

COMMENT

Justice and Mercy: An Enigmatic Yet Crucial Relationship for the Application of Canon Law

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Not a single day goes by without Pope Francis making charity and mercy – central characteristic traits of any Christian – the pivot of his sermons, exhortations and proclamations, formal and informal alike. The last holy year, concluding in November 2016, which explicitly featured the motto of mercy, offers a welcome opportunity for the canonist to contemplate the relationship between mercy and justice.² Certainly, there is no lack of warning speeches and auguries against the oversimplification of the canonical norms through invoking a false understanding of an imperative of indefinite mercy. To do so would be to neglect the crucial and central commandment of justice, which ensures both legal certainty and an equal treatment of similar cases. The papal address given to the Tribunal of the Roman Rota in 2009 may serve as an eloquent example.³ In his address Benedict XVI emphasised the interrelation of love (*caritas*) and justice (*iustitia*), but at the same time explicitly cautioned against over-pastorally motivated charity as far as the application of the law is concerned:

Charity without justice is not charity, but a counterfeit, because charity itself requires that objectivity which is typical of justice and which must

- 1 See also T Schüller, *Die Barmherzigkeit als Prinzip der Rechtsapplikation in der Kirche im Dienst der salus animarum. Ein kanonistischer Beitrag zu Methodenproblemen der Kirchenrechtstheorie* (Würzburg, 1993); W Kasper, 'Gerechtigkeit und Barmherzigkeit: Überlegungen zu einer Applikationstheorie kirchenrechtlicher Normen' in *Theologie und Kirche* (Mainz, 1999), pp 183–191; M Nelles, *Summum Ius Summa Iniuria? Eine kanonistische Untersuchung zum Verhältnis von Einzelfallgerechtigkeit und Rechtssicherheit im Recht der Kirche* (St Ottilien, 2004).
- 2 Francis, *Misericordiae vultus*, 11 April 2015, available at <https://w2.vatican.va/content/francesco/en/apost_letters/documents/papa-francesco_bolla_20150411_misericordiae-vultus.html>, accessed 21 June 2016.
- 3 Benedict XVI, 'Address to the Tribunal of the Roman Rota given 29.01.2010', officially published in (2010) 102 *Acta Apostolicae Sedis* 110–114; English translation available at <http://w2.vatican.va/content/benedict-xvi/en/speeches/2010/january/documents/hf_ben-xvi_spe_20100129_rotaromana.html>, accessed 21 June 2016.

not be confused with inhuman coldness. In this regard, as my Predecessor, Venerable Pope John Paul II, said in his Address on the relationship between pastoral care and the law: ‘The judge ... must always guard against the risk of misplaced compassion, which could degenerate into sentimentality, itself pastoral only in appearance.’⁴

There is sufficient reason, therefore, to consider once more how mercy and justice relate to one another.

CLUES FROM THE HISTORY OF ECCLESIASTICAL LAW⁵

It can be demonstrated from the history of ecclesiastical law that the legal tradition of *aequitas canonica* (canonical equity), which can also be found in the 1983 Code of Canon Law,⁶ combines the principles of mercy and justice as interrelated one with the other. Alger of Liège (1060–1131)⁷ taught ‘that depending on the situation, the principle of mercy (ie the possibility to apply canonical prescription with clemency) or the principle of justice (ie the strict enforcement of disciplinary measures) must be given priority’.⁸ Both principles aim at the salvation of souls (*salus animarum*). Gratian is aware of this concept, using the terms *miser cordia* and *rigor*. *Consideratio discretionis*, weighed in each individual case, helps the person making a decision to arrive at the correct application of a canonical norm after considering the concrete circumstances of the case. According to Gratian, the pendulum swings between mercy and *aequitas severitas*, the full rigour of the law. After Gratian, thought about mercy and charity became atrophied until Henry of Segusio (Hostiensis) came up with arguably the most successful definition of the synthesis of mercy and justice as combined in *aequitas canonica*.⁹ He defined equity as ‘justice tempered by sweet mercy’: the *via media* between *rigor* and *dispensatio*.¹⁰ It was a very long time before Pope Paul VI re-emphasised this connection drawn up by Hostiensis during his pontificate.¹¹ Many allocutions underline and emphasise the *salus animarum* as the prime and core principle of the application of any canonical norm, which can be reached especially by adhering to the principle of canonical equity. It is about higher, better justice, which would normally lead to a peaceable tempered

4 Ibid.

5 See Schüller, *Barmherzigkeit*, pp 349–358.

6 Canons 19 and 221 §2 (1752 CIC).

7 J-L Kuper, ‘Alger von Luettich’ in S Haering and H Schmitz (eds), *Lexikon des Kirchenrechts* (Freiburg im Breisgau, 2004), p 1038.

8 R Kretzschmar, *Alger von Luettichs Traktat ‘De misericordia et iustitia’*. Text mit kritischem Apparat und Sachkommentar (Sigmaringen, 1985), p 31, my translation.

9 H Zapp, ‘Heinrich von Segusio’ in Haering and Schmitz, *Lexikon des Kirchenrechts*, p 1089.

10 Hostiensis, *Summa aurea, Lib. V, de dispensationibus* (Lyon, 1537; reprinted Aalen, 1962), p 289.

11 C Huber, *Papst Paul VI. und das Kirchenrecht* (Essen, 1999).

application of a canonical norm but which could also, in some cases, bring about aggravation.¹²

THE RELATIONSHIP BETWEEN MERCY AND JUSTICE

Many contemporary lawyers, including canonists, feel a certain chill when there is talk of the absolute and unconditional mercy of God, and therefore also of the Church. For instance, unconditional forgiveness offered to perpetrators could be seen as mockery of victims brought to rack and ruin. Does not the unthinking attitude of being 'charitable and merciful' lead to arbitrariness and cause weakening of the community if fundamental rights no longer count from the point where the reign of charity's sceptre commences? Is it not a tell-tale sign of any law founded on democracy that each and every person is equal before the law and therefore to be treated justly, without any charitable concession in his or her favour? Worse still is the accusation against clerics of gracefully administering a top-down dose of paternalism, on the one hand behaving charitably towards sinners, but on the other behaving mercilessly depending on their personal taste and inclination as they see fit. Is it therefore possible to conceive justice and charity together in any way whatsoever, if canon law really is to stay law, without being perverted into a kind of has-been toolbox, sometimes taken seriously and sometimes not, at whim? Does the Roman Catholic Church, with its internal hierarchical structure, know neither separation of powers nor a functional and hierarchically supported control of arbitrary clerical behaviour?

The answers to these critical questions and objections are offered via biblical and systematic thinking. Working theologians are all plain and clear: God's charity is more than any human perception. Salvation and blessing are experienced only when laws are virtuously and dutifully kept. Is not the theological quantum leap *per se* that which St Paul experiences? Believing deeply in the death and resurrection of Christ means believing in God's justice as God's acquittal and absolution leading to new life.¹³ Here, God's justice is not punishing but justifying justice, not given out of debt but unearned and undeserved (*gratias gratis data*) to anyone believing in Christ. God's justice justifies out of grace and 'in such a way does the message of the new justice, given through faith, constitute the foundation of Christian freedom'.¹⁴ God's greater justice is therefore greater mercy: revealed in Jesus Christ, purely given as gift and not enforceable as a reward for fulfilling the law. Hence, charity is to be

12 Paul VI, 'Allocutio die 19.2.1977', (1977) 69 *Acta Apostolicae Sedis* 208–212 at 210.

13 W Kasper, *Barmherzigkeit. Grundbegriff des Evangeliums – Schlüssel christlichen Lebens*, fourth edition (Freiburg im Breisgau, 2014), p 83, my translation.

14 *Ibid.*

understood as emanating from God's omnipotence. The Christian understanding of God's mercy is understood and interpreted as coming from God's charity.¹⁵

This is the point where the thought of St Thomas Aquinas comes into play. According to Aquinas, mercy does not annul charity; on the contrary, it fulfils it, excels it and finally leads it, as it were, to its real destiny, as Christ really intended.¹⁶ In his commentary on St Matthew, Aquinas condenses the aforementioned when he states: 'Justice without mercy is cruelty, mercy without justice the mother to the dissolution of all things.'¹⁷ The punchline is rooted in the fact that Aquinas does not exclude justice or an organised legal system, despite his understanding of divine compassion, thus ensuring security and safety. In the present day, Pope Francis again strives for this balance, when he emphasises in his bull announcing the Holy Year of Mercy:

If God limited himself to only justice, he would cease to be God, and would instead be like human beings who ask merely that the law be respected. However, mere justice is not enough. Experience shows that an appeal to justice alone will result in its destruction. This is why God goes beyond justice with his mercy and forgiveness. Yet this does not mean that justice should be devalued or rendered superfluous. On the contrary: anyone who makes a mistake must pay the price. However, this is just the beginning of conversion, not its end, because one begins to feel the tenderness and mercy of God. God does not deny justice. He rather envelopes [*sic*] it and surpasses it with an even greater event in which we experience love as the foundation of true justice.¹⁸

MERCY AND CANON LAW: HOW DO THEY FIT TOGETHER?

It is a striking difference that, unlike the Churches of the East, who have kept alive from their early beginnings into the present the principle of *oikonomia*, imitating divine mercy in the person of the bishop who was understood as the good steward (*oikonomos*),¹⁹ it poses something of a problem to Latin canon law to implement the demand for the greater justice that is mercy in the application of canonical norms. All too often the application of norms is dominated by a legal positivist understanding resistant to hermeneutical principles, according to which – in an abridged version – it is simply sufficient to know the concrete

15 Ibid.

16 See Thomas Aquinas, *Summa theologiae* I, q 21, a 3 ad 2.

17 Thomas Aquinas, *Super Evangelium Matthaei lectura*, cap 5, lc 2.

18 Francis, *Misericordiae vultus*.

19 For more on this, see Schüller, *Barmherzigkeit*, pp 8–160.

norm (the letter of the law) in order to apply it to any case and to come up with a judgment or decree. Such thinking – masked, alas, by the matrix of formal syllogism – is still common in ecclesiastical judicial praxis, in both forensic and executive areas alike.²⁰

It is submitted that canonical equity constitutes a central part of law, which enables a judge or other person exercising authority to reach a just and merciful decision, adhering to the norm itself (justice) but comprehensively including the specific circumstances of the case (mercy – which is possibly sometimes stricter), so as to reach a decision primarily focused on the salvation of the souls of the faithful concerned. This aspect can be seen in Canon 221 §2 of the 1983 *Code of Canon Law*. This norm concedes to the faithful the right, in case they are drawn into a lawsuit by the competent authority, to be sentenced only according to the prescriptions of the law (*iuris praescriptio*) and canonical equity. Law and equity together constitute the foundation of passing a sentence. Accordingly, before passing sentence the ecclesiastical judge is obliged on the one hand to identify the norms relevant to the case and on the other (with the help of equity) to consider the particular circumstances including the persons involved and other relevant aspects, before fusing both in his verdict and sentence.²¹

It becomes very clear that the demand for canonical equity also demands a certain judicial attitude, understanding the judicial ministry as a service to the people, the Church. A judge must consider his actions as being orientated towards the salvation of souls. He is called to see humanity through the filter of the message of the Gospel and, therefore, to engage the parties with a sense of awareness that he himself is also in great need of God's mercy: maybe more so than anyone else. Legalism is alien to ecclesiastical law, nor can it ever become an end in itself, as is seen in the parable of the disciples plucking the ears of corn on the Sabbath (Mark 2:23–27). Consequently, an ecclesiastical judge who is negligent in the application of the principle of equity, or who even violates the same with intent, causes the litigants concerned grave harm and infringes their fundamental rights. The *Code of Canon Law* does not tolerate such behaviour and stipulates in Canon 1457 §1:

The competent authority can punish with fitting penalties, not excluding privation from office, judges who refuse to render a judgment when they are certainly and manifestly competent, who declare themselves competent with no supporting prescript of law and adjudicate and decide cases,

20 Ibid, pp 268–280.

21 See also *Communicationes* 12 (1980), p 440: 'Verum est caritatem supremam esse virtutem, at ut vera caritas habeatur, oportet iustitia serventur. Si non servatur iustitia, quae hov nomine digna sit, nec caritas habetur. Aliquando caritas et misericordia videntur adhiberi; et tamen iniuria fit alteri parti, iniuria fit filiis, iniuria fit iis qui aliquod ius habent. Ergo oportet iustitiam servare cum aequitate ... quae aequitas multoties non est nisi illa charitas [sic]'.

who violate the law of secrecy, or who inflict some other damage on the litigants out of malice or grave negligence.

The mention of *aequitas canonica* in Canon 19 indicates the problem of having to decide in a particular situation without a concrete norm.²² This Canon deals with situations of *lacunae legis*. By it, the papal legislator states that the idea of a perfect *Code of Canon Law*, ready to fit each and every situation, remains sheer illusion. It is required for justice's sake to deal with *lacunae legis* by the application of equity so that the decision of the Church has a valid and just foundation, rather than forming an example of purely arbitrary justice. Canonical equity acts as *modus iudicandi*, meaning a way to specify the underlying principles of law (Canon 19) in relation to a concrete case in which a clear norm is missing. With the added adjective *canonica* it becomes clear that the norm deduced must fit harmoniously and aptly into the legal system of the present Code.²³

This Canon and the principle it lays down is a prominent position, only surpassed by the last Canon of the Code, Canon 1752, in which canonical equity is mentioned in the same breath as the salvation of souls, the *salus animarum*. The latter Canon – which, as far as material legal terms are concerned, concludes the administrative procedure regarding the transfer of parish priests minus broadens the horizon by invoking the *salus animarum*, which must always be the supreme law of the Church, thereby legally placing the *salus animarum* as the centre point of all legal action in the Church.²⁴ This is in accordance with the third principle behind the reform of the Code of Canon Law, dating back to 1967, which spoke of canonical equity as a juridical principle, accessible by all those applying law in the Church, in order to come to an appropriate decision based on both the legal norm and the salvation of souls.²⁵

Notwithstanding a certain popularity in episcopal pronouncements for referring to the pastoral dimension of canon law,²⁶ this norm has so far not achieved fundamental recognition, let alone found a place commensurate with its

22 'If a custom or an express prescript of universal or particular law is lacking in a certain matter, a case, unless it is penal, must be resolved in light of laws issued in similar matters, general principles of law applied with canonical equity, the jurisprudence and practice of the Roman Curia, and the common and constant opinion of learned persons.' There is also reference in Canon 17 to rules for interpretation when in doubt.

23 C Lefebvre, 'Équité', in *DDC Tom 3* (Paris, 1953), pp 394–410 at p 408. Lefebvre distinguishes between *aequitas canonica* and *aequitas cerebrina* (an arbitrary equity). He defines the former as *informata a iure*, ie 'conforming to the conception and applications made by canon law'.

24 Francis, 'Es gibt keine Sakramente auf Bezahlung', in *Osservatore Romano* (German edition), no 21, 27 May 2016, p 8.

25 See (1969) 1 *Communicationes* 79.

26 See eg the distinguished canonist and emeritus Bishop of Aix-la-Chapelle, H Mussinghoff, 'Nobile est munus ius dicere iustitiam adhibens aequitate coniunctam' in H Reinhardt (ed), *Theologia et Ius Canonicum. Festgabe fuer Heribert Heinemann zur Vollendung seines 70. Lebensjahres* (Essen 1995), pp 21–37; see also W Kasper, 'Gerechtigkeit und Barmherzigkeit: Überlegungen zu einer

methodological and theological importance for canon law in modern thinking on justice and mercy.²⁷ It is all about a just decision in a case, in which specific circumstances are adequately brought into the process of applying the law so that sentence may be passed appropriately and justly and with a pastoral perspective. Anyone who in this context demands mercy as a prerequisite for justice does not therefore intend a cheap or saccharine act of mercy awarded out of a somewhat naïve gracefulness irrespective of applicable law but acts prudently. It must be the aim

to apply the objective sense of the law in an often complex and concrete situation in such way that it is just and meet in the given situation. This does not mean an arbitrary self-interpretation but the requirement is to bring to bear the sense of the objective law as is fit to both the situation and the case alike.²⁸

None of this is about a cunning, clever, serpentine advocate, but about a person (again referring to St Thomas Aquinas) who is capable of relating norm and case in a prudent fashion. Prudence, so the ‘Angelic Doctor’ says in reference to Aristotle, is nothing else but the *recta ratio agibilium* (‘right reason applied to practice’).²⁹ It is for this reason that we speak of jurisprudence rather than jurisience.

CONCLUSION

It is hard to uphold the claim that mercy is in good shape as far as canon law is concerned. This may also be true for the importance of canon law in the life of the Church. Internal discussions and segregation within the discipline of canon law itself have not helped this. The range of understanding of canonical norms runs from extreme legal positivists, who call themselves ‘correct canonists’,³⁰ despite being entirely resistant to hermeneutics, through to those who would dissolve canon law into essentially a vaudeville production: a theological discipline with theological method, thereby forgetting its juridical nature.³¹ Justice and mercy can only be thought of together because they correspond to God’s acts of judgment which are illustrated by Jesus Christ in many parables. The ecclesiastical judge, therefore, must be a just and merciful judge. One might even say

Applikationstheorie kirchlicher Normen’ in R Puza and A Weiß (eds), *Iustitia in Caritate* (Frankfurt am Main, 1997), pp 59–66.

27 See T Schüller, *Barmherzigkeit*, pp 408–432.

28 W Kasper, *Barmherzigkeit*, p 176, my translation.

29 See Thomas Aquinas, *Summa Theologiae II/II*, q 47, a 2, sc.

30 Georg Bier (Freiburg im Breisgau) and Norbert Luedecke (Bonn) might serve as examples for the German-speaking countries.

31 Libero Gerosa (Lugano) might be regarded as a distinguished representative.

that a merciless *iustus iudex* cannot possibly exist because this would be contradiction in terms. As such, the papal demand for mercy in the administration of justice is obvious and is rooted in being a Christian rather than in a revolution. Thence, it is only logical that Pope Paul VI stated that ‘the law is not an obstacle to pastoral care but a pastoral aid; it does not kill, but gives life.’³² The contingent dimension of justice within ecclesiastical judicature finds its fulfilment in mercy, which corresponds to the biblical ideal, to speak the truth in love.³³

32 Paul VI, ‘Allocutio die 19.2.1977’, p 210: ‘Ius enim non est impedimentum, sed adminiculum pastorale; non occidit, sed vivificat.’

33 Ephesians 4:15.