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# AN AMERICAN EXPERIMENT: TEACHING CANON LAW TO STUDENTS OF COMMON LAW

LADISLAS ORSY, S.J.\*

More than 20 years ago, I published a report in *The London Tablet* on *A Roman Experiment: Teaching Common Law to Canon Lawyers*.<sup>1</sup> That experiment had taken place at the Gregorian University. Little did I think then that one day I would have the opportunity to report on a contrasting academic exercise, namely, teaching canon law in an American school of law. This last experiment took place during the academic year 1981-1982 at Georgetown University Law Center, Washington, D.C., where I was invited to offer to advanced students, that is, to those who were beyond the first year of their training, a semester-long seminar in canon law. Some fifteen of them elected to join the group. They did so because they were interested in the subject and wanted to learn about it. A dream situation for the teacher!

But just what led them to choose the seminar? Here is a sampling from their answers: "Curiosity;" "Intellectual diversity;" "I wanted to study a wholly different body of laws;" "It would give me some interesting insights into the operation of the Roman Catholic Church;" "I am very interested in the field of religion;" "Interest in the role of a lawyer in lay ministry." A varied enough motivation!

Seeing their sustained interest throughout the semester, I could not help wondering about the extraordinary situation we have in English-

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<sup>1</sup> See *The London Tablet*, July 27, 1963, at 815-16.

speaking countries. We have many Catholic lawyers who worship dutifully with the Community, and yet know little or nothing about the legal tradition and the existing laws of their own Church. The responsibility for such a sad state of affairs lies, of course, mainly with Henry VIII. For obvious reasons he developed an aversion to canon law. He expelled it from the English universities. Yet, in these ecumenical times when old wounds are being healed, a legitimate question could be raised: should Henry's problems with canon law be put to rest and the door opened to a respected field of learning? After all, canon law played a prominent role in the development of our Western civilization, and today it is vigorous enough to keep the life of a worldwide religious community in good balance.

So the subject is worthy of study, both in its past history and in its present efficacy. Indeed, in many countries in Europe, such as in Germany, Switzerland, Holland, Italy, Spain, and elsewhere, canon law is an integral part of the curriculum of civil law schools, not only for its affinity with civil law, but also for its historical significance. There is not, however, as far as I know, any school of law in an English speaking country with a chair in canonical studies.

This is not to say that in the United States, prestigious universities have not found their way into the study of canon law. The University of California, Berkeley, has an extensive and still rapidly growing library on religious law—the Robbins Collection—attached to its school of law, which houses also The Institute of Medieval Canon Law, founded and directed by Stephan Kuttner. Further, university presses have given us remarkable books on historical topics. From Stanford comes what is probably the best account of *The Matrimonial Trials of Henry VIII* by Henry Anscott Kelly; from Princeton, *The Bishop-Elect: A Study in Medieval Ecclesiastical Office* by Robert Benson; from Wisconsin, a fine *summa* on the *Medieval Canon Law and the Crusader* by James Brundage; and from Harvard, an inquiry into the development of our marriage laws, *Power to Dissolve*, by John Noonan. These are no more than examples; all outstanding ones. More could be added, especially from Canada and the United Kingdom. In particular, Oxford and Cambridge have given us many fine historical studies.<sup>2</sup>

But let me return to the experiment—the seminar at Georgetown University Law Center. The first issue that I had to settle for myself, and

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<sup>2</sup> There is a graduate school of canon law (officially a Department within the School of Religious Studies) at the Catholic University of America. It offers a 2-year program leading to the Licentiate in canon law and a program consisting principally of dissertation guidance leading to the doctorate. Those who have not done theological and/or legal studies are required to take some foundational courses (no more than two semesters) before they can enter the program.

for the students as well, was the content of the course. Clearly, in a field so new to them I could not take as my point of departure the elucidation of some abstract prime principles. I had to begin by relating my topics to the experience of the students.

In structuring the program, my studies at Oxford stood me in good stead, since much time there was spent on legal history.<sup>3</sup> Thus, I was able to return to the point in the Middle Ages when canon law and English common law were good companions. In other words, I tried to convey some historical understanding of the law of the Church and of its influence on common law. Then I moved on to explain the developments of the constitutional structures of the Church. I showed them how the balance of power had shifted over so many centuries and had led to an increasing centralization; then I described the present functioning of the Church's legislative, judicial, and administrative operations. Next, I asked the students to read and interpret canonical texts. The introductory canons on ecclesiastical laws in the Code are well-suited for such an exercise; besides, they contain the keys to the understanding of all the other texts. Finally, I focused on a couple of concrete issues which an attorney might well encounter in his or her practice: laws relating to marriage and to real property.<sup>4</sup>

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<sup>3</sup> The principal difference between the training of lawyers in English and in American universities consists mainly in the composition of the program. In England, much emphasis is placed on history (including Roman law and English legal history), and legal philosophy; less attention is given to the practical preparation of the future barristers and solicitors. The professional associations (Inns of Courts) have their own rules and requirements, but in no way can they interfere with the universities. In the United States, the training is more practical, the students have to cover many more subjects, and the professional associations perform for the schools the function of accrediting agencies.

<sup>4</sup> The first Code of Canon Law was promulgated on the Day of Pentecost in 1917, and entered into force on the Day of Pentecost in 1918. A second substantially revised Code was promulgated on January 28, 1983 and entered into effect on the First Sunday of Advent, 1983. Thus, to live by a codified system of laws is a relatively recent phenomenon in the life of the Roman Catholic Church. Before the codification, the sources of valid laws were three: norms evolved by customs, papal decisions in individual cases which played the role of judicial and administrative precedents, and statutory legislation by Popes and councils. The official language of the Code of Canon Law is Latin; there is no official text in any other language. Translations are, however, available. To date, two English translations have been published, one by The Canon Law Society of Great Britain and Ireland in association with The Canon Law Society of Australia and New Zealand and The Canadian Canon Law Society, published in 1983, and the other published under the auspices of The Canon Law Society of America in 1983. Both translations carry the approval of the competent Episcopal Conferences. The approval however, does not make the text official; the source for genuine and correct interpretation remains the Latin. The American edition is bilingual, and contains an index. As yet, no commentary on the whole Code has been published in English; The Canon Law Society of America announced the publication of one by different authors, through Paulist Press, later in 1984.

The class was responsive; questions abounded. For the students it was a journey into a different world, and *very* different at that, as they pointed out repeatedly.

To learn about the influence of canon law on the development of some sections of English law in the Middle Ages was a new undertaking for most, if not all of the students. They were unaware of the role that canon lawyers—and through them Christian ethical ideas and canonical devices—played in the creation of the Chancellor's Equity. They were surprised to learn that such typically Anglo-Saxon legal institutions as injunction and contempt of court proceedings owe so much of their origins to the ingenuity of canon lawyers.<sup>5</sup>

After I had explained how laws are made in the Church of today, they asked if there exists an agency that functions to watch steadily the emerging needs in the Church and to plan new laws accordingly. I answered that in canon law we have no permanent and orderly procedure for new legislation; new needs are brought to the attention of the legislator through public debates and occasionally by more or less organized (and not always desirable) pressure groups. But we have a regular assembly of Bishops, meeting every 3 or 4 years, which could develop into a "planning" body.

Presently, the assembly is functioning in a restricted way, usually by debating one simple issue as requested by the Pope. If the members were granted more freedom to take an overall look at the life of the Church and its problems they could suggest appropriate legislation if so needed. Such developments would be very much in accord with the spirit and even the letter of *Vatican Council II*.<sup>6</sup>

As I listened to the students' questions in class and in private interviews, the seminar gradually turned into an experiment for myself in a way I had not anticipated. I became the recipient of the reactions of fresh minds to modern canon law. True, the minds were still in the process of entering into the world of law and learning critically sound methods. True also, they did not always have the necessary information for under-

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<sup>5</sup> For a discussion of the influence of Christianity on the origins and development of common law, see J. Wu, *FOUNTAIN OF JUSTICE* (1955); especially the section entitled *The Common Law in its Old Home*, at 63-114. The notes contain numerous bibliographical references, and O'Sullivan, *Changing Tides in English Law and History*, in *THE KING'S GOOD SERVANT* 7-25 (1948). For further study compare the extensive list of references to canon law in the index of Pollock and Maitland's classical work *The History of English Law* (1895).

<sup>6</sup> For the universal Church, the competent legislators are the Pope and an ecumenical council when convoked and presided over by the Pope. For the particular dioceses, the legislative power rests with the local bishops.

There are no institutional or formal channels in the Church to bring new legislative needs to the attention of the legislators, except through personal representation or through some kind of appropriate publicity.

standing canonical complexities. Yet, their queries were penetrating and instructive. Often the students were able to pinpoint a burning issue of our day. For instance, when I explained the judicial structures in the Church, they soon remarked that, if the courts have no right to interpret the meaning of the law authentically (which canon law courts cannot do), the judiciary can hardly be called independent. They must constantly be aware of what the legislator or those in executive offices think of their interpretation.

In general, the students showed a lively interest in the procedural rules of canonical tribunals. All the more so since, at the time, the press kept reporting on an extraordinary case. In a midwestern city a woman filed a lawsuit in the state court against the diocesan tribunal. She alleged that she was not granted the benefit of due process by the Church in a nullification of marriage proceeding initiated by her estranged husband. Apparently, her complaint was not so much against any individual judge who was in charge of the case as against the canonical norms themselves which the court had to follow. So, I had to explain the ways of obtaining evidence in canonical procedures, the rights and duties of the judges, the examination of witnesses, and the specific problem of balancing confidentiality with publicity. Thus, I covered the basics of the procedure of the most important courts: those functioning on the diocesan level, and those in Rome—the *Rota*, the *Signatura*, and the *Tribunal of the Congregation for the Doctrine of Faith*. The students' responses varied from thoughtful questions to adverse reactions. For me, the discussions that we had pointed to a deeper problem. If the Church operates in a given country, and that country has a good system of dispensing justice which is held in high esteem by the citizens, should not canon law make some use of it? After all, the local law of contract of every country is recognized by the Church as binding in canon law; there is no good reason why some elements of procedure could not be admitted as canonically valid. Presently, even in the new Code, no such concession is made.

The students inquired as to what proportion of the cases before the Church courts were marriage cases and what proportion represented other issues of justice. I gave the answer as I knew it: perhaps one case out of a hundred or two hundred was not about the nullity of a marriage. Their reaction was logical enough: for *practical purposes* then, the Church has no ordinary courts of justice. The truth is that in theory all courts in the Church are courts of justice but in practice they have become specialists in settling nullity suits only. Given this development it is easy to understand that disputes about that alleged violations of rights in the Catholic Church are conducted frequently in the public forum without the benefit of an impartial tribunal. Although there are some minimal provisions in the new Code, the judicial system of the Church remains defective. The norms for the interpretation of canonical texts are, of

course, quite different from those used by common-law courts. The rule that penalties should be minimized as far as the terms of the law decently allow it, and that favors should be maximized as far as the words honestly permit it, went over well. Such a human approach spoke well of our legal traditions. But that an act could be forbidden by the law and yet valid once done was a new concept for my students; some sensed danger in such an approach. My defense came from Roman law; it was accepted by the ancient jurists. Besides, it worked well.

The students showed much interest in the law of marriage; but I can give only a partial listing of their numerous questions. There was the classical one: if the Church affirms that all marriages are indissoluble, why does it dissolve so easily all non-Christian marriages once the interest of the Church is at stake (this is a reference to the so-called "privilege of faith" cases)? Would it not be more honest to say (they claimed) that only marriages between Christians are indissoluble and leave it at that? Further, if the exchange of promises between Christians is a sacred act and generates an indissoluble bond, how is it that the bond can be dissolved before the marriage is consummated? What is so sacred in the consummation that brings that quality of indissolubility that the sacrament alone could not give? But the most difficult thing to convey to the class was the "metaphysical psychology" that canon law still uses to explain the internal structure of a human person; I mean the sharp distinction between the mind and the will. That someone may not know marriage is indissoluble, and yet can bind himself to an indissoluble union seemed to most of the students incomprehensible. Is there not a greater unity in a human person between what he knows and what he commits himself to?

Concerning real property, for lack of time, I had to be content to draw the students' attention to the great differences in approach to the issue of ownership in civil law of Roman origin and in common law. Civil law knows undivided ownership only; it is the unlimited right to use a thing, appropriate its fruits, or even to abuse the thing owned. Common law knows of divided ownership in the form of trust: the legal owner holds the property for the sake of the beneficial owner. Since much of the ecclesiastical properties are held in trust in the United States, an attorney may come across a case which presents a real "conflict of law." A typical example would be the case of a Catholic hospital or of a university where for some reason the legal ownership would be transferred from a religious community or from a diocese to a board of lay trustees but without any change regarding the right of the beneficiary owners. A person trained only in canon law may regard such a transaction as full alienation of ecclesiastical property, a common lawyer as a partial one—if at all.

From time to time the discussions drifted into ethical issues. The problem of determining the right relationship between religion, philosophy, and law clearly was on the mind of the students. There also were the

professional problems: how to be loyal to both the truth and the client? As one put it to me in a private interview: "I cannot be satisfied with guidelines that someone else gives me, be it my own professional association; I must think for myself." In general, the interest of the group went well beyond the narrow technicalities of law—be it common law or canon law.

Now that the experiment is over, some reflections are in order. As far as I can foresee, in the not-too-distant future, there will be heavy demands on the Church to adjust its legal system to new developments. In particular:

1. There will be a demand to make our laws more responsive to the universal mission of the Church. If we want to speak to all nations, we cannot enclose ourselves forever into a legal system inspired by Roman Law and medieval scholasticism. There are "seeds of truth" (or should I say "seeds of justice"?) elsewhere. We need to reach out for them and incorporate them into canon law. In other terms, as the Church expands, it will become increasingly evident that our present system is, even in its present revised form, too narrow for an international community.

2. There will be a demand for reshaping our laws in such a way that they express better the new (and yet so old) self understanding of the Church: we are God's people. The rights and duties of people will have to be expressed far more articulately than has been done hitherto. From the model of the Roman *imperium* (of which the prototype was the absolute power of the *paterfamilias*), we must move gradually toward another model inspired by *communio* where all the members, conscious of their own power and dignity in the Spirit, contribute steadily to the building of the social body. This movement from *imperium* to *communio* may be slow, but in the long run it is irreversible.<sup>7</sup>

Eventually, in order to find the ways and the means to respond to such demands, the Church may well turn for inspiration to the "other"

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<sup>7</sup> The strong concentration of authority in the office of the Pope, a way of life for the Roman Catholic Church today, developed mainly in the Middle Ages. In feudal times, ecclesiastical provinces, dioceses and parishes became the fiefdoms of secular princes and overlords who often had no respect for their religious character, but simply used them to further their own political aims. The Papacy alone was powerful enough to provide a counterweight and, after long and bitter struggle, to free the local churches from their secular masters. Since the same dangers do not exist today—except perhaps in countries of totalitarian regimes—ever since Vatican Council II, there has been widespread demand for more autonomy to be granted to the individual dioceses. Note that in the Catholic doctrine the belief that the Pope is in possession of far-reaching powers does not imply that he must use that power to its full extent all the time. Prudence may advise him that in ordinary circumstances he should enhance the authority of the local Bishops and restrict his own intervention to extraordinary cases and situations. Hence, the new trend of administrative decentralization is in no way against Catholic tradition and belief.

major legal system of the West, that is, to common law. It is different enough to inspire some new ideas, yet it is similar enough to spare the community from serious upheaval. Besides, common law would be just paying off its historical debt to canon law! Such rapprochement, however, desirable as it is, cannot be achieved overnight, nor can it be brought about at the turn of a magic wand or imposed by stern command. A great deal of meticulous work and immense patience would be necessary to make the cause progress. To initiate, and to carry such project toward completion, I could not think of a better place than the highways and byways of the *Academia*; *pace* Henry VIII.<sup>6</sup>

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<sup>6</sup> This Article is a revised and expanded version of an earlier one entitled *Lessons in Canon Law*, published in *The London Tablet*, July 24, 1982, at 740-41.

