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Canon Law at the Crossroads

Canon law is a practical legal instrument to serve the life of the people of God. It does this by providing an order that lays down rights, duties and procedures, so that life in the community of faith can take place in communion, and in the spirit of the gospel and according to the demands of justice. But we should not forget that the community of the faithful is a pilgrim people on the move, with a dynamic faith that seeks to deepen the understanding of the Word of God and put it into practice. The theological, pastoral and spiritual challenges thrown up by Vatican II became, obviously, a challenge to the formulation of laws for the life of the Church. The new Code of Canon Law promulgated in 1983 was followed by the Code of Canons of the Eastern Churches in 1990. We need to acknowledge the enormous amount of work done by the respective commissions over several years to bring out these Codes; it involved a lot of discussions, debates, harmonization and even compromises between opposing positions.

More than three decades have elapsed since the Code of 1983 was promulgated, and during this period confronting the actual life-experience of the people of God has also brought to light several critical questions, demanding significant revision, abrogation and amendments that would correspond more closely to the teachings of the Council and to the signs of the times. They have become necessary for a more attentive dispensation of justice and exercise of freedom. The great programme of *aggiornamento,* set in motion by Pope John XXIII on the eve of the Second Vatican Concil, applies to every field in the life of the Church, including the laws that govern its life. It is the spirit of *aggiornamento* and sensitivity to the needs of our changing times that prompted *Concilium* to prepare an issue dedicated to the question of law in the Church. The main articles of this issue are divided into three parts – the first considering history and principles; the second highlighting some areas requiring urgent reforms; and the third dealing with the issues of application.

Part One:
History and the Questions of Principle

Light of the World: Reclaiming the Historic(al) Role of Canon Law

WIM DECOCK

From a historical point of view, canon lawyers have made a fundamental contribution to the development of legal cultures around the world. Driven by a spiritual desire to build a new legal culture on the ruins of Roman precedents but imbued with Christian values, the canonists' regulatory appetite, especially from the age of Gregorian Reform until after the Council of Trent, has left its mark on all fields of life. Their aim was to create a legal culture sufficiently flexible to account for the complexities of life, but strict enough to avoid disturbance of peace. They wanted to advance a model legal system that could become light for the world and salt of the earth. They succeeded. Three issues on which canonists had something to say to the world will be discussed in this article: mercy and justice; mediation and litigation; and the protection of human rights.

I Introduction

Over a period of more than five hundred years, canon lawyers have profoundly shaped the development of legal cultures from Scandinavia through Central Europe and the Americas, so much so that in his *System of the Modern Roman Law* the great German jurist Friedrich Carl von Savigny (1779-1861) observed that all our legal thoughts, however hostile and strange they may appear to be, are nevertheless penetrated by the Christian view of life. Whether the law of obligations or family law, the rules of public governance or procedural fairness, company law or criminal justice: they all owe some of their fundamental principles to the

late medieval and early modern canon law.[1] Especially in the five centuries between the Gregorian reform and the Council of Trent, canonists did not content themselves with establishing legal rules for the internal affairs of the Church. Driven by a desire to build a new legal culture on the ruins of Roman precedents but imbued with Christian values, their regulatory appetite extended to all fields of life. Their aim was to create a legal culture sufficiently flexible to account for the complexities of life, but strict enough to avoid disturbance of the peace. They wanted to advance a model legal system that could be light for the world. Specialists have investigated the role, both historic and historical, played by canon law in the shaping of modern legal systems.[2] This article highlights three issues on which canonists had something to say to the world: mercy and justice; mediation and litigation; and the protection of subjective rights and human dignity.

II Mercy and justice

In 2015, the image of Christ as the 'Gentle Judge' (*mitis iudex*) was invoked by Pope Francis in a remarkable *motu proprio* which reconsiders the administration of ecclesiastical justice in marriage cases. However beautiful the image, the *motu proprio* itself has met with a mixed reception. While acknowledging that too much justice can lead to injustice, experts warned that too much mercy can lead to the same undesired result. Clearly, for human beings in a post-lapsarian condition to find a balance between rendering justice and showing mercy remains a daunting task. Such was already the case during the age of Church Reform in the eleventh century. Bishops of Rome such as Pope Gregory VII (1073-85) sought to initiate an overhaul of Church structures and Christian doctrine to fight clerical misbehaviour and oppose interventions by secular authorities.[3] As a matter of fact, venality of church offices and clerical marriage had become the rule rather than the exception in many Christian communities around the turn of the millennium. A firm reaction based on the rule of justice was needed by the Gregorian reformers to defend the freedom of the Church and to impose strict discipline among its clerics. Yet, just how strict could they afford themselves to be in prosecuting the sins of nicolaism and simony? Should not Christians refrain from judging in order not to be

judged (Matt. 7.1)? Should not Christians be as merciful as their Father (Luke 6.36)? Should not they sing the praises of mercy rather than justice (Ps. 100.1)?

The choice between tolerating and punishing sinful behaviour, especially if committed by clerics, is a tough one. It requires careful discretion and perpetual balancing. Significantly, it was canon lawyers who provided the first intellectual framework to deal with this thorny issue. One of them was Alger of Liège, a canon lawyer born around 1060 and active in the prince-bishopric of Liège. He is the author of a treatise *On Mercy and Justice* (*De misericordia et iustitia*, hereafter in this article: DMI), composed somewhere between 1095 and 1121 – that is, before Gratian's *Decretum*.[4] The uncertainty about Alger's life contrasts with the certitude about the quality of his work. A local dispute between reformers and the prince-bishop Otbert – who had gained possession of the episcopal see through simony rather than a lawful election – formed the background against which Alger developed his arguments on mercy and justice. His work nevertheless exceeds the narrow confines of a local dispute, offering a more abstract reflection on the tension between mercy and justice in tolerating or sanctioning sinful behaviour of Christians.

An advocate of the Gregorian Reform movement, Alger of Liège was aware of the necessity to demand strict enforcement of ecclesiastical rules. However, drawing on a letter from Pope Gregory I (590-604), he took as a guiding principle that Church governance must carefully alternate between applying justice and granting mercy. Depending on the context, the force of canon law rules varies. For example, promises should not be kept if they lead to immoral actions. By the same token, punishment should not always be executed with the same rigour. Simoniacal priests are deserving of stricter treatment than clerics indulging in sexual misbehaviour. Even punishment of simoniacal priests must make way for patience whenever the unity of the Church and peace are threatened by the strict application of justice. For the sake of the unity and peace of the Church, evil must sometimes be tolerated. 'Canon law precepts must be partly tempered or sometimes entirely dispensed with', Alger held (DMI I, 6), 'according to time, person and circumstances.' With this statement, Alger of Liège expressed a fundamental characteristic of his profession. Specialists have called it the 'instrumental nature'[5] or the 'elasticity'[6] of

canon law. It privileges empirical circumstances over abstract principles, the human person over the legal system, mercy over justice.

From the beginning, then, canonists have been masters in managing the tension between great principles and practical circumstances. Because they were concerned with mercy, a simplistic and inflexible approach to legal rules remained alien to their work. The risk of arbitrariness was contained because canon law was in the hands of an elite of outstanding scholars at universities across Europe. The opinions of canonists could differ, but were not allowed to fail the test of reason or authority. Moreover, through applying the scholastic method, canonists were engaged in a never-ending endeavour to reconcile opposing propositions.[7] In addition to *doctores utriusque iuris*, experts in the science of both civil and canon law, the Church relied on well-educated judges to render justice in concrete circumstances. The judge's office required not only the strict application of abstract rules, but also sensitivity to concrete circumstances, historical contexts and human needs. For the sake of salvation of souls, equity and not rigour of the law was the ultimate criterion to judge.

III Mediation and litigation

If mercy fails to correct evil, recourse to stricter enforcement mechanisms can be necessary. Indeed, one of the major contributions of canon law to Western legal systems is that it defined civilized ways to litigate and punish. A certain order of procedure must be observed. 'Order is so important in the Church', Alger of Liège explained (DMI II, 30), 'that acts or words are void unless they are done or spoken according to the rules of order.' Following instructions in the New Testament (Matt. 18.15-17 and 1 Cor. 6.1-6), the canonists have required Christians to reach an amicable settlement first, to look for a mediator or arbitrator within the community if brotherly correction fails, and to bring a matter before an ecclesiastical court only as an ultimate remedy. Even in court, it is an essential insight of the canon law tradition that the judge should act principally as a mediator. After the model of Christ, the judge should be a bringer of peace and harmony.[8] According to medieval canon law, the judge should promote humanity, seek for an equitable solution and strive for conciliation between the parties.

From the start of the Gregorian reform, developing a right order for settling disputes was at the heart of canonists' concern.[9] Canonists cared as least as much about the quality of the procedures to implement justice as they did about developing the substantive norms expressing the Christian idea of justice. For example, they elaborated sophisticated rules on the types of evidence that can be accepted to establish the truth in court. Appellate procedures were introduced to guarantee quality control of an inferior judge's sentence. Special powers were granted to the judge by virtue of his office to make sure that he took special care of the interest of weaker parties, especially the so-called 'miserable persons', widows or the poor. As a matter of fact, the foundations of the procedural laws in the Western tradition have been laid by canonists who promoted orderly and peaceful procedures to resolve disputes. Combining Roman legal texts with Christian values, canonists developed the so-called Romano-canonical rules of procedure, described in hundreds of treatises on legal procedure.[10] A famous example is the *Mirror for Judges*, published by the French canonist Guillaume Durand (c. 1230-96).

Their concern for the order of judicial process led canon lawyers to make a historic contribution to the culture of procedural fairness that is typical of modern legal systems. In the work of late medieval canonists such as Johannes Monachus (c. 1250-1313), the right to be summoned and to be heard before the pronouncement of any judgment was elevated to the rank of a basic procedural right for defendants.[11] At first, the canonists legitimated this basic element of the *ordo iudiciarius* by referring to the manner in which God had summoned Adam after he had committed the offence of eating from the tree of good and evil. If God had asked Adam where he was (Gen. 3.9: Adam *ubi es*?), so that Adam could render accounts for his behavior, then surely human judges should give a chance to defendants to give explanations for the misbehaviour they were accused of? Exceptions were often made to this rule, however, for instance, when crimes were heinous and notorious. This changed when Monachus shifted the basis of the argument from the biblical example to natural law, arguing that summons to court had been established by natural law, so that no human authority, not even the Pope, could do away with it on any ground. Moreover, Monachus was the first to formulate the maxim that 'any person is presumed to be innocent until proven guilty'.[12]

To underline the absolute nature of the presumption of innocence, canonists acknowledged that God must even give the devil his day in court. In the course of time, the canon law's adherence to the principles of due process led canonists to doubt the legitimacy of sanctions imposed without a trial. Of particular interest is Francisco Suárez's (1548-1617) *Disputation on Ecclesiastical Sanctions*, one of the most comprehensive discussions on the criminal law of the Church in the early modern period. He explained that ecclesiastical sanctions can be imposed in two ways, either by a judicial sentence or by mere violation of a rule (*ipso facto*), thus rehearsing the distinction between penalties *ferendae* and *latae sententiae* (see canon 1314 CIC 1983). However, Suárez timidly submitted that 'one might rightly wonder how it is possible that a penalty is imposed by the law itself,' especially because 'nobody can be rightly punished until after the accusation and the defence have been heard.'[13] In other words, the canonists were aware of the tension between due process, on the one hand, and *latae sententiae* sanctions, on the other, but then they were more tolerant of ambiguities than are secular legal systems today.

IV Human rights and dignity

The pioneering role of canonists in advancing a legal culture founded on respect for individual rights and human dignity cannot only be seen in their concern for procedural order. It is even more evident in the early modern debates on the rights of indigenous people that followed the discovery of the Americas in 1492. Theologians and canonists of the Universities of Salamanca and Coïmbra, in particular, contributed over the course of the sixteenth century to laying the foundations of a legal order where individuals derive rights primarily from their nature as human beings, not from their belonging to a particular state or a particular religious belief system.[14] Famous is Bartolomé de las Casas's (d. 1566) defence of the human dignity of the indigenous people living in Spain's overseas colonies, and the rights of non-Christian people to own land and establish their own political institutions.[15] During the famous dispute of Valladolid (1550-1) he attacked Juan Ginés de Sepúlveda's view that, by nature, there were superior and inferior human beings. Las Casas demonstrated the illegitimate character of the Spanish conquest as it had unfolded in practice and denounced violations of human dignity.

It would be an exaggeration to say that human rights in the twenty-first century are the direct legacy of canon law. Modern human rights declarations are inconceivable without the United Nations' response to the atrocities of World War Two. It is also necessary to recall that the historical context in which canon law arguments for the protection of the equality and dignity of all human beings were developed, remained one in which hierarchy, status and inequality remained the organizational pillars of society. Yet, the canon law tradition can be considered an ancestor of human rights to the extent that it fostered a climate for the protection of subjective rights, especially against abuse of power. Although it is true that medieval canon lawyers' theories about the plenitude of power have inspired political absolutism, for instance the divine right of kings theory in early modern England, at the same time there has always been an important current in canon law emphasizing the limits of both civil and ecclesiastical power. An excellent example can be found in the work of Martín de Azpilcueta (1492-1586). He advocated a constitutionalist theory of power that provided later jurists and theologians with the intellectual ammunition to protect individual citizens against absolutist princes.

The canonists' historic concern for the protection of subjective rights against arbitrary politics and irresponsible princes is often visible in affairs that would now seem to be alien to the profession of canon lawyers. One such affair is monetary policy, especially debasement of the currency in order to raise the revenue of the treasury and alleviate sovereign debt. Medieval canonists had connected this issue with larger political questions such as political representation and the protection of subjective rights.[16] For example, late medieval canonists had elaborated upon the maxim, borrowed from Roman law, that 'what concerns all, must be approved by all'.[17] They agreed that a king cannot impose laws that are particularly burdensome for the people (e.g. tax laws) without their consent. The Jesuit Juan de Mariana picked up these canon law principles in his *On the Alteration of Money* to criticize the politics of monetary debasement practised by King Philip III.

V Conclusion

Throughout the centuries, canonists have shown how to cope with challenges on a spectrum much broader than the subjects covered by the

1983 Code of Canon Law. Canon law has every reason to be proud of its glorious past and reclaim its historic(al) role. Thanks to the audacity of their minds, the 'elasticity' of their method, and the vast array of issues that their work covered, canon lawyers managed to play a pioneering role in shaping governance and justice in Western societies. From the presumption of innocence to the rule that what concerns all must be approved by all, canonists laid the foundations of a legal culture in which individuals could trust that their rights would be respected, especially against the powerful. Guided by the principle that Church governance should alternate between mercy and justice, the canonists of the late medieval and early modern period elaborated a Christian legal culture that was sufficiently authentic to keep its flavor, yet sophisticated enough to entice secular princes to build their systems of justice after the enlightening model of the Church.

Notes

1. Richard H. Helmholz, *The Spirit of Classical Canon Law*, Athens GA: University of Georgia Press, 1996.
2. One example from an endless list of good scholarship is the series *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, edited by Orazio Condorelli, Franck Roumy and Mathias Schmoeckel, 2009.
3. Uta-Renate Blumenthal, *Papal Reform and Canon Law in the Eleventh and Twelfth Centuries*, Aldershot, Ashgate: 1998.
4. Robert Kretzschmar, Alger von Lüttichs Traktat 'De misericordia et iustitia': *Ein kanonischer Konkordanzversuch aus der Zeit des Investiturstreits. Untersuchungen und Edition, Sigmaringen, Jan Thorbecke*, 1985, p. 27. References to Alger's work are based on Kretzschmar's edition.
5. Paolo Grossi, 'Diritto canonico e cultura giuridica', in Carlo Fantappiè (ed.), *Paolo Grossi. Scritti canonistici*, Milan: Giuffrè, 2013, pp. 229-245.
6. Joaquín Sedano, 'Codificación y renovación metodológica en el Derecho canónico actual', *Ius Canonicum* 54 (2014), 819-842 (837).
7. Stephan Kuttner, *Harmony from Dissonance. An Interpretation of Medieval Canon Law*, Latrobe: Archabbey Press, 1960.
8. See, for instance, the late medieval glosses *Ex parte tua* and *Ad componendum to Liber Extra* 1, 36, 11.
9. Johannes Fried, 'Die römische Kurie und die Anfänge der Prozessliteratur', Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, *Kanonistische Abteilung*, 59 (1973), pp. 151-174.
10. Wieslaw Litewski, *Der römisch-kanonische Zivilprozess nach den älteren ordines iudiciarii*, Krakow, Jagiellonian University Press, 1999, 2 vols; Bruce C. Brasington, *Order in the Court. Medieval Procedural Treatises in Translation*, Leiden-Boston: Brill, 2016.

11. Kenneth Pennington, 'Innocent Until Proven Guilty: The Origins of a Legal Maxim', in Patricia Dugan (ed.), *The Penal Process and the Protection of Rights in Canon Law*, Montréal: Wilson & Lafleur, 2005, pp. 45-66.
12. Walter Ullmann, 'The Defence of the Accused in the Medieval Inquisition', *The Irish Ecclesiastical Record* 73 (1950), 481-489.
13. Francisco Suárez, De censuris, disput. 3, sect. 1, nr. 6, in C. Berton (ed.), *Francisci Suárez Opera omnia,* Paris: Vivès, 1861, vol. 23.1, pp. 33-34.
14. Felix Hafner, Adrian Loretan and Christoph Spenlé, 'Naturrecht und Menschenrecht. Der Beitrag der Spanischen Spätscholastik zur Entwicklung der Menschenrechte', in Frank Grunert and Kurt Seelmann (eds), *Die Ordnung der Praxis. Neue Studien zur Spanischen Spätscholastik*, Tübingen, Mohr Siebeck, 2001, pp. 123-153.
15. Mauricio Beuchot, *Los fundamentos de los derechos humanos en Bartolomé de las Casas*, Barcelona-Santafé de Bogotá: Anthropos-Siglo del Hombre, 1994.
16. Andreas Thier, 'Money in Medieval Canon Law', in Wolfgang Ernst and David Fox (eds), *Money in the Western Legal Tradition: Middle Ages to Bretton Woods*, Oxford: Oxford University Press, 2016.
17. Yves Congar, 'Quod omnes tangit ab omnibus tractari et approbari debet', *Revue historique de droit français et étranger*, 36 (1958), 210-259.