

Applying the Principles and Procedures of Civil Law to Canon Law: A Recipe for Frustration

By Charles M. Wilson

§1. The legislator authentically interprets laws as does the one to whom the same legislator has entrusted the power of authentically interpreting.

§2. An authentic interpretation put forth in the form of law has the same force as the law itself and must be promulgated. If it only declares the words of the law which are certain in themselves, it is retroactive; if it restricts or extends the law, or if it explains a doubtful law, it is not retroactive.

§3. An interpretation in the form of a judicial sentence or of an administrative act in a particular matter, however, does not have the force of law and binds only those persons and affects only those matters for which it was given.

Canon 16, 1983 CIC

§1. The object of a trial is:

1° the pursuit or vindication of the rights of physical or juridic persons, or the declaration of juridic facts;

2° the imposition or declaration of a penalty for delicts.

§2. Nevertheless, controversies arising from an act of administrative power can be brought only before the superior or an administrative tribunal.

Canon 1400, 1983 CIC

Contrary to the perception of some, canon lawyers are not “private attorneys general”; canonists qua canonists cannot compel ecclesiastical authority figures to take or refrain from taking action on specific cases. We can set out, to the best of our ability, the salient ecclesiastical issues in a case—and, of course, await evaluation of our positions by qualified critics—but ultimately, responsibility rests with officials in the local Church (or their hierarchic superiors) to investigate (or to direct the investigation of) important pastoral and social matters such as those arising from the Terri Schiavo case. Or not, if that is what they decide.

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INTRODUCTION

Roughly 1 out of every 300 Americans is a lawyer. The remaining 299 of us who are not lawyers still have good reasons to be interested in our legal system. Out of necessity, we have to conduct much of our day-to-day affairs without a lawyer standing beside us. Therefore we need to have at least some knowledge about the law so as to anticipate the possible legal effects of our actions and, for sure, to know when to seek professional counsel.

Aside from our personal involvement in legal matters, the give and take that is associated with legal processes and the drama of the courtroom, where reputations, fortunes and sometimes even lives are at stake has attracted the attention of the general public throughout history. This is especially true since the advent of television. From Perry Mason to the Water-

gate hearings to the O.J. Simpson trial to the Clinton impeachment trial, it sometimes seems that a growing percentage of those who are not lawyers nonetheless fancy themselves as armchair legal strategists. Strictly speaking, there is nothing wrong with this; but when such non-lawyers try to deal with actual legal matters very serious problems can result. Generally speaking, the same can be said of canon law and it makes little difference whether the offender is a common lawyer or is simply someone who has watched too much Court TV, read too many John Grisham novels or not stayed in a Holiday Inn Express.

You might wonder how someone like me, who is not formally educated in either canon or civil law, would attempt to write even a superficial article about two complex legal systems. Obviously, I had to rely on the work of those who

are truly expert. One very valuable resource is the website of Dr. Edward N. Peters. I am also grateful to the advice of my associates here at the Foundation, Michael Dunnigan and Duane Galles who, like Dr. Peters, are trained in both canon and civil law.² Any errors or shortcomings, however, are entirely my responsibility.

CANON LAW AND THE TEFLON DON

John Gotti, once called the “Teflon Don” for his ability to slip through the fingers of the law and former head of the Gambino crime family in New York City, died of cancer in federal prison on June 10, 2002. At the time of his death he was serving a life sentence for racketeering and other crimes, including murder, for which he was convicted in 1992. The Bishop of Brooklyn denied the Gotti family’s request for a funeral Mass in accord with c. 1184, §1, 3°. This canon prohibits ecclesiastical funerals for “manifest sinners who cannot be granted ecclesiastical funerals without public scandal of the faithful,” unless they gave some sign of repentance before death. However, the bishop did say that a Mass for the Dead could be celebrated after burial, which was permitted in St. John’s Cemetery in Queens.³

By now, the events surrounding the death of John Gotti have long since exceeded the attention span of the general public. Earlier this year, though, an article on the subject did appear in the journal of St. John’s University School of Law.⁴ The piece was written by a civil lawyer, Patrick Gordon, who claimed that Most Rev. Thomas Daily, the Bishop of Brooklyn at the time, was wrong in denying Gotti a funeral Mass. Dr. Peters took strong exception, saying:

Indeed, anyone with a background in canon law can see that Gordon’s article is a cornucopia of canonical errors and even occasional gaffes. Gordon makes repeated mistakes in handling even the most rudimentary canonical sources and, because he wrongly utilizes techniques of legal interpretation that are sound in the common law system but which are gravely flawed in the canonical, he utterly misconstrues the plain text of the primary canon in question.

*Unfortunately, what would be quickly apparent to readers with training in canon law will not necessarily be recognized by persons without. Given, therefore, the severity of the criticism that Gordon has visited upon a bishop who, I suggest, was acting squarely within the scope of his authority, and because that criticism rests on demonstrably shabby canonical analysis, this reply is in order.*⁵

The Peters article is seemingly severe, but is within the bounds of academic debate, given the seriousness of the deficiencies he identifies in Gordon’s analysis. However, this article is not about the rightness of Bishop Daily’s action, however interesting a discussion of it might be. Mr. Gordon’s article is important to us because it illustrates so well the consequences of the failure to take into account the differences between two distinct legal systems. Dr. Peters states what is arguably the key difference as follows:

*I have encountered this attitude among common lawyers before but, being trained in the common law system myself, I think I understand what leads some of them so wrongly to his [Gordon’s] conclusion. Canonical legislation does not read like common law legislation for some very important reasons and common lawyers who would venture into canonical waters need to understand this before setting out. It is certainly not my intention to defend the felicity of every expression used in the Code of Canon Law but, if one aspect of the difference between canon law and common law needs to be clearly understood, it is this: **Common law is a system of judicial***

supremacy; canon law is a system of legislative supremacy. *Grasp that, and one has the essence of the thing. Of the 1,752 numbered provisions that make up the 1983 Code of Canon Law, one of them (in fact, one section in one of them) quietly sets forth this vitally important difference between the ways these two great legal systems (common law, dating back nearly 1,000 years, and canon law, which is nearly a millennium older) function. (Emphasis in original.)*

INTERPRETATION OF THE LAW

The “one of them” referred to by Dr. Peters is canon 16, the full text of which appears at the top of page one. He proceeds to explain the significance of this canon:

Every legal system worthy of the name faces a question: who has the final authority to determine what a given law means? In a common law nation, the judiciary has the last word on the interpretation to be accorded a specific legal provision (a power distinguishable from the legislature’s, or even the peoples’ power to change the text of the law itself. But, in a “Roman” or civil law system, the legislator himself generally has the power of “authentically interpreting” legal texts. Neither the judicial supremacy approach nor the legislative supremacy approach is right or wrong and, I suggest, neither is particularly better than the other at doing what legal systems have to do, namely, developing norms of conduct that can be understood by and applied within their respective societies. Both systems have long and worthy records in upholding the rule of law. But they obviously operate in very different ways, and lawyers well-trained in one tradition are at serious risk of mis-handling the provisions of the other unless they understand and accept the difference, in rather the same way that drivers who are used to driving on the right side of the road are highly accident-prone when they go to a country that drives on the left. It says nothing about their basic skills behind the wheel, but it says much for the problems encountered when trying to cope with a “foreign” way of doing things. Modern canon law draws much more heavily from the classical Roman or civil legal tradition, and not from the Anglo-American common law tradition and as a consequence many canonical interpretive principles differ from those to which common law attorneys are accustomed.

That canon law is a system of legislative supremacy is clear from the terms of 1983 CIC 16 § 1.

While the Pope can indeed interpret the law personally whenever he may choose to do so, he has entrusted the exercise of this power to the Pontifical Council for the Interpretation of Legislative texts (PCILT). PCILT can, with confirmation by pontifical authority, issue authentic interpretations of universal laws of the Church. It also assists other dicasteries of the Holy See in the issuance of general executive decrees, reviews general decrees of episcopal conferences and, at the request of those interested, decides whether general decrees of diocesan bishops or other legislators below the level of the supreme authority are in conformance with the universal laws of the Church.⁶

It remains possible that an interpretation of the law could also be made in the course of a judicial decision or an administrative act. However, as stated in c. 16, §3, such an interpretation would not have the force of law and would bind only the parties involved.

ECCLESIASTICAL COURTS

As we have seen, the principle of judicial review does not exist in canon law. Parenthetically, it might be noted

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here that the notion of the separation of executive, judicial and legislative power as expressed in the Constitution of the United States is not present in ecclesiastical law. The Pope is the supreme legislative, judicial and executive authority on the universal level and the diocesan bishops or their equivalents wield equivalent powers in the particular churches.

It also follows that in a system of legislative supremacy the courts — or tribunals, as they are called in the Code of Canon Law — would have less power than their common law counterparts, which is indeed true.

In the first place, we have canon 1400, §2, the text of which appears above. This means that, for all practical purposes, disputes arising from such actions as parish suppressions or mergers, renovation of church buildings or the removal of pastors can be appealed only to the superior because, as yet, there are no administrative tribunals in the Church below the Second Section of the Supreme Tribunal of the Apostolic Signatura.

Second, secular courts can, for example, compel persons under their jurisdiction to testify or to produce evidence, forbid public discussion of pending litigation and, in general, enforce their rulings. Ecclesiastical tribunals could also do these things and even could coerce; but their coercive power is only moral, whereas civil courts can physically coerce as well. There was a time when ecclesiastical tribunals could look to the state to enforce their sentences; but since the Reformation this is no longer the case, especially in the English-speaking world.

Third, *stare decisis* or the law of precedent does not exist in canon law in the same way that it does in common law, where appellate judicial decisions have legal force beyond the cases they actually decide. In arguing cases before Church tribunals, canonists can and do cite judicial decisions to support their position; but such citations have only moral rather than legal force. Moreover, the Roman Rota is the only ecclesiastical tribunal that regularly publishes its decisions and then only ten years after the decision is made and with redactions made to protect the privacy of the parties. That is why canonists rely heavily on the comments by those learned in the law instead of judicial decision, as Dr. Peters explains:

Scholarly commentaries are to canonistics what court cases are to common law. *Where the common law turns to court decisions to elucidate the meaning of laws, canon law looks to scholarly writings to illumine the purview of its provisions. One must appreciate, then, that Gordon's failure to use so much as a single canonical commentary in support of his interpretation of Canon 1184 is akin to an appellate lawyer's fashioning a constitutional argument without reference to even one Supreme Court case dealing with the provision in question. (Emphasis in original.)*

This is reflected in the holdings of the St. Joseph Foundation's library. Out of over fifteen hundred books, academic journals, other periodicals and documents, only two deal exclusively with the decisions of ecclesiastical tribunals.

In the service of their clients, conscientious canon and civil lawyers will first consider alternatives to litigation. However, if alternate means of resolution prove fruitless, the common lawyer usually heads for the courthouse. The canon lawyer, on the other hand, may also head for the tribunal; but usually looks elsewhere.⁷ In both canon and common law, approaching the wrong forum may prove fatal to the case.

Public order is a hallmark of civilization and its preservation is a basic function of any organized society. Civilization can hardly exist if the people do not feel reasonably secure in their persons and possessions.

In the Church, law and order involves more than simply the protection of persons and property. The salvation of souls depends upon sorting out truth from error so that the message of salvation can be effectively proclaimed until Christ comes again. Those of us who have heard this message and embraced the faith have a right to expect that those who teach in the name of the Church will present the truth without error or ambiguity. We also have a right to the spiritual goods of the Church and to worship according to the norms established by the competent authority and we are entitled to expect that those who have been entrusted with the exercise of authority should follow the example of our Lord by caring for their sheep. In short, it is our pastors and bishops who have the duty to drive away the ravenous wolves and return the stray sheep to the fold. This includes using, when necessary, the penal sanctions provided by canon law.

Like other aspects of canon law, Book VI of the 1983 Code, titled Sanctions in the Church, differs in many ways from secular criminal law. However, there is one fundamental similarity. i.e., it is the role of the competent public authority, not the victim of wrongdoing, to determine guilt and impose penalties. In the Church, under most circumstances, this authority is exercised by the diocesan bishops and their tribunals. In our secular system, it is exercised by the public prosecutors and the courts. In short, neither system countenances vigilante justice.

Especially since the sexual abuse crisis erupted in 2002, we have had opportunities to see how the secular and ecclesiastical officials deal with the same offenses. For example, just as this article was being written, a newspaper article reported that the "Sonoma County Sheriff's Office has recommended criminal charges be filed against Santa Rosa Bishop Daniel Walsh for failing to timely report evidence of sexual abuse by a Sonoma priest who has since fled the country."⁸ The article also reported that "It will be up to the Sonoma County district attorney's office to decide whether it can prove Walsh broke the law and whether there is 'sufficient evidence and circumstances to sustain a conviction.'"⁹ Recalling the words of Dr. Peters at the top of page one, responsibility rests with the District Attorney to prosecute Bishop Walsh. Or not, if that is what he decides. As of this moment, the District Attorney has not announced his decision.

One might say that the one thing that the secular and ecclesiastical systems have most in common is that neither is perfect. Sometimes, in the former, an innocent person is wrongly convicted; although, more often, the perpetrator is erroneously acquitted or is never prosecuted at all. For instance, Carlo Gambino, the boss of the same crime family later headed by John Gotti, died of natural causes — which itself seems to be the exception rather than the rule for mobsters — without ever being convicted of a crime. In contrast, though, we often get the impression that ecclesiastical penal law is hardly ever used to call violators to account.

Finally, there is one more similarity between the two systems. Both depend on the honor, commitment to justice and competency of those in charge.

HOW THE SYSTEMS CAN BE CONFUSED

The St. Joseph Foundation has acquired considerable experience regarding law and order in the Church. Over twenty-two years, we have recorded in our database a total of 3,109 requests for assistance. Of these, 422 had to do with canonical discipline and another 1,235 involved allegations that Church authorities failed to take action to correct abuses pertaining to the liturgy, doctrine or the exercise of governance.¹⁰ We have seen that it is quite common for Catholics to assume that the Church's penal law works in much the same way as does the secular criminal justice system. And this confusion of the two systems leads to frustration and disappointment.

A penal case in either system usually begins the same way, with a complaint being made to the proper authority. A civil complaint is normally made to the law enforcement authority, while an ecclesiastical complaint or denunciation is made to the diocesan bishop. After the denunciation has been made, the differences between the two systems become apparent and among them are the following:

1. The Church does not have, nor does it really need, a separate and extensive investigative apparatus like the police or the FBI. According to canon 1717, the ordinary can conduct the preliminary investigation "personally or through some suitable person" The "Straws" in this issue from the dioceses of Springfield, IL and Bridgeport, CT are examples of bishops using others to investigate. Unlike these incidents, most allegations in canon law are not crimes in civil law and outside investigators are seldom involved. Thus, given the lack of investigative resources, it is essential that denunciations include as many proofs as can be collected.

2. There is an ecclesiastical office that is roughly equivalent to the district attorney: i.e., "A promoter of justice is to be appointed in a diocese for contentious cases which can endanger the public good and for penal cases; the promoter of justice is bound by office to provide for the public good" (canon 1430). The problem is that the office of promoter of justice is usually held by a priest, although the law permits the appointment of a layman or laywoman, who has many other responsibilities. He may also be the pastor of a busy parish or have additional duties at the chancery. Moreover, he does not have a number of deputies and other staff at his disposal, which provides another reason for a denunciation to be considerably more comprehensive than a secular criminal complaint.

3. Once the investigative phase is complete and it has been determined that it is likely that an offense has been committed, "The Ordinary is to start a judicial or an administrative procedure for the imposition of penalties only when he perceives that neither by fraternal correction or reproof, nor by any methods of pastoral care, can the scandal be sufficiently repaired, justice restored and the offender reformed" (canon 1341). As the Santa Rosa case cited above indicates, a civil prosecutor can exercise discretion; though we know of no state or federal law that requires that alternatives to prosecution *must* be considered. That is why a well prepared denunciation should contain persuasive arguments in favor of proceeding with a penal process rather than the alternatives proposed in canon 1341.

The victim of or a witness to a civil crime has only to report it to the authorities and cooperate in the investigation, which is normally conducted by professional law enforcement officers who have the authority of government behind them. The victim does not have to worry about interviewing witnesses, collecting other evidence and presenting the case in court. In

theory, the same is true in canon law. In practice, it falls upon the one who files the denunciation to build the case.

CONCLUSION

Being finite and imperfect creatures, men are incapable of creating anything that is perfect, including a legal system. If we were perfect, then it would be reasonable to expect that our legal systems would always dispense perfect justice combined with perfect mercy. Our Lord commands us to be perfect as our Father in Heaven is perfect.¹¹ Sadly, try as we will, few of us will attain perfection in this life and neither will the legal systems that we devise and manage.

In addition to being imperfect, canonical processes, like their civil counterparts, are often complex and difficult. We do not need to make them any more so and jeopardize our chances of success by applying the procedures of our secular legal system.

(Endnotes)

1 <http://www.canonlaw.info/2006/06/closer-canonical-look-at-schiavo.html>. Dr. Peters currently holds the Edmund Cardinal Szoka Chair at Sacred Heart Major Seminary in Detroit. This comment is taken from a commentary concerning potential canonical problems with the wedding under Catholic auspices of Michael Schiavo and Jodi Centonze. This commentary was published as an article in the *Fellowship of Catholic Scholars Quarterly* 29:2 (Summer 2006) pp. 6-8.

2 The term civil law itself has multiple meanings. For the purposes of this article, it can be defined as secular law and I use the terms civil law, secular law and common law interchangeably. For a more detailed discussion see Duane L.C.M. Galles, "The Civil Law", *The Jurist* 49 (1989) 241-248.

3 http://en.wikipedia.org/wiki/John_Gotti. Also interred with Gotti at St. John's Cemetery are other figures connected with organized crime, including Lucky Luciano, Carlo Gambino, Vito Genovese, Salvatore Maranzano and Carmine Galante.

4 See Patrick Gordon, "Gotti, Mob Funerals and the Catholic Church", *Journal of Catholic Legal Studies* 44(2005) 253-276. For the full text of the article, see: <http://stjohns.edu/media/3/287de4bc44a64bb8954f79d0573d2464.pdf>

5 Edward N. Peters, "Lest Amateurs Argue Canon Law: A Reply to Patrick Gordon's Brief Against Bp. Thomas Daily", *Angelicum* (2006) 121-142. *Angelicum* is an academic review published by the Pontifical University of St. Thomas Aquinas in Rome. A copy of the issue was not available when this article was written. Therefore I used the text as it appeared on Dr. Peters' website, which accounts for the lack of page references. In order to avoid repetitious citations, all excerpts from the article will be indented and in italics.

6 Apostolic Constitution *Pastor bonus*, Articles 154-158.

7 See Note 1 above.

8 San Francisco Chronicle, August 26, 2006, page B-2.

9 Ibid. The internal quotation is from the statement of Lt. Dave Edmonds of the Sonoma County Sheriff's Office.

10 For example, see: Charles M. Wilson, "More Weeds in the Canonical Garden," *Christifidelis*, May 2, 1997, <http://www.st-joseph-foundation.org/cfd15-2.htm>; Philip L.C. Gray, J.C.L., "The Necessity of Law and Order," *Christifidelis*, June 9, 1997, <http://www.st-joseph-foundation.org/cfd15-3.htm>; R. Michael Dunnigan, "Temptations for the Weak and Burdens for the Virtuous: A Comparison of Canon Law with Civil Law," *Christifidelis*, June 13, 1999, <http://www.st-joseph-foundation.org/cfd17-3.htm>; and, Charles M. Wilson, M.T.S. and R. Michael Dunnigan, J.D., J.C.L., "Overdosing on the Medicine of Mercy," *Christifidelis*, June 22, 2004, <http://www.st-joseph-foundation.org/newsletter/lead.php?document=2004/22-3>

11 MT 5:48.