was separated from the law that *was*. Fifty years of analysis and experience with the operation of the *Codex* have shown where gaps might be filled or improvements introduced. A commission on revision has already been appointed. The modern criterion of justice which has been urged

by the social doctrine of the Encyclicals calls for increasing cooperation with the states in improving the human condition. Recognition of the special function of the lawyers in making justice effective in collaboration with economists, political scientists, and government, corporation, and labor officials, among others, is suggested in all of these, but especially in the juridically oriented addresses of Pope Pius XII, and in the call for dynamic, as contrasted with static, action, by Pope Paul VI. The Encyclical, *Pacem in Terris,* of Pope John XXIII, was broadly visioned to embrace juridical improvement on the world scale. The way is opened, not so much for a new code, with rigidities written in, but for a new emphasis in reaching decisions case by case. Not institutions or practices, however long established, but persons, with their needs and responsibilities, must now be put uppermost. With the recent change from the cautious and protective attitude of conservation and preservation to an outlook embracing all the people of God on the march toward the second coming of Christ, which characterized the Council, all the documents issued, but especially the Declaration on Freedom of Conscience, point the way to a new juridical flowering at the very moment when the world is becoming more and more confused about rights and obligations under law.

With the shift in emphasis toward persons and their place in the law, the new jurisprudence calls for a differently oriented professional education for lawyers. Civilians and canonists alike, who have been trained to look backward for precedents in the interest of fairness, will have to develop fresh outlooks and changed techniques. Without losing the invaluable skills of analysis, exactness, and relevance, they will have to begin to work much more closely with economists, and psychologists, and extend their vision beyond local law, to the world view. More, rather than less, knowledge of history will be needed in order to understand relationships and the paths that transition takes. Most of all, a revised set of values will have to be worked into law, reviving the enduring hopes of the human spirit which alone give purpose to juridical effort. With so much challenge made manifest, there will surely be no shortage of generous and enthusiastic aspirants for leadership in the legal profession, who will be able to earn and claim the high regard of the people, all of whom rely upon the law for guarantees of justice and freedom.