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A CRITIQUE OF THE REPORT OF THE CANON LAW SOCIETY OF AMERICA ON DUE PROCESS[†]

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THE REPORT of the Canon Law Society of America (CLSA) to the National Conference of Catholic Bishops (NCCB) *on due process* was published by the NCCB in April 1970. The Report was approved by the CLSA in October 1969 and by the NCCB in November 1969. This critique will examine the Report in detail, pointing out its attributes and deficiencies.

IN GENERAL

The first objection to the Report is that it did not fulfill the purpose of its existence which was to provide specific suggestions to the NCCB as to how due process may be incorporated into canon law. Specific suggestions were offered in the appendices as to how conciliation and arbitration could be established. Conciliation and arbitration, however, are not due process. Appendix C also gave specific suggestions as to how administrative discretion should be structured. This is a laudable end, but it is not due process. It is a result of due process. Properly structured administrative discretion can only be accomplished by establishing sub-

[†] The Report of the Ad Hoc Committee on Due Process to the Canon Law Society of America is reprinted in full in 15 CATH. LAW. 278 (1969). All citations herein are to that edition of the Report.

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stantive and procedural due process. To the extent that the Report sought this, it sought due process. However, for some unfathomable reason it failed to acknowledge this. Consequently, the measures suggested under the title of "preventive steps" were a type of dwarfed and truncated due process but not true due process because certain essential elements were lacking.

The second objection to the Report is that it devoted very little space to the subject of the Report, due process, but gave a disproportional amount of attention to other matters. The Report consists of thirty-eight pages. The appendices account for approximately one-half of the Report. Only six pages, five to eleven, dealt with due process. The Report should have been limited to six pages or else the title should have been changed to indicate its true scope. The rest of the Report consisting of thirty pages, by far the greater part, dealt with conciliation, arbitration, and administrative discretion. None of these are due process. They are procedures for participatory government of a judicial nature. Unless due process is required in these procedures, they may well violate due process. The Report did not make this requirement. Even if they were within the scope of the title, there was no need to give such detailed procedures in the appendices indicating how they could be established. These concepts have been well-defined in law. It was not necessary for the ad hoc committee to rediscover the wheel in this respect. For forty years the Federal Mediation and Conciliation Service has been working with these procedures. This experience is available to the Church if desired. Therefore,

these appendices were not only immaterial to the scope of the work, they were completely unnecessary, even if they had been material. The greatest error, however, that the committee made in this regard was its failure to demand due process in these procedures of participatory government if they were adopted by the Church.

The committee made another error in this connection, because it did not separate the issue as to whether these procedures should be adopted from the issue as to how they should be implemented, if adopted. There is no question that these procedures should be adopted. There is grave doubt, however, as to whether the techniques of implementing them as suggested by the Report and outlined in the appendices are valid if due process is to be secured. Employing an independent group of mediators and arbitrators having no connection with the Church would be a much simpler procedure. Such a method of securing these services would avoid the problem of separation of powers. It is not certain that the method of the Report could. Failure to secure separation of powers would in itself violate due process. Since the Report does not clearly distinguish between due process on one hand, and conciliation and arbitration on the other, considerable confusion results. In fact, the Report equates due process with conciliation and arbitration. This error is compounded by the Report's failure to demand due process in all conciliation and arbitration proceedings.

Under the title *Structuring Administrative Discretion*, the Report sought substantive and procedural due process in

administrative proceedings without, however, calling it by its proper name.¹ It is difficult to see why the ad hoc committee did this, particularly in a Report with this title. Even though many more injustices might have been committed in administrative proceedings than in other judicial proceedings, as the Report contends, it is also difficult to understand why the committee limited its demand for reforms to administrative proceedings. Administrative proceedings should be restructured to provide justice. This can best be done by requiring substantive and procedural due process.

The third objection to the Report is that, although it dealt with a legal subject, it is not written in a precise legal style, using legal terminology and employing legal reasoning and precedents. Even if otherwise accurate, this fact in itself would constitute a serious flaw for this type of Report.

The fourth objection to the Report is that it contains many errors. These occur in its statements on the law, in its statements on the law of due process, in its statements on the law of rights, duties, and authority.

LAW

The Report states that “[r]ights without legal safeguards, both preventive and by way of effective recourse are often meaningless.”² In American law, a right does not exist unless it has an effective remedy.

There is no right without a remedy. Consequently, the above quoted statement is erroneous.

In the following sentence, the Report continues: “It is the noblest service of law to afford effective safeguards for the protection of rights, and, where rights have been violated, to afford effective means for their prompt restoration.”³ The above errs in understatement. The protection of rights is not merely the noblest service of law, it is the basic reason for its existence.

The following incredible statement then appears: “Phrased in abstract terms, the question whether there ought to be ‘due process’ in the Church answers itself since everyone is obviously entitled to whatever process is ‘due.’”⁴ The above statement is, of course, a truism. It assumes incorrectly that the definition of the legal term “due process” is equal to the sum of the definition of the two words “due” and “process.” This is completely erroneous. Due process is a well-defined legal term in the law of the United States. Due process does not exist in the law of the Church at the present time. Consequently, if this position were followed, due process would receive no further consideration simply because it is not “due” now. That is not the issue, however. The issue is whether a legally defined concept known as due process should be incorporated into canon law.

The Report recognizes the validity of this position when it says:

¹ 15 CATH. LAW. at 291-92.

² *Id.* at 281.

³ *Id.*

⁴ *Id.*

The question becomes real only when specific content is given to the expression "due process" so that what is asked is whether certain specific substantive and procedural protections are due, in given sets of circumstances, in order that the rights of persons involved be adequately safeguarded.⁵

This is the point where the discussion should have begun. Due process should have been defined at this point. The ad hoc committee failed to define due process here and throughout the thirty-eight page Report.

The next paragraph declared that most of the current discussion about due process is conditioned by Anglo-American common-law tradition. This would suggest that there is a type of due process which is not conditioned by the Anglo-American common-law tradition. This, of course, is false. Due process exists only in Anglo-American law. Due process is not merely conditioned by that tradition; it is an essential part of it.

The Report continues by saying that the Anglo-American common-law tradition "requires, substantively, that no fundamental right or freedom shall be denied without adequate justification."⁶ This statement is erroneous. No fundamental right may ever be denied under the law of the United States. There can be no adequate justification for the denial of a right in the United States. Under certain circumstances, the exercise of a right may be

limited provided the requirements of substantive and procedural due process are observed.

The Report denies the fact that separation of powers is required by due process.⁷ This is erroneous. The arguments offered by the Report in support of this position are irrelevant. Separation of powers is necessary to due process both historically and logically. Due process requires an independent judiciary. Without separation of powers there can be no independent judiciary.

RIGHTS AND AUTHORITY

The Report shows considerable confusion as to the true nature of the fundamental rights of men in relation to the authority of the Bishop. For example, it states that "[t]he declaration and protection of fundamental rights . . . is one of the most important exercises of governmental authority by the Bishop."⁸ Protection of fundamental rights is not an exercise of the Bishops' authority at all. In the area covered by the rights of men, the Bishops have no authority. Rights are protected by law not by Bishops. Everyone has a duty to respect the rights of others, including Bishops.

Consequently, the statement of the Report—"[i]f they are genuine rights, the Bishop loses nothing by being required to respect them"⁹—is correct in the sense that they lose nothing because they have

⁵ *Id.* at 282.

⁶ *Id.*

⁷ *Id.* at 283.

⁸ *Id.*

⁹ *Id.*

nothing to lose. This statement, however, is incorrect, because it suggests that the Bishops are not already required to respect these rights. This is false. It is not necessary to incorporate due process into the law of the Church to oblige Bishops to respect rights. With or without due process, all Bishops, as all men, must respect rights. This is so because God has given rights to man to enable him to have the freedom to fulfill his duties to God. To violate the rights of man is to intrude upon the sacred relationship that God has established with man. It is an offense against God and an injustice to man. All men, particularly, all leaders of men have a duty to God and man to respect the rights of man. As a man and as a leader of men, a Bishop has the same duty. As an *Alter Christus*, he has the additional obligation to follow closely in the footsteps of the Humble Christ in accordance with his sublime vocation.

In spite of the apparent confusion regarding the nature of rights and authority as indicated above, the Report shows a true understanding of the issue when it declares:

It seems to the members of this Society that the obedience a Bishop legitimately expects when he seeks the unity of the diocesan apostolate never requires a person unwillingly to give up his Christian rights.¹⁰

It is not clear what the Report means by "Christian" rights. Man's rights arise from

his nature, not from his acceptance of Christianity. *The Declaration on Religious Freedom* has reaffirmed this position. No one should be barred from his natural rights by reason of rejection of Christianity. Such a course of action would violate man's religious freedom. Christians and non-Christians, all men, have natural rights because these rights arise out of their nature as men. No person should be required to give up his rights by anyone, least of all, by Bishops. Actually, a man is not free to give up his rights because they are not his to surrender. They are God's rights. God has given them to man so that he will be free to fulfill his duties and obligations to God in accordance with his nature. A person may refrain from exercising his rights; he may not, in fact, he cannot surrender them.

The Report is correct in considering due process an effective way to exercise authority. It is not accurate to say that due process is simply one of the effective ways in which this end is realized. In the law of the United States, due process is the only means by which authority may be exercised legally.

Separation of powers is necessary for due process. Therefore, when the Bishop is a party to a dispute in disciplinary matters, he has a duty to refer the dispute to an impartial board outside of his control. As the Report has correctly stated, there is no theological obstacle to such a course of action. There is, on the other hand, the very demanding reason of law, separation of powers in accordance with due process, for doing so. In addition, such a course of action frees the Bishop from the possible

¹⁰ *Id.* at 285.

suspicion of hypocrisy and of subverting justice.

NEED FOR DUE PROCESS

There can be little question of the validity of the Report's position that "the present moment in the history of mankind imperatively calls for further development in the recognition of fundamental fairness in the governmental life of the Church."¹¹ This, of course, can be best accomplished at least in the United States by the introduction of due process into the law of the Church. The Report is accurate in declaring that this position is solidly founded in the teaching of the Second Vatican Council. The citations from *The Declaration on Religious Freedom*, which the Report has used in support of its position, are most apt. As the Report indicated, the Council referred these statements to civil society and not to the Church. Nevertheless, the Report is accurate when it says in reference to these statements that "they have obvious implications for the Church, since the Church is and must ever be 'a sign and a safeguard of the transcendence of the human person.'"¹²

The Report should have declared flatly that these principles are of universal application. Consequently, they are equally valid in Church government as in civil government.

The Report highlights the need for due process by saying:

It would be unfortunate if, while civil so-

cieties labored to build "an effective and independent system for the protection of rights," the Church allowed itself to remain at a lower stage in the development of adequate safeguards for the protection of human rights.¹³

Unfortunately, that precisely is what the Church has done for many centuries. The Report should have admitted this fact candidly as did the Second Vatican Council and Pope Paul VI.

The Report has noted with approval the view of the Vatican Council and then demonstrated the need for canon law due process with the words:

The ferment of the gospel, which is especially active in the Church of our time, is arousing in the hearts of Christians an irresistible demand that the human dignity of each member of the faithful should be recognized and protected by suitable legal guarantees.¹⁴

It would seem that this ferment of the gospel would be equally active in demanding the protection of the human dignity through canon law due process as it is in demanding protection against the state by suitable legal guarantees.

In the section entitled *Governmental Context*, the Report considered the entire legislative, judicial, and administrative structure of the Church.¹⁵ In referring to adjudication, the Report asserts that the Church law affirms the availability of a judicial remedy for the protection of every

¹¹ *Id.* at 283.

¹² *Id.* at 284.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 286.

right in accordance with Canon 1667.¹⁶ This is, of course, within the context of the present Code, which does not recognize due process. The Report acknowledged the fact that understaffed tribunals have de facto limited these rights and that canon law does not permit judicial review of administrative decisions. Even when such decisions are reviewable by the Roman Congregations, the Report admits that such review is unsatisfactory because of distance, secrecy, unavailability of evidence, and "other failures in regard to contemporary standards of fundamental procedural fairness."¹⁷ This, of course, is a very persuasive argument for establishing canon law due process.

While asserting that the Code of Canon Law is not without concern for limiting administrative discretion, the Report admits that the checks it has established are minimal and unsuited to present-day jurisprudence. In any event, due process is not fulfilled, because canon law rules do not take cognizance of the principle of separation of powers.

The Report is accurate in stating that "[p]rocedural fairness in all aspects of the administrative life of the Church is one of the pressing needs of our time."¹⁸ However, as usual it is not complete. Fairness should be extended to all of the life of the Church, judicial, executive, legislative as well as administrative. Due process should permeate the entire Church. The Report continues:

[I]ndeed, it is the conviction of the members of this Society that the greatest promise for removing causes of conflict in the Church lies in the elimination of unnecessary discretionary power in ecclesiastical administrators, and in the development of effective guidelines, controls, and checks upon necessary discretionary power.¹⁹

This statement, as well as the entire section on *Governmental Context*, might be reduced to simply saying that the Church needs canon law due process in every type of administrative and judicial proceeding. The specific evils referred to in this section are due to the lack of due process. Consequently, they can easily be remedied by establishing due process of law in the law of the Church. It is unfortunate that the Report did not say so.

With the exception of two paragraphs entitled *Judicial Process*,²⁰ which are not relevant, the rest of the Report is concerned with conciliation, arbitration, structuring administrative discretion and the appendices, none of which is due process. Therefore, with the exception of the last sentence of the Report, no evaluation of this material will be made. This sentence is:

Exceptions to this principle of fundamental fairness should be extremely rare and only in the interest of protecting confidentiality deemed essential to the good order of the ecclesial community.²¹

The mandates of fundamental fairness which are referred to above are the right

¹⁶ *Id.* at 287 & n.23.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 287-88.

²⁰ *Id.* at 291.

²¹ *Id.* at 307.

to notice and right to be heard in administrative proceedings in which rights may be adversely affected. It is, therefore, incredible that a Report on due process could end on a note like this suggesting exceptions to the rules requiring notice and hearing, two of the most basic concepts of due process. It is even more incredible that any group of Americans, which includes lawyers, canon lawyers, and priests, could possibly assert that there should ever be any exceptions to the basic rule of justice which requires fundamental fairness.

ARGUMENTS AGAINST DUE PROCESS

In the section *Ecclesiological Implications*, the Report examines the issue as to whether due process has any place in the Catholic Church.²² It is argued that the American legal concept of separation of powers would be in conflict with the Catholic doctrine of unity of authority in the Bishop. Three answers are offered to this objection.

First, the Report denies that the doctrine of separation of powers is required by due process. As was stated before, this view is erroneous, the arguments offered by the Report in support of this position are irrelevant.

Second, the Report compares the various procedural protections against the abuse of authority by Bishops in the present Code of Canon Law to due process: "All of these are in the nature of procedural limitations upon the Bishop, and yet

they have been thought to be consistent with the centralization of all governmental authority in the local Bishop."²³ This view is, of course, accurate. By putting to rest the objection that due process violates the concept of unity of authority in the Bishop, the Report has performed a great service for the Church.

Third, the Report makes a similar contribution to the Church by eliminating the objection that due process undermines the Bishop's authority. In so doing, the Report is inaccurate in saying that "'[d]ue process' does place limitations on a Bishop's exercise of power."²⁴ As stated previously, due process only protects rights over which the Bishop has no authority. The Report admits this principle and contradicts itself when it says "the obedience a Bishop legitimately expects when he seeks the unity of the diocesan apostolate never requires a person unwillingly to give up his Christian rights."²⁵ By this same statement the Report also effectively eliminates the argument that due process violates the obedience due to Bishops. The Report is correct in asserting that "far from undermining his authority, [due process] does much to win respect for it, and so enables him to govern more effectively."²⁶ This statement is, of course, true and is a very convincing argument for due process in the minds of many, particularly Bishops.

The Report evaluates due process in the following words:

²² *Id.* at 282.

²³ *Id.* at 283.

²⁴ *Id.*

²⁵ *Id.* at 285.

²⁶ *Id.* at 283.

Those securing it, in positions of authority in the Church, show their love for the People of God, their trust in the working of the Spirit, and their personal disinterestedness by effectively safeguarding the rights of those entrusted to their care.²⁷

This is a high tribute to due process and to those who seek it. It would appear that anyone who seeks due process and in that sense hungers and thirsts after justice in accordance with the promise of the Beatitude shall be filled, whether they be in authority or not. In fact, those without authority would seem to have a greater reward since they do not have a special duty by reason of authority to seek it. Those in authority with a duty to fulfill their office in justice and love have no right to do less.

The Report has probably reached its highest flight of rhetoric and achieved the summit of its validity as a legal document with these words:

The characteristics of a free man are precisely that he has rights, that he is not dependent for the enjoyment of his rights upon the good will of his superiors, and that his rights are effectively protected so as to be legally inviolable. The aim of "due process" is precisely to give such inviolability.²⁸

SUMMARY

To sum up, the Report on due process failed due process because:

1. It did not define it.
2. It did not demand it in Church Law.

²⁷ *Id.* at 286.

²⁸ *Id.* at 284.

3. It did not require it in every conciliation, mediation, arbitration, administrative and judicial proceeding in the American Church.
4. It confused due process with participatory government.
5. It equated due process to conciliation, arbitration, and structured administrative proceedings.
6. It claimed that due process does not require separation of powers.
7. It did not show the true nature of due process. It made many errors in statements of law and in the concept of due process.
8. It suggested that rare exceptions could be made to the principle of fundamental fairness, specifically in the due process requirement of notice and hearing in administrative proceedings where rights could be adversely affected.
9. It made many misstatements on the law of rights, duties, and authority.

It did, however, accomplish much good for due process by demonstrating that many arguments offered against it are fallacious. Specifically, the Report has proven that:

1. Due process is not incompatible with the principle of unity of authority in Bishops.
2. Separation of powers is not inconsistent with the principle of unity of authority in Bishops.
3. Due process does not violate the duty of obedience due to Bishops.

4. Due process does not undermine the Bishop's authority.

The Report also proved that:

1. Due process enhances the Bishop's authority by enabling him to govern more effectively.
2. The need for reform in the Code of Canon Law is immediate and far-reaching.
3. Administrative authority in the Church should be structured.
4. Effective appeals from administrative decisions should be provided.
5. Conciliation and arbitration proceedings should be incorporated into Canon Law.

6. Participation in the government of the Church by all its members, priests, religious, and the laity should be implemented immediately.

The greatest value of this Report, however, is threefold.

1. It brought the immediate need for due process in the Church to the attention of the NCCB.
2. It was the instrument by which the NCCB accepted this immediate need for due process in the Church.
3. It was the vehicle by which the NCCB recommended to its membership experimentation with due process.