THE LAW AND THE CATHOLIC JUDGE

A Personal View

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WHATEVER may be the responsibilities of Catholics, as such, in relation to other activities, it is not very obvious on the face of it that the practice and interpretation of the Law demands from the faithful any different obligations from those which they encounter in secular life generally. This, however, is but a superficial opinion; in reality, whatever may be the specific influence of Catholicism on the professional work of solicitors and advocates, when the functions of a judge, particularly of high office, are considered, the responsibility of his moral judgment, affected by his faith, cannot be ignored.

Despite the fact that, increasingly since the Reformation, the dogma of the omnipotence of Parliament has rejected the notion of the Eternal and the Natural Law (which latter in relation to jurisprudence has been defined as 'the law of reason as it is commonly called by those who are learned in the Law of England'), the power of the judges, even today, by interpretation of Common Law, Equity and Statutory Legislation, to make in effect new law or construe old in accordance with novel circumstances, cannot be denied.

There are, of course, many matters on which the belief or outlook of a judge can be only of little moment, as in the case of the ascertainment of fact and the obedience due to unambiguous principles contained in earlier decisions or works of authority; but, beyond these and similar matters, there must always remain a large area of judicial determination where no such compulsions obtain; where the judge has to decide of his own responsibility how justice should be done, and how his decision, by precedent, may affect those who will come after him.

On the nature of the judicial process varying opinions have been held: first we may exclude, as contrary to all Catholic teaching, the view that the judge should decide a particular case in such manner as the State may require—a method unhappily prevalent under Communism and not long ago obtaining in Nazi Germany. It was a feature of such perverted jurisprudence that

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certain suitors should be denied the right of audience in the Courts. On application to have the case where such a one was affected tried in Germany, it was pointed out by the Court of Appeal that it was contrary to Natural Justice that a litigant should be deprived of a hearing, and so the cause was ordered to be determined here.

This very recent acceptance of one notion of Natural Justice shows that the idea is not entirely extinct in England, though to my alarm, when arguing as counsel, I once heard a judge (who subsequently became Lord Chancellor) deny that such a notion as Natural Law was part of the Law of England.

At the opposite pole to the authoritarian principle, there is a school of thought, especially prominent in America, which affirms that judges, in effect, make their decisions subjectively, according to their personal predilection, using legal authority as a mere justification of preconceived opinion. In such a case the religious (and political) opinions of the judge would be all-important, but the emphasis on this idiosyncratic method of decision is as indefensible as that of complete obedience to State authority—in England neither extreme affords a fair explanation of the judicial act.

A judge, even if he has to decide according to his conception of right, where there is no express authority should be guided not so much by his personal feelings as by those which exist generally in the society of his time. I may, as a Catholic, deplore suits for divorce and regard marriage as inviolable, but if I take office in a Protestant or agnostic state, I cannot ignore the fact that the majority of the people have come to regard the re-marriage of divorced persons as a not improper proceeding, and I have no right to interpret or apply the Law on any other assumption.

In so far then as a judge must follow public opinion, in an age increasingly secular and agnostic the problem of the Catholic judge is becoming more critical than was formerly the case. When the Catholic Emancipation Act first allowed Catholics to sit upon the judicial bench, the country was still essentially Christian. The legislature itself, as late as the time of the Bradlaugh dispute insisted upon members taking the oath, as at an earlier time 'on the full faith of a Christian'. This state of affairs is now over and Parliament may at any time legislate in such a way as would make the enforcement of its law in a particular case contrary to Catholic conscience. Acts prescribing or permitting euthanasia, abortion, sterilisation

and other invasions of personality, whether in the field of sexual regulation or otherwise, would produce many searching problems, civil or criminal, for future Catholic judges, and it is not impossible that in the end they might themselves be driven to abstain from exercising judicial authority, as would have been the case if the Emancipation Act had never been passed.

This necessity is not yet upon us, and, if this country remains even sub-Christian, never may arise; but the obligation, never effectually repealed, to take an oath against the doctrine of Transubstantiation and other Catholic beliefs which still arguably precludes a Catholic from holding the chief judicial office of Lord Chancellor may one day, through Statute Law becoming avowedly anti-Christian, force him to refuse all further participation in the judicial process; an attitude resembling that of the early members of the Society of Friends.

On the other hand, it is one of the most significant features of present instructed legal opinion, largely owing to the writings of Mr Richard O'Sullivan and the Thomas More Society, that lawyers are once more beginning to appreciate the existence of a specific Catholic jurisprudence, which received but little assent from jurists and historians when the late Professor Maitland so eloquently emphasised its claims.

Even as late as the eighteenth century, great judges such as Holt and Mansfield referred in deference to the Law of Nature and the Law of God; both of which received somewhat exiguous acknowledgement by Blackstone in his Institutes, and of late have been further considered by the eminent jurist Sir Frederick Pollock in his *History of the Law of Nature* and by Professor Allen in *Law in the Making*.

This revival has been but a part of a renewed interest in Thomistic and Scholastic conceptions generally and has had some practical effect. In the case of Carroll, as late as 1931, at least one judge in the Court of Appeal, in a case concerning the care of an adopted child, did not hesitate to quote from the *Summa* that it would be contrary to natural justice if the rights of a parent were to be ignored, and the recent declaration internationally of *Human Rights*, to be accepted by this country, is a tardy recognition of a law greater and more general than one deriving from the unimpeachable sovereignty of Parliament. As Mr O'Sullivan has said:

'Parliament was once, in truth as well as in name, the High

Court of Parliament. Like the Common Law, legislation was governed by rules of justice. Even a rebel like Jack Cade paid homage to justice: "We blame not all the laws, nor all those about the King's person, nor all gentlemen or yeomen, nor all men of law, but all such as may be found guilty by just and true inquiry and by the law".

'A profound change in political ideas led men to think that legislation should no longer aim at fashioning free and lawful men and women, but at increasing the wealth and power of the State. Parliament, which must have the last word in law-making, claimed to be omnipotent; to be no longer bound by rules of justice. In *May's Parliamentary Practice* (1946), it is said that "a law may be unjust and contrary to the principles of sound government: but Parliament is not controlled in its discretion, and when it errs its errors can only be corrected by itself". Governments which retain a majority are unlikely to correct their errors. For a whole century, Omnipotence has been working overtime. There are now so many Statutes, rules and orders, that it is difficult for the most law-abiding subject to avoid offending the law.'

There are signs, however, which cannot be ignored, that Parliament in its turn is surrendering its powers to the Executive. This is a matter of common observation, and here need not be discussed save in relation to the fact that the Orders and Regulations, which give Ministers such overwhelming authority, generally set up Administrative Tribunals which gradually are taking from the Judges many of their functions; in some cases the statutes enabling them actually provide that appeals to the Courts are forbidden. The judges, Protestant, agnostic or Catholic, have inherited from times past, from the Common and even from the Canon Law, certain Catholic principles which, subconsciously in many cases, they still endeavour to defend, mitigating where they can the authoritarian decrees of Parliament or the Executive in favour of the natural law. With these new Tribunals there is lacking any such ethos. For the most part, while administering their office fairly as regards facts, they are almost wholly lacking in that historic reference which still enables old Christian, nay Catholic, assumptions, to pervade the judiciary, even in the most unlikely places. The Common Law and Equity are historic in process and reference, they look back to precedents and authority and eventually to Natural Law; even Parliament cannot prevent their

doing so—indeed the Judiciary may be said in the best sense to be our one remaining conservative element in modern polity; with the new Tribunals there is no such influence at work, rather the reverse.

It may well be that a feeling, as yet unexpressed and perhaps unrecognised, that the whole conception of Justice as it has developed in Christendom is incompatible with the modern pagan outlook has prompted the gradual supersession of judges by officials holding inquiries in so many cases. A collectivist society will pay less reverence to persons and property than was the case with the judges tutored in the old ways, and in the absence of religious sanction, a gradual and, it may be, peaceful drift towards the communist conception of Justice and the overriding rights of the State is by no means impossible. But here we are concerned primarily with the Catholic judge, though many of his problems will be shared by the whole judiciary unless it is entirely to alter its nature. Most of the judges, it must be confessed, have been erastian in religion, and are accustomed to look to the State for guidance in matters religious as well as secular: no good preparation to face the perils to come. Saint Thomas More, one of the few so far who have resigned office on principle, has had few followers. Yet, comments Fr Leslie Watt in his lecture on *Court and Conscience*, 'it would be rash to assume that a similar issue will not confront English lawyers' in the future.

But we must be clear as to what precisely that issue is. A demand that law should be unjustly administered would be resisted by all who exercise judicial functions and never, it is hoped, be tolerated by the British people, but scrupulous justice in court is quite compatible with statutory or ministerial requirement to give effect to unjust or even atrocious legislative requirements. The former demand, to be false to one's judicial oath, would easily be recognised and resisted; the increasing use of the Courts, apparently in a perfectly fair manner, to deprive people of their natural or Christian rights would be a far more subtle process, and far more likely to occur. Yet, said Saint Thomas, no judge should co-operate in the execution of a law manifestly contrary to natural justice, but how can he avoid it if first he interpret such law, and then, in giving judgment, as he must, orders its enforcement? Nor is such a dilemma likely to come, as it did to Saint Thomas More, in the form of one definitely uncatholic decree, as that of

the supremacy spiritual of Henry VIII. Rather in our time is there danger that the natural rights of man will be diminished or destroyed by a series of measures, each of itself apparently innocuous. In England the appearance of definite anti-catholic laws is most improbable; on the Continent it is otherwise, and canonists there have already told Catholic judges that occasion may arise when they should resign. In general, however, a Catholic judge, not confronted with such an obligation, may be of great assistance to the Faith in keeping before his Brothers the regulative conception of the Natural Law. And it is surprising, in my experience, how often an interpretation which does not offend against it in a particular case is as open as is a construction which would. For all judges, at any rate in England, wish to do justice between the parties if the law will permit it, and a certain national pragmatic attitude and distaste of pedantry encourage them to do so. Catholics who exercise judicial functions have it as a duty to counteract a school of thought expressed by Professor Wingfield when he declared of the Natural Law that it had 'long since had its brains knocked out'. Could we but revive belief in the Divine Law also, the future position of the Judiciary and the State would be more secure; but such a consideration would take me into the realms of theology where I am not competent to go. This much, at any rate, must not be overlooked; at the beginning of every legal year the Catholic judges attend a special Red Mass with the intention of the performance of their duties as judges, and as Catholics. With such inspiration the task of reconciling juridical obligation with spiritual integrity should be rendered the more possible of performance.

Finally, again to quote Mr O'Sullivan, we have reached a turning point in English Law and History. 'It is the changing of the tide. The current of which we begin to feel the onset is charged with the truths that the historians of the law, Pollock and Maitland, and Holdsworth have taught us all. It is borne also on the returning tide of Christian philosophy and theology that goes with the names of Pope Leo XIII and Cardinal Mercier, and Etienne Gilson and Jacques Maritain, and a host of others. This current receives, too, in England and in the United States the impact of the Roman Canon Law which was reintroduced into England with the restoration of the Catholic Hierarchy in 1850.'