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# ESSENCE OF DUE PROCESS†

ROBERT N. C. NIX\*

One of the major objectives sought to be achieved by the framers of the American Constitution was to provide written evidence of the limitations upon official authority and majority control. The limitation of the use of a written document to serve as a vehicle to accomplish this purpose is the inherent inflexibility of the written word, and the difficulty in selecting phrases which are fashioned in a language of a particular time and a particular place and influenced by the experiences of a given society, which can communicate to successive generations standards responsive to changing community needs. To avoid drafting a document which would become obsolete with the passage of time, our forefathers determined to speak in terms of concepts of government rather than provide rules of law which would be incapable of withstanding the scrutiny of time. These concepts attempt to identify areas of societal concern and merely indicate direction of solution. They suggest important community values that are more fully immersed in the solution of the endless chain of specific problems when those problems arise. These concepts provide a philosophy of government which is to serve as a beacon as we traverse the sea of experience.

Probably the most fundamental tenet of that philosophy was the concept which we now call the fifth amendment. It is the admonition of the fifth, and to the States through the 14th amendment, that neither federal nor state government shall deprive any person of life, liberty or property without due process of law. The American concept of due process is traditionally believed to be the progeny of the Magna Carta's "according to the law of the land." This was designed to restrict the enforcement procedures available to the old English monarchs. I agree with Justice Frankfurter's—as one of the great Justices of our United States Supreme Court—provocative observations that "due process is the least frozen concept of our law, the least confined to history, and the most capable of absorbing the powerful social standards of a progressive society."<sup>1</sup> This appraisal of due process I believe illustrates not only its greatest strength, but also its greatest weakness; its greatest strength being the flexibility to give and to yield and to absorb changing circumstances, its greatest

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† A paper read at the Canon Law Society of America, Eastern Regional Conference on May 3, 1973, at Eden Roc Hotel, Miami Beach, Florida.

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<sup>1</sup> Griffin v. Illinois, 351 U.S. 12, at 20-21 (1956) (concurring).

weakness being its dependency upon the prevalent thinking—when I say prevalent thinking that means majority thinking—of any given society at any given time. I believe that it is a fair appraisal of that concept of due process to say that it is the means by which a given society is allowed to insert into its laws, the personality, the thinking of that particular society.

The idea of due process is not limited to the civil law. It also has some relevance in the Church, and I think it should pervade any association of men. Illustrative of this point is the pertinent observation of the Second Vatican Council that I am sure all of you have known, but allow me to call it again to your attention—a sense of dignity of the human person has been impressing itself more and deeply on the consciousness of contemporary man, and the demand is increasingly made that men should act on their own judgment, enjoying and making use of responsible freedom, not driven by coercion, but motivated by a sense of duty. The demand is also made that constitutional limits be set to the powers of government in order that there may be no encroachment of the rightful freedom of the person and of the association. If conscientious co-operation between citizens is to achieve its happy effect in the moral course of public affairs a positive system of law is required. In it should be established a division of governmental roles in institutions and at the same time an effective and independent system for the protection of rights. Let the rights of all persons, families and associations, along with the exercise of those rights, be recognized, honored and fostered.

While, admittedly, these observations were, initially, directed to the secular rather than the religious, I would suggest to you that it would be unrealistic to believe that there is no parallel. I think that the Church, not only in its capacity as an entity in the common scheme of the general law, but as one of the segments of society, has some relationship to this concept of due process which we will discuss in a moment, but also the concept of due process is very relevant in the Church's relationship to its members, both laity and religious.

At one time in this nation, the disposition of men would not have been necessarily adverse to the autocratic rule of the hierarchy of the Church. The relationship being a voluntary association, complete submission to the regulations was accepted as a natural and a reasonable condition to that membership. In today's society, with this ever-increasing awareness of the dignity of man and human rights, it is unrealistic to believe that any association—voluntary or not—could hope to grow and flourish if it is premised on a theory of total submissiveness. Ironically, it is my judgment that the impetus or the force demanding due process—if you want to use that term—in the Church will not come from civil law, but from the Church within. The civil courts, recognizing the principle of separation of Church and state, have been traditionally reluctant to take jurisdiction in Church matters—and, I think, properly so. As far back as 1871, in *Watson v. Jones*,<sup>2</sup> the United States Supreme Court expressed its aversion to inter-

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<sup>2</sup> 80 U.S. (13 Wall.) 679 (1871) at 727.

fering with ecclesiastical affairs.<sup>3</sup> Although that case is over one hundred and two years old now, I think that this is the judicial thinking of the civil courts with reference to the Church. The law knows no heresy and is committed to support no dogma, the establishment of no sect, and support the right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine. Furthermore, the right to create Tribunals for the decision of controverted questions of faith within the association and for the ecclesiastical government of all the individual members, congregations and offices within the general association is unquestioned.

All who unite themselves to such a body do so with an implied consent to this government and are bound to submit to it. But it would be a vain consent and would lead to total subversion of such religious bodies if any one aggrieved by one of their decisions could appeal to secular courts and have them redressed. I know that is a problem today. It is of the essence of these religious unions and of their right to establish Tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides. In my judgment, because the Church is a voluntary association and one has an absolute right to withdraw, secular courts would not interfere if the Church saw fit to vest complete autonomy with the Bishops nor would it strike any obligation voluntarily assumed. I go to the case of *St. Benedict Order v. Steinhauser*<sup>4</sup> in which there was a challenge to the vow of poverty on the basis that it was against public policy. It was argued

that the vows in connection with Rule bind the member in complete servitude to the Order for life or until the Head of the Church absolve him from his obligations; and it is concluded that an agreement for such a surrender, being opposed to individual liberty and to the inherent right of every person to acquire and own property, is unenforceable in the civil courts and cannot form the basis for an equitable title in the complainant.<sup>5</sup>

The Court had this response:

This argument . . . disregards the explicit provision . . . as to voluntary withdrawals . . . . With this privilege of withdrawal expressly recognized, we are unable to say that the agreement . . . that the gains and acquisitions of members shall belong to the corporation must be condemned. These go to the corporation in exchange for the privilege of membership and to further the common purpose to which members are devoted. No constitutional right is invaded and no statutory restriction is transgressed.<sup>6</sup>

Therefore, the Court rejected that claim that this was adverse to pub-

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<sup>3</sup> *Id.* at 727.

<sup>4</sup> 234 U.S. 640 (1914).

<sup>5</sup> *Id.* at 647-48.

<sup>6</sup> *Id.* at 648-49.

lic policy. Even today with our acute sense of awareness, in the judicial field, of these personal rights of the man, any obligation voluntarily assumed, I think will be enforced. So I do not think that the Church has that fear from the outside. To review controversies concerning the Church rules voluntarily assumed do not present a real problem as far as due process. I do not think—and the impression I get is that many priests who are interested in this aspect of the religious fear this—that the civil law changes are just pressing upon us. I do not think that the Courts are going to be involved in that particular area and I do not think they are going to pressure you in changing.

I do say to you, however, that your desire to maintain present membership and to encourage new membership necessitates the departure from autocratic rules. It is at this juncture that the present dilemma of the Church comes, in my judgment, within focus. While the courts are going to stay out of it, you have to be able to keep your present membership and you are under a moral duty to teach the faith and to bring new souls to God. It is in this area where you try to make these adjustments and I see the vortex of your problem.

In attempting to anticipate—and that is always a dangerous thing—some of the problems, in attempting to suggest solutions that may ameliorate future difficulties, the most important step is to define a concept of due process compatible with Church doctrine and reject any attempt to apply American or Anglo-American concept of due process without, at least, a consideration of its applicability to Church dogma.

First, I can say to you honestly that we do not even know what the civil law concept of due process is. It is really a matter, as I have tried to indicate, of experience, so that you do not have to adopt our rules. If you take this concept of what I think a fair concept of due process really means of trying to engender fairness into your rules, that is the only thing you have to take from the civil concept. Of course, you, in your own conscience, have to be fair—that's another ball-game that I will not go into. You and your confessor can discuss that part of it. The dogma of the Church by its very nature is the essence of the association and that should remain exclusively within the purview of the hierarchy. The ritual, while it obviously may be influenced by changes of the moods of society, nevertheless, the time and the extent of these changes are also appropriately best left with the governing body of the Church.

So I would suggest this is not an area to adopt the philosophy of community control. I think it would be completely incompatible with the basic tenets of our Faith. By the way, I profess no competency in theology. I could, but I do find it difficult to, conceive any kind of concept of community control of ritual or dogma with our rejection of private interpretation and our adherence to the doctrine of Papal infallibility. In view of those two precepts, I believe that we must sustain the view that these areas are removed from any concept of due process. We must rely on Divine intervention and inspiration. While, admittedly the ritual must be flexible

and adhere to the tenor of the times, it is so closely interwoven with dogma the same body must govern—or should govern—both.

So let me again, since I am sure this is rather a sensitive point, attempt to redefine what I mean—I am not suggesting that those vested with the authority to design ritual should be insensitive to changes in our society. Nor should they lose sight of the other urgent goal not only to maintain, but also to encourage and attract new souls. I am simply suggesting that I don't see how you can separate the inter-relationship between ritual and doctrine, in my view. It would seem to me that there should be prior approval of any ritual changes. These must be conditioned upon an absolute certainty that the innovation is in no way offensive to basic beliefs, and this could only be achieved if the ultimate control is within the authority of those responsible for preserving the purity of the doctrine. It is within the area of administrative responsibilities of the Church that I believe a concept of due process can be fashioned and should be fashioned. In this day it would be absurd to assume, as I have said, that dictatorial rule would be tolerated.

Hopefully, the concept of due process that is ultimately adopted should be consistent with the dogma of the Church. And in my judgment, due process should apply in administrative matters only. I know I have lost at least one-third of the audience that wants due process across the board, but I just do not see it in the other areas. I do not think you can do it—I do not think it is appropriate, and I think it would be a relinquishment of moral responsibility if you did. But as to administrative matters, this is the area for due process and I think you ought to make it compatible to the Church dogma so that there is no problem living with it, but sufficiently broad to satisfy this feeling of independence in the world today, so that it is capable of living with the changes of tomorrow. I do not want you to make it stale and stagnant so that tomorrow's society cannot live with it because they will be in the dilemma that you may be faced with today.

In designing the concept, it must be remembered that, unlike the civil law, our major concern must at all times be the life hereafter. We do not share the pressing concern for this immediate existence. You are going to have to expect many challenges at this particular time because you are living in a society that is acutely aware of this idea of right of human dignity, of the human man and the development of the human man, but the challenge is not important. The fact of prevailing in your position is. And I think the *Steinhauser* doctrine that I read to you earlier will prevail in the civil courts. But you do have this problem of trying to make the Church attuned to the times—not only a problem but a responsibility. And you have to bring in some gear to meet today's kind of society and thinking.

Now I understand that many Church scholars are suggesting conciliation and arbitration as the answer to due process—you know, the panacea. But let me caution you to that suggestion. Not that there is any problem with these procedures, but due process means something more than procedure. It is not only the procedure by which a right is enforced or secured.

It is also the definition of that right. So that your concept of due process must mean not only setting up some procedures, but also the development of the rights of the individual in the Church. And as to administrative matters, although I have not been asked, I will suggest that I believe that since we have this inflexibility and since so many areas of the Church are not susceptible to this kind of input by congregation and religious, that administration should be that area that the hierarchy should be willing to allow to input from the outside. Defining rights—I know that might be called heresy—but we cannot ignore the temper of these times, and that since it does not affect dogma or basic beliefs, we can fulfil this desire for self-determination in this burgeoning area of administration. I think that the religious should have a significant say, and the laity should have a significant say, in the appropriate areas where they are involved in administrative matters, not only giving them the right of procedures to give these rights, but in actually designing and fashioning the rights that they should be entitled to.

Now, I have given you a picture of the Court staying out of the ball-game and I hope that is true. If you had autocratic rule and whatever the Pope or the Bishops said was right, people with complaints could go to court—because everyone can come to court, but they would not prevail, because of the basic theory it is a voluntary association. The members voluntarily assumed this. But once you do fashion this doctrine of due process, once you do give rights X, Y and Z, then if you deny Y right or Z right from X parishioner or from a priest or from a Sister or from a Brother, the Courts *will* step in. In other words, if you have the autocratic rule you have no problems with the court—but once you give these rights and you say that a priest is entitled to a certain redress, once you establish that a priest can only be disciplined in a certain manner for a certain reason—and I suggest that it is appropriate that you do that—you are going to have to follow those rules that you set up. I want you to be aware that once the rules are set up—you set the rules up—but then the courts will be there to see that you play by the rules of your ball-game. Under those circumstances I think a person has a legitimate right to come into a court of law and say rule X says this and this was not complied with, and he will get judicial review to that limited scope of seeing that you have complied with your own rule.

I know a lot will say “well, why get into this ball-game?” It is easier to say “No,” but I again remind you of your responsibility of attracting priests and of attracting membership. You have to propagate the faith. You have to deal with the times. I, personally, do not think you can get young men inspired as they are—to come into the priesthood with this rigid discipline. Take the Peace Corps—do you realize that two-thirds of the Peace Corps are basically individuals that would be inclined to the priesthood, to become nuns, but that added bit of independence that they are given there, that they feel they are not given in the Church, has caused them to opt in the other direction rather than the Church. You have got

to give it to them. If you feel that you can compete without that, that's your judgment. I find it difficult to understand that you could. As I said, the courts are going to get into the ball-game once you set up these rules and precepts, and I am sure you are going to feel them an intrusion or obnoxious, at least at first blush, but I think that you realize that once you have designed the concept, determined that it is consistent with the basic belief, you cannot really complain if you are forced to comply with your own judgment.

While I recognize that I have not resolved the problems that face you, I believe your prayerful consideration will be the only answer. I have only attempted to focus the problem and thereby allow you to assess the situation in the vein that I think appropriate for finding solutions.