



Law as an instrument of life together

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“Our judges cannot be faulted for seeking always to ground their decisions in written law and precedent ... Nevertheless, they ought to recognise that if their judicial authority has no other grounds than custom and public opinion, they are not promoting justice, but merely a power that may equally well violate as protect basic human rights”¹.

LAW is often seen as a source of restriction upon people’s liberty in modern society, at least in the West, but some form of law is recognised generally to be necessary for any society to function. The classical adage *ubi societas ibi lex* (“wherever there is society, there is law”) reflects this latter perception.

Of course, it is perfectly possible for society to be confronted with the reality of law which enables it to function, where that law is imposed. A monarchical regime, especially of an absolutist stamp, operated in centuries gone by on that basis and the rule of one man was judged to be the only way of overcoming rampant self-interest and its destructive effect upon the public good. This was so even given that success for the ruler of a state often depended upon deceit and manipulation; indeed Machiavelli urged that people ought to obey laws, yet, since they are often ineffective, laws are at times to be set aside and a ruler ought to pursue success by power².

¹ B.M. ASHLEY, *Justice in the Church: Gender and Participation* (Catholic University of America Press, Washington, D.C, 1996, p. 38.

² Cf. N. MACHIAVELLI, *Il principe*, A. DE LA HOUSSAYE (ed.), *Cosmopoli*, 1769, cap. XVII, XVIII, XXVI: “... Dovete adunque sapere come sono due generazioni a combattere; l’una con le leggi, l’altra con le forze: quel primo modo è degli uomini, quel se-

More recently, totalitarian régimes have embodied political philosophies of right and of left which have sought to direct all aspects of a country's life, all levels of social life, through a pervasive system of laws rooted in such philosophies. Thus, although communism ought to have seen the 'withering away' of law along with the other apparatus of the state according to classical Marxism-Leninism, under Stalinist totalitarianism it was seen to be an expression of the will of the whole people through the power of the state³.

Theocratic régimes, such as in Calvin's Geneva in the 16th century or in certain modern Islamic states, for instance Iran and Saudi Arabia, attempt a similar enterprise in terms of making religious doctrine directly the law of the state. Governments in representative democracies, on the other hand, also need a system of laws to ensure the effective and proper functioning of their societies, in line with the value system they espouse. Although the absence of any form of government and the rejection of all forms of law have been advocated by anarchist groups and although efforts to realise these ideals have been fostered through political campaigns and through violent action, the effective operation of a society based on anarchism has not been achieved and, indeed, would seem to be a contradiction in terms.

1. Law and the functioning of society

Life together implies more than the juxta-position of individuals; it has to do with how those individuals relate to one another and to the group or to society as a whole. Precisely here law can fulfil the role of being an instrument which facilitates life together. In a sense any system of law can function in this way, if it is efficiently implemented. Thus, people can live in security, individuals and families can undertake activities and operations with some degree of order and structure, knowing what is possible, how things function and thus to this extent can be assured of some level of reliability and of justice. Even a dicta-

condo è delle bestie; ma perché il primo spesse volte non basta, bisogna ricorrere al secondo. Pertanto, ad un principe è necessario saper bene usare la bestia e l'uomo" (cap. XVIII).

³ A. BULLOCK, *Hitler and Stalin: Parallel Lives*, BCA, London, New York, Sydney, Toronto, by arrangement with Harper Collins, 1991, pp. 704, 1115, note 9, referring to A. VYSHINSKY, *Soviet Legal Philosophy*, translated by H.W. BABB, Camb., Mass, 1951, p. 139.

torship or a totalitarian government can enable a certain level of security and of justice, perhaps from some angles a higher level than representative democracies; in these ways, people can live in society together and can enjoy a greater or a lesser degree of peaceful co-existence.

However, law under an absolute monarchy, in a dictatorship or in a totalitarian system, will often be able to fulfil this role only to the extent that such law is imposed upon the population of the state. A high degree of coercion, actually exerted or latent and implicit, will often be necessary to implement and to maintain life together within one of these structures. This will be the case all the more where the majority of the population do not share the value system of the government and/ or are excluded from effective participation in its operation. Life together is possible in such circumstances, as the courageous lives of countless victims of political oppression testify, but it depends heavily upon coercive action or upon the threat of such action. Under such régimes law can be a powerful instrument rendering life together possible, where judicial, political and/ or military enforcement is involved. It would be wrong to think that all laws emanating from governments such as these are immoral or unjust; many laws will be both morally binding and just even in such circumstances (where those laws reflect natural moral law, so that murder and perjury, etc., will remain wrong), but many others will stand in violation of what is right and of what is just. The more laws rest upon mere power and upon coercion, the more they stem from the mere will of the ruler or of the government, the less persuasive they will be to those who are governed by them; people may be constrained to obey or to appear to obey such laws, but they will not be likely to be convinced that they are right. In other words, laws imposed by mere whim, by brute force or by sheer will are improbable instruments for the establishment and maintenance of life together in the long term precisely because, as such, their appeal to, and their basis in, reason are deficient or are obscured.

2. Life together and the instrument of positive law

One approach to this question has been to emphasise the degree to which a government is able to legislate actively for its citizens and for those who live within its borders and to legislate in the sense of es-

tablishing or creating human laws which are perceived to be new, as distinct from being considered to be merely and only an extension or an elaboration of pre-existing laws. In past centuries ancient custom and precedent were often predominant in the conception of law and in its application; this is a feature of common law, at least in principle. Where laws at the human level were seen to be essentially a question of specifying the pre-existing laws of God or of natural law, it was argued, such human laws lacked any truly progressive or innovative dimension⁴.

The tensions and disputes between the medieval Papacy and the Holy Roman Empire reflected, on both sides, a pretension to universalism, even though the extent to which the spiritual power might oversee, restrict and even dismiss those exercising temporal power formed the core of the conflicts between them. Both appealed to God and even to the Church in defence of their respective claims. Yet, it was the lack of awareness and the inability to innovate in legislation which characterised their more specifically legal interventions, part of their common self- understanding, which meant that life together in those centuries was often assured through amassing of previous collections of laws and through their somewhat haphazard attempts to apply them by officials who were frequently remote, out of touch with, or even opposed to the policies of the Papal or Imperial authority in whose name, in principle, they were acting⁵.

The rediscovery of Roman law in the twelfth century, transmitted along with Aristotle, through Averroes and Avicenna, and the elaboration of juridical science in civil and in canon law, especially at the university of Bologna, engendered a slow, but gradually increasing recognition by political authorities in various parts of Europe which Papacy and Empire found it increasingly difficult to control or even influence, although in the 12th and 13th centuries appeals to the great lawyer Popes in Rome did much to strengthen the Papacy.⁶

⁴ Cf., F.H. HINSLEY, *Sovereignty*, C.A. Watts and Co. Ltd., London, 1966, pp. 67-70.

⁵ *Ibidem*, pp. 76-82.

⁶ Cf. C. BROOKE, *Europe in the Central Middle Ages, 962-1154*, Longmans, London, 1964, pp. 325-328; R.W SOUTHERN, *Western Society and Church in the Middle Ages*, Penguin, London, 1970, pp. 131-132.

Eventually, however, the idea that law could be created and could function as an instrument of social and political cohesion came to be appreciated by many secular rulers. Clearly, it was in civil law that such an impact was more directly felt, for example in Henry II and Edward I's England and in Philip IV's France. It was some centuries later, from the time of Jean Bodin onwards, that the specific concept of state 'sovereignty' came to be developed to express and to promote this tendency. Here it was precisely the capacity of a government to legislate for people within a given territory, independently of higher temporal or even spiritual authority, and to do so in a positive way by creating laws which were deemed to be new which made it 'sovereign'. Laws pertaining to inheritance of titles and of property or to commercial enterprises and to interest rates and then to religious confession and practice are examples of how laws were increasingly used against the earlier prevailing universal authorities of Christendom to forge a cohesive way of being able to live together in a given society in a way which was distinct from that of other similar structures⁷.

A further development within this system was that of seeing law itself as sovereign as distinct from the person of the absolute monarch who had previously been above the law which he created by his sovereign act on the basis of a 'divine right' to rule⁸. The advent of limited monarchy and the recognition, at least in principle, that all in the state ought to be equally subject to its laws, was a significant point of development, since republican governments would seize upon such legal sovereignty and equality before the law as essential prerequisites for life together in the more liberal societies which emerged over the last three to four centuries. However, it was the insight that laws essentially regulate relationships between people and that they ought to be based upon reason that characterised the views of Montesquieu, of Beccaria and of the Enlightenment⁹.

⁷ Cf. HINSLEY, *Op. cit.*, pp. 120-121.

⁸ Cf. *Ibidem*, pp. 129ff.

⁹ Cf. P. HAZARD, *European Thought in the Eighteenth Century* Pelican, London, 1965, pp. 170-176; original French: *La pensée européenne au XVIIIème siècle, de Montesquieu à Lessing*, Paris, 1946.

3. Juridical order, sanctions and life together

If the systems of thought and of practice just noted are to be distinguished on the basis of a capacity to legislate positively for a given society within a specific territory and if life together in that society was more and more predicated upon such legislative structures, the actual operation of judicial systems to apply laws to all within a given state or society was to be no less important. Indeed, it has been suggested that it is not the legislative dimension of state activity which counts most of all when law is being examined as a means of cohesion, of rendering possible life together, but the 'legal order' understood as a system of generating and of applying laws to those whom they concern. In fact, from this angle, the assertion has been made that it is not even necessary that laws should be considered only from the perspective of the state. Rather, in this view, any entity and only such an entity which has a legal or juridical structure for applying and for enforcing 'laws', norms by which that reality is to be regulated, enshrines a genuine legal system¹⁰.

This would mean that bodies which operated and applied rules in an ordered way to those who constituted them or who were involved in the activities of that entity, such as a trade union, a religious community, would count as bodies with a legal system. Such an understanding of laws and of their role in facilitating life together prescind from any necessary reference to what is morally right, to God or to natural law. Thus, even criminal or terrorist organisations which had structures for enforcing the rules by which they shared life together as such would be judged to be operating a legal system, not by virtue of the content of what those regulations might enjoin, but by virtue of their existence as regulations and by virtue of their enforcement through a system of application.

This latter approach to law as a means of making life together possible places the emphasis quite strongly upon the application of laws and upon enforcement, punishment and sanction not through haphazard or through arbitrary action, but through an ordered system

¹⁰ Cf. L. MÜLLER, *Fede e diritto: questioni fondamentali del diritto canonico*, Eupress FTL, Lugano, 2006, pp. 215-227, analysing these positions of S. ROMANO, *L'ordinamento giuridico*, Firenze, 1977.

of sanctions. More commonly, sanctions or punishment are not presented as the kernel of a legal system, but feature as one element in a much broader arrangement which begins with legislation. Positive human law is also deemed generally to be established through jurisprudence, which is by no means reducible to the penal dimension of law. Even where the understanding of law were extended beyond the penal to incorporate whatever system of application might pertain in a given community, it is worth recalling that jurisprudence is not just a matter of the correct application of laws, but that, precisely by determining what is meant by a specific piece of legislation or by giving a new interpretation of legislation or of other law in applying this to new situations, new law is indeed capable of being created, even if such jurisprudence is subject to subsequent confirmation or rejection by means of legislation or of further jurisprudence.

4. Law and life together: the question of justice

Both of these approaches, that of law being created by positive legislation and that of law as the structured enforcement and application of the norms of a given identifiable group have contributed in some ways to rendering life together in society possible. If the only factor of significance, from either approach, is that the system works or functions (sociological functionalism), then many systems of political oppression by governments would have to be judged to be lawful and legitimate as such or *per se*. It would mean, on the second interpretation just noted, that certain criminal bands operated as structures of law *per se*, where there was a system of enforcement which was implemented. This distinction is important because the claim being advanced by those who eschew any necessary moral basis to law implies exactly that, whereas those who construe law as having to do essentially with justice and with the pursuit of what is right and good for the community for whom those laws are intended will admit that certain features of a given system of implementation or enforcement, operated by unjust rulers or by criminals, especially though if it involves a government, may be just or good, but they would only be just or good *per accidens*.

In fact, the insistence that there should be a legal structure to apply laws and that this should be equitable is already a recognition that

law and justice cannot to be severed from each other. While it is perfectly true that there can be unjust systems of government, even highly oppressive, which yet maintain some elements of justice and while there can be little doubt that unjust systems of law do operate, yet, to opine that the laws of a land, or the regulations of some other entity which has procedures of enforcement akin to a judicial structure, need have no reference to right and wrong or to justice in their content is, at best, to opt for what is the case and to neglect what ought to be the case in their regard.

It is precisely justice which is at issue in the question of how people ought to be treated when they violate existing laws and in the question of equity in the treatment of those in identical or similar situations. Whether a man is rich or poor ought to have no bearing upon whether or not he is prosecuted for a traffic offence, nor ought such differences to lead to diverse treatment of one from the other where the offence is the same. In some respects, the argument seems to reduce justice to procedural matters, which are important, but the neglect of basic content in the laws or norms in such a perspective must also play a role. If the content of the law or regulation at issue is unjust, it is hard to see how justice can be done properly by adhering to procedures to punish those who transgress them.

4.1. Law and voluntarism

One apparent escape from this dilemma is to revert to the proposition that law is a matter of what is enacted by the lawgiver or superior by virtue of his or her will on the matter. Extreme voluntarism would seem to be required to underpin this type of thinking, but such voluntarism is arbitrary and hence irrational. Some level of understanding of law in its basic aspects would seem to be necessary for a person to be held to be imputable if he or she violate it; why should a person be bound by laws enacted arbitrarily, since, on this argument, the law could just as well compel next week what it forbids explicitly this week and without any more explanation than the fact that it is the ruler's, the government's, the association's president's will that this should be so. Nor is it a solution to argue that laws apply and hence are to be enforced according to the procedures where the system or structure is accepted. A juridical structure of application and sanction under a system of voluntarism of the kind just noted would be inher-

ently unstable and open to erratic change at the government's whim. A rational person might, and presumably would, find such a system difficult to accept precisely because it is inherently irrational. It is difficult to see how such a system would be capable of facilitating life together in any meaningful way; it would put people in situations which were contradictory, cause them, potentially, to live in a way which was self-contradictory, and would remove the minimal stability which is normally and correctly to be associated with laws being logical and life being predictable at least in significant ways. The tendency to disintegration which would appear to arise from this type of proposal would not only militate against key aspects of what we call the common good, but would render social inter-action itself problematic.

4.2. Law rooted in reason, determined by the will of the lawgiver

It is true that some element of decision can often be required in determining human positive law. What is obligatory, as distinct from what is morally right but not necessarily a matter of strict duty, can be settled at times and ought to be settled at times by those responsible for enacting laws. Of its nature, human law concerns inter-actions between people or at least their external acts; it does not pertain to their internal acts of thought, except to the extent that these are externally manifested in some form of planning, conversation, letter or other gesture which can be and is externally perceived. However, at times such human law needs to be established through decisions which determine what action is right or wrong in a given setting, since a specific alternative is neither intrinsically right nor intrinsically wrong. A simple example concerns traffic regulations, where the duty to protect innocent human life, as the most fundamental of human goods, implies driving and travelling safely, driving either on the left or on the right side of the road, observing a system of traffic lights (with colour and sequences specified and understood) and of speed limits. There is nothing intrinsically good or bad about driving on one side of the road or the other and the goodness or badness, extrinsic, depend upon a determination by the lawgivers. This is not a matter of mere voluntarism, since the basis upon which such a judgment has to be made is a rational one of protecting life (and hence is rooted in the rationally discernible and objective criteria of natural law), while the way traffic lights operate and particular speed limits need to be settled and re

viewed on the basis of practical, rational evaluation. Where it is not a question of prohibiting what is intrinsically morally wrong, the properly expressed will of the lawgiver, rooted in rational reflection and upon rationally discernible criteria bearing upon basic human goods, is needed. This kind of inter-dependence of reason and will in legislation, obviously in an age prior to modern traffic systems and laws, seems to have been a key concern of Suarez, as he sought to overcome the mere voluntarism of Ockham, while maintaining firm the key insights of Aquinas of law as an order of right reason¹¹.

5. Law and reason: some modern tendencies

While it might be possible for a system to function to a certain extent with a focus just on application and sanctions, especially if enforced repressively, the presuppositions lying behind the content of the norms or regulations in any given society with an order akin to the juridical order could hardly not become the object of reflection and of questioning by the subjects involved. That questioning would turn rightly to the rational basis and justification for the laws or norms being enforced. However, the way in which reason is to be engaged is not indifferent. Among the major presuppositions lying behind modern approaches to reason are that of imagining that reason is self-sufficient, that it is a self-referentially justifying criterion for action in the sense that, as long as a reason for doing such and such exists (whatever that reason is and however weak it may be), that is all that matters, and that it is the sole criterion of truth. This latter dogma of the Enlightenment sought to banish revelation as a criterion for truth and to assert, inadequately, that only that is true which can be proven by unaided reason to be true¹². Proscribing not only revealed religion, but also any abstract metaphysical argumentation from evaluations of what is true, good, right and just, the way was open for positivist philosophy and for ever more radical positivist justifications of law. Whatever the mob, urged on by demagogues, wanted could become

¹¹ Cf. F. SUAREZ, *De legibus ac Deo legislatore*, in L. Pereña et al. (ed.), edición crítica bilingüe, Consejo superior de investigaciones científicas, Instituto Francisco de Vitoria, Madrid, 1971-1978, II, lib. II, cap. XII, nn. 3-5.

¹² Cf. HAZARD, *Op. cit.*, pp.39-42, 437-439.

law, as if Rousseau's 'general will' of the people could be grasped in this way. In fact, Rousseau's view of democracy was not that rational, free individuals might decide what they wanted or judged best in an autonomous fashion, but that they should be educated to 'will', all of them, individually the objective general will, to identify themselves with that one basic truth and work for it together with passionate feeling¹³.

It has been claimed, not without justification, that the representative institutions established during the French Revolution were dismantled through a coup of the Jacobins, who then ruled, and it is to be noted legislated and executed their laws, as the only permitted political group, in the name of the people and of popular sovereignty, they knowing the 'true will' of the people which was identified with the aims of their own programme. The 'totalitarian democracy' of the Terror of the French Revolution had its own ruthless system of legal or juridical implementation; the general will there excluded neutrality and required active participation of all in the cause¹⁴. So too did later systems which espoused no less dubious discernments of the 'general will' in the dictatorship of the proletariat or in the anti-Semitic pogroms which preceded the holocaust. It may be countered that these examples point to excesses and, indeed, they do, but they are excesses which have been verified in history and which have had their impact upon countless millions of victims across just over two centuries. Laws enacted in the service of ideology and judicial systems to implement them have facilitated life together in some way, but it has been within oppressive régimes whose ideologies have led them to foment vicious hatred and oppression of citizens and of others within and beyond the territory they ruled.

Of course, not all endeavours to harness reason to progress entailed repression, dictatorship or totalitarianism. A more congenial enterprise was that of utilitarianism, of promoting 'the greatest happiness of the greatest number'. Closely allied to this has been the development of liberal democracy. Few would doubt that, as a system, democracy is better than many alternatives, that it facilitates life together in

¹³ Cf. J.L. TALMON, *The Origins of Totalitarian Democracy*, Sphere, London, 1970, pp. 43-44.

¹⁴ *Ibidem*, pp. 76-80, 83-86.

society within a state precisely by enabling representatives of the landed aristocracy, then of the propertied bourgeoisie, but potentially of all citizens, to participate in the political system and, thus, in formulating its policies and its laws. In such a system there is also a judiciary which is often, if not always, technically independent of both legislative and administrative or executive dimensions of government and so the implementation of the laws which are brought into being largely through the democratic process can be effected through a structure which is fair.

However, as remarked above, the mere functioning of a system is no guarantee that it is just or right nor that it will facilitate life together in anything more than a partial or rudimentary way. Thus, neither state sovereignty nor naked reason, presented as the determining criterion of all truth, can deliver a system of law which properly facilitates life together. Beyond that, it has to be asked how 'useful' is to be defined. Someone who is terminally ill and at a stage where death is relatively close might be judged 'useless' to the greatest number in that the person is no longer productive and will never again be productive, but, on that basis, the elderly as such would risk being discarded as of no (longer of any) use to the majority or to society. The criteria on which those more directly involved in the political process and others in other walks of life might assess 'usefulness' will be very varied and may not always correspond to the demands of 'reason'. Discrimination and prejudice abound, those most closely involved in matters may well be too emotionally involved to judge correctly what ought to be done. What is useful to all, to some, in the immediate context or in the long term are all variables, which make the task of establishing and of operating laws on that basis problematic. More programmatically, the political theory of utilitarianism was wedded to the key concept of liberty by J.S. Mill in terms of a fundamental 'right to choose' by each individual. For example, he states explicitly, on the basis that individuality is an element in each one's well-being, that no authority has the right to interfere with individual liberty; hence laws about what might and might not be done in Britain on the Sundays might be justified on the basis that everyone needed a day of rest from work, but would then be based on general consent, but what might and might not be done by individuals in terms of their 'self-chosen activities' ought not

to be influenced by religious motivations, ‘which can never be too earnestly protested against’¹⁵. The absoluteness of liberty, thus posed also against law, is affirmed directly against the concept of the good as such: ‘There is no reason at all for human existence to be constituted on some one or a small number of patterns. If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his own existence is the best, not because it is the best in itself, but because it is his own mode’¹⁶.

An interesting study of Mill’s correspondence with Harriett Taylor argues that it was through her that his influence upon law became so pervasive and that in order to attain ‘the replacement for the clergy by a secular administration deferring to the supposedly empirical criteria deriving from the university intelligentsia’¹⁷. This tactic resulted in sustained claims of over- population, the presentation of the child as a burden, the reduction of the sexual act to questions of mere feeling and, hence, to attitudes and policies which have resulted in legislation permitting sexual acts outside of hetero-sexual marital relationships, extra- corporeal conception in a pervasive, but long-standing dissemination of such notions, with Mill being quoted, for instance, to justify the claim that there is no one correct view to be had about the status of the human embryo (Warnock in the Commission over which she presided on the embryo) and the view that there is no longer any single standard of sexual morals, according to Lord Russell¹⁸.

A similar type of claim has been made with regard to developments in people’s thinking over the role of civil law over the last two generations, based on a radical version of autonomy, freedom or liberty and often influenced by utilitarian thinking, to the point where it is

¹⁵ J.S. MILL, *On Liberty and other Essays* (J. GRAY ed.), Oxford University Press, New York, Oxford, 1991, as re-issued in 1998, ch. IV, pp. 100-101.

¹⁶ *Ibidem*, ch. III, p. 75.

¹⁷ D. FENLON, ‘De-Christianising England: Mill, Newman and the Stationary State’ in L. GORMALLY (ed.), *Culture of Life - Culture of Death: Proceedings of the International Conference on the Great Jubilee and the Culture of Life*, The Linacre Centre, London, 2002, pp. 27-48 at p. 28. Newman, of course, opposed strenuously this unfettered liberalism.

¹⁸ *Ibidem*, 29, referring, in footnotes 6 and 7, to Warnock’s position on the embryo: *A Question of Life: The Warnock Report on Human Fertilisation and Embryology*, Blackwell, Oxford, 1985, p. x and to her basis in Mill in M. WARNOCK, *The Uses of Philosophy*, Blackwell, Oxford, 1992, pp. 84-101, as well as to Lord RUSSELL’s, *An Intelligent Person’s Guide to Liberalism*, Duckworth, London, 1999, p. 90.

considered by some that the mere exercise of that autonomy suffices to justify action and that laws ought to guarantee that individuals may exercise their autonomy in such a way, untrammelled by what is right or wrong in fact; such a perspective differs fundamentally from personal autonomy legitimately and necessarily being defended as a presupposition for voluntary action, where that action is ordered to the respect for and attainment of what is in fact, objectively, truly good and to the avoidance of what is objectively wrong¹⁹.

The influence of such philosophies upon law has been notable. Where large families, poverty and handicap were concerned, many argued that children ought not to be born and there was a significant eugenic element in the Abortion Law Reform Society, founded in Britain after 1929. This was true not least of its President, Glanville Williams, Cambridge University jurist and author of *The Sanctity of Life and the Criminal Law* whose unambiguous positions on the desirability of disabled children not being born exercised a great influence on both on the Abortion Act of 1967 in Britain and on the Roe-v-Wade judgment in the United States in 1973, his book having been published in both countries in the late '50s and his opinions having been widely circulated²⁰.

In the Western world at present utilitarianism and consequentialism are prominent and the rationalist legacy of the Enlightenment is often imbibed uncritically. Thus, court judgments sanctioning the withdrawal of artificial hydration and nutrition, knowing that this will bring about the death of one who is not dying, have been taken on the basis that their life is not worth living or that they are no longer present as persons. Democracy is a much better political system than many alternatives, but establishing laws by majority vote only facilitates life together superficially in some instances. Where parliaments

¹⁹ Cf. J. KEOWN, *Euthanasia, Ethics and Public Policy: An Argument against Legalisation*, Cambridge University Press, Cambridge, 2002, pp. 52-53.

²⁰ ID., 'Genetics and Eugenics in Law' in Pontifical Academy for Life, J. LAFFITTE and I. CARRASCO DE PAULA (ed.), *The New Frontiers of Genetics and the Risk of Eugenics: Proceedings of the Congress on the Occasion of the Fifteenth General Assembly of Members, 20-21 February, 2009*, Libreria editrice Vaticana, 2010), part 1 of his article subtitled 'Eugenics and the Unborn', pp. 177-188. The Italian version of the paper, 'Genetica e l'eugenetica' appears in ID., *Le nuove frontiere della genetica e il rischio dell'eugenetica*, pp. 184-196. The book by Glanville WILLIAMS was published by A.A. Knopf, in the United States in 1957 and by Faber and Faber in Britain in 1958, cf. footnote 20 of Keown's article.

legislate either to de-penalise or to permit certain behaviours which are intrinsically morally wrong, life together in society is threatened, even though it may not appear to be so to those who act thus. When positive law through legislation or where court judgments extend the sphere of the positive law, permitting the direct killing of the unborn child by deliberate abortion, in the course of procedures which violate the bond of matrimony and/ or which substitute for the conjugal act, in destructive experimentation upon the human embryo for the supposed benefit of others, in procedures of euthanasia and so on, life together in society struggles badly. This is because untrammelled 'reason' and criteria of 'utility' lead here to very profound and systematic injustice, both directly in relation to the victims upon whom such procedures are practised and indirectly because of the discriminatory attitudes inevitably engendered in people more broadly to whole categories of human beings, apart from damage to respect for the law itself.

6. Justice as a requirement of law

The mere existence of a system of laws does not automatically ensure life together will be safeguarded or enhanced, not even a juridical order which oversees and seeks to ensure their implementation and enforcement can ensure that. This is because jurisprudence is itself a mechanism for the development of law; where judges give judgments or controversial applications of existing law, they often do so on the basis of the presuppositions of the society in which they live. Even where development of new law is not at stake, the political and other prejudices of judges, often appointed for political reasons and under political influence, will often affect their decisions and judgments. Equality before the law is a criterion of justice, but the content of the laws being applied also needs to be just, if a rationally based peaceful co-existence in society is to be possible.

6.1. Justice in relation to early contract theory

It has been argued that human law needs to rest upon a concept of justice if life together in a society is to proceed on a basis which avoids the mere imposition of the arbitrary will of a government or the invasive and coercive control of totalitarianism. That some sense of justice needs to under-pin law in a state has been gleaned by those

who have sought to argue for an originary foundation of the state on the basis of the rational and free decisions of the collectivity of human beings who are part of the state. This development is not exclusively the product of Enlightened thought. Indeed, an early representative of a type of contract theory is Suarez, who certainly saw the origin of the state to lie in the divine will for human beings in society, also on the basis of natural law, since the human being, social by nature, was created as such by God and since what is essentially implied by that nature (political power - we might say to facilitate life together) must equally have been willed by the one who created us with that nature.²¹ However, since each individual is free as part of the nature given him by God, it is a matter of the free consent of human beings that a political community is formed, at which point the political power it exercises is given directly or immediately by God²². On the other hand, the form of that political power is not immutable, since it can be altered, for a just cause, as for example through a just war, so that it may better correspond to the exigencies of the common good²³.

What Suarez had in mind was not the later contract theory, according to which political power came from human beings granting governments that power over them as such, since he is clear, both from St. Paul (Rom. 13, 1-7) and from the natural law argument just elaborated, that such power came directly from God. However, the formation of a political community (of a perfect society with which that power alone could be associated, as God-given form to appropriate humanly organised matter) and in which it would be exercised, that came from the free and rational decisions of human beings and, hence, the form of that political power could be altered according to their determination or ‘consent’²⁴.

²¹ F. SUAREZ, *Op. cit.*, V, lib. III, cap. III, n. 5.

²² *Ibidem*, n. 6.

²³ *Ibidem*, nn. 7-8: “Ergo, ita datur a natura et eius auctore ut possit in ea mutatio fieri, prout comuni bono magis fuerit expediens” (n. 8).

²⁴ *Ibidem*, n. 6: “homines in unam communitatem perfectam congregentur et politice uniantur.” The Spanish translation specifies this ‘perfect society’ or ‘perfect community’ further, as one which is ‘autonomous’, although this term does not appear here in the Latin: “que los hombres se agrupan en una comunidad perfecta o autónoma.” For the form – matter relationship, cf. *Ibidem*, n. 2.

The need for laws to govern societies was evident at a time of civil and religious upheaval. Indeed, it was the near anarchy of civil war which led to the theory of the sovereignty of the state, seen especially in its capacity to enact and enforce laws. Initially, this was perceived as being dependent upon the will of God and upon natural law. However, to avoid the anarchy and distress of civil conflict, as experienced in the French Wars of Religion, sovereignty, a concept central to the idea of the state even though it had never been defined either by jurists or philosophers before Bodin, was to be absolute in the state²⁵. This would mean that the governing power was to be unlimited by constraints as to what it could promulgate as law, untrammelled by any time limit to its governing capacity, in no way subject to anyone else nor to any law; indeed, it was of the essence that the government be able to enact, change and annul what was law²⁶. Despite this forceful statement, the anchoring of this concept in the will of God and in natural moral law meant that there was an objective reference point for the content of laws and not just a procedural arrangement in mind, admittedly to be interpreted and applied by the sovereign. That objective reference point was justice, however imprecise a concept that might be.

The classical contract theories arose in part as a result of revolutionary activities and the need to justify regicide and a change of regime on the basis that government was essentially there to provide security for the community. Left to themselves, human beings in a 'state of nature' were so unruly and selfish that life together was impossible. When two men want the same thing, they would fight to obtain it and, although everyone was born equal and free, that freedom was severely limited by the freedoms of others. Each individual has a right to anything, including another's body, to maintain his right to existence, but that situation renders peace impossible. From this fundamental law of nature there is derived another, by which each individual should be prepared to sacrifice his liberty, provided all others do likewise, to ensure peace, since 'a man should be contented with so much liberty

²⁵ Cf. J. BODIN, *I Sei libri dello stato* M.J. PARENTE (ed.), Unione, Torino, 1964, I, p. 345; original French; *Six livres de la république*: "per sovranità s'intende quel potere assoluto e perpetuo che è proprio dello Stato" (citing the original French – "souveraineté est la puissance absolue et perpetuelle d'une république," footnote 2, p. 345).

²⁶ *Ibidem*, pp. 353-358.

against others as he would allow other men against himself²⁷. This mutual sacrifice of various liberties for the sake of such security provided by government is ‘what men call a contract’²⁸. Such a government might be monarchical or an assembly, but it would be sovereign following upon the transfer liberties, which transfer and resultant sovereignty would thus ‘authorise all the actions and judgments of that man or assembly of men as if they were his own, to the end, to live peaceably among themselves and be protected against other men’²⁹. This sovereign alone would make laws, but would not be subject to them and, even where long-standing custom were to appear to establish something as law, it would not be so, since it would be the tacit approval of the sovereign body which would render it law. In the end, this system of government and of law is one based on the effective power or might of the ruler. Hobbes did envisage a judicial system, in which judges would have to apply and interpret law, not according to the letter of the law, but according to the reason why the sovereign authority established it as law³⁰.

A slightly later version, was a contract theory which distinguished a ‘state of nature’ where there was no proper law or proper political society and human beings had to act themselves to ensure that what was right and just was observed from a ‘political state’, which, for Locke, involved those who were ruled having consented to being ruled according to certain principles, including the right and duty of the ruler then to ensure that what was right and just in public affairs was observed³¹. Locke based his view of human nature upon the presupposition that all persons were equal and independent and hence

²⁷ Cf. T. HOBBS, *Leviathan or the Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil*, 4th edition, George, Routledge and Sons, London, New York, 1894, part I, ch. XIII-XIV, pp. 63-66.

²⁸ *Ibidem*, ch. XIV, p. 67.

²⁹ *Ibidem*, part II, ch. XVIII, p. 84.

³⁰ *Ibidem*, part II, ch. XXVI, pp. 123-125.

³¹ Cf. J. LOCKE, *Two Treatises of Government*: In the Former the false Principles and Foundations of Sir Robert Filmer and his Followers are detected and overthrown. The Latter is an Essay concerning the True, Original Extent and End of Civil Government. The latter is the key work of his political thought, often called ‘*Of Civil Government*’, and is the essay referred to in here, based on extracts from Locke’s Works, 3 volumes (1727), as given in W.T. Jones, *Masters of Political Thought*, II, *Machiavelli to Bentham*, Harrap and Company, London, Toronto, Wellington, Sydney, 1947, pp. 164-167.

viewed them as having the right not to be harmed in their ‘life, health, liberty or possessions’³². In the state of nature, a situation where there was no proper civil government, each individual would have the right to defend these goods by apprehending and punishing offenders to the extent needed to deter them from behaving in that way. This condition he distinguished clearly from that of political power, understood to be ‘a right of making laws with penalties of death and consequently all less penalties, for the regulating and preserving of property and of employing the force of the community in the execution of such laws and in the defence of the commonwealth from foreign injury, and all this only for the publick (*sic.*) good’³³.

Although he does not use the term ‘perfect society’, this is what Locke means by an authentically ‘political society’, one which is supreme within its own identified community, where it has the sole capacity to make laws, see to their execution through its officials and to their enforcement by appointed magistrates, where they are infringed. Passing from a ‘state of nature’ to a ‘political society’ can only occur when every member of a body of people in a given community surrender their rights operative in the state of nature to that community as such for that community to undertake these functions. In other words, they consent to being governed, entering into a contract in this way. Only in such a way can there be a truly political or civil society³⁴.

This contract theory led to the elaboration of a political system which articulated consent as a key element in the process, which led to the incorporation of religious toleration for those who would themselves, it was thought, be tolerant (excluding Catholics on that basis) and which included distinct governmental functions of legislation, administration (or execution of laws) and judicial enforcement. This system was admired later by Montesquieu, who argued that such powers in regard to laws ought to be separated from one another in a more balanced constitution, to use one power of law (legislative, executive or judicial) to block another in order to avoid or reduce the abuse of power, so common a danger in human experience. In this way harmo-

³² *Id.*, *Of Civil Government*, ch. II, § 6-8, p. 165.

³³ *Ibidem*, ch. 1 § 3, pp. 167-268: I have eliminated the many capital letters in this text.

³⁴ *Ibidem*, ch. VII §87, 89; ch. VIII § 95-99. *Ibidem*, ch. VII §87, 89; ch. VIII § 95-99.

nious life together in a society might be sustained by the rule of law³⁵. Locke's specific concern for those possessing property, their contractual consent ensuring legal and political protection for their property rights, has led to this type of system being described as a political theory of possessive individualism³⁶. Locke's contract theory, however, does focus upon consent as crucial to authentic politics and to life together, it rests further upon the rule of law which is not a matter of arbitrary will and which is independently enforced by the judiciary and it is rooted in the recognition of what are some of the basic human goods.

Rousseau's social contract envisages a 'state of nature', not of brute selfishness under the impact of original sin, as in Hobbes, but as an idyllic condition in which primitive human beings, innocent and noble (*'le bon sauvage'*), existed and a 'social contract' has been negotiated, laying down the conditions under which people agreed to be ruled. In fact, his point of departure seems to open the way for law to be the source of life together in peaceful co-existence, since he expressly rejects force as being capable of producing anything other than 'an obedience which is not duty' through 'an act of necessity' as opposed to 'a voluntary act'³⁷.

Thus, to ensure life together in society Rousseau argues that conventions or agreements are required in order to find a way of protecting everyone involved, in his person and as to his assets, so that, in the end 'he is only giving obedience to himself and so remains as free as he was before. Such is the fundamental problem to which the social pact provides the solution'³⁸.

³⁵ Cf. Charles Louis Secondat, Baron de MONTESQUIEU, *De l'esprit des lois*, new edition, edited, revised, corrected and considerably expanded by the author, Arktee and Merkus, Amsterdam, Leipzig, 1763, livre XI, ch. IV: 'Puisqu'on ne puisse abuser du pouvoir, il faut que le pouvoir arrête le pouvoir. Une constitution peut être telle que personne ne serait contrainte de faire les choses auxquelles la loi n'oblige pas et à ne pas faire celles que la loi permet.'

³⁶ Cf. C.B. MACPHERSON, *The Political Theory of Possessive Individualism*, Oxford Paperbacks, Oxford, 1964.

³⁷ Cf. J.J. ROUSSEAU, *Du contrat social ou principes du droit politique, Lettre à M. D'Alembert sur les spectacles*, Flamiron, Paris, 193?, livre 1, ch. III, p. 9: 'Le plus fort n'est jamais assez fort ... Il ne transforme sa force en droit et l'obéissance en devoir ... Céder à la force est un acte de nécessité, non de volonté.'

³⁸ *Ibidem*, ch. VI, p. 17: «Trouver une forme d'association qui défende et protège de toute la force commune la personne et les biens de chaque associé, s'unissant à tous, n'obéisse

Yet, Rousseau's solution to life together, so plausible in its beginnings, involves the claim that the terms of the social contract are never formulated, but are known, the same everywhere and are tacitly accepted. His critical move is to assert that they can all be reduced to one term or condition, namely that of every member of the community giving up 'completely all his rights' to that community, 'without reservation', and to the point where the union established is 'as perfect as it possibly can be and no member has then any claim that can any longer be urged against it'³⁹. It is against such a background that he advances the claims of the general will of the community, but this is in the context of the sovereignty of the community being always inalienable, always indivisible, always correct and always tending towards the realisation of what is useful for the public⁴⁰. The cost of life together under such a system is the totalitarian democracy, so perceptively traced by Talmon and visited upon so many countless people across more than two centuries, with ideological zeal for what is distorted and misguided and with ruthlessly repressive and oppressive force. Turning Rousseau's words against himself and against what has been generated by similar logic, the force invested in such a government in such a system can never become right or just, the obedience elicited can never become authentic duty and what is done, if not inevitably without any voluntary element (since refusal to do what is intrinsically wrong is always a duty), is nevertheless constrained.

These various contract theories, at least implicitly, connote the possibility and legitimacy of insurrection against a government which fails to maintain its part of the bargain, except in the case of Hobbes, where no right of resistance ever exists, but where (only) a successful insurrection would demonstrate that the (defeated) government had failed in its duty to provide security for its citizens. Apart from Hobbes, justice in the form of rights for some or for all was a presupposition, which was to inform the rational exercise of political power and laws in their enactment and in their application, laws seen by the

pourtant qu'à lui-même et reste aussi libre qu'auparavant». Telle est le problème fondamentale dont le contrat social donne la solution.

³⁹ *Ibidem*, ch. IV, p. 17: "l'aliénation totale de chaque associé avec tous ses droits à toute la communauté ... De plus, l'aliénation, se faisant sans réserve, l'union est aussi parfaite qu'elle peut être et nul associé n'a plus rien à réclamer."

⁴⁰ *Ibidem*, livre II, ch. 1, pp. 27-30.

time of the Enlightenment to be essentially innovative and constitutive of the progress which that age judged would be the inevitable product of decisions of rational, free human beings.

6.2. Justice and life together in contemporary pluralist societies

A major attempt has been made in recent decades to insist that law ought to be based upon justice. J. Rawls has sustained this opinion strongly as a necessary moral foundation for law in democratic societies. However, there are some difficulties in establishing precisely what is to count as being just. Greek society had no difficulty about advocating justice and about seeing slavery as part of what justice required, since some people were destined to serve and others to own and rule; it was axiomatic that those defeated in war ought justly to become the slaves of the victors. After proclaiming that there were certain self-evident inalienable rights in the American Declaration of Independence in 1776, the newly independent United States from the 1780s onwards continued to practise slavery in the southern states until the bitter Civil War resulted in its abolition in 1865. More recently, the issue of what is just has involved discussions around the treatment of homosexual persons or of those whose religious manifestations may be seen to foster hatred and terrorism. Even more radically, it has been argued that it is just to permit abortion or even infanticide if a majority of those actually exercising reason in a given society (those not yet born, those children not yet in possession of rational capacity, those who have lost rational capacity being excluded from the category of 'persons' and so of those entitled to participate in such a decision) choose to adopt such a position and cause it to be enacted into law or otherwise enshrined in the legal system⁴¹.

Rawls's aim has been to establish the bases of justice upon which life together is possible in a pluralist society. He offers a contract theory, not one which refers to a presumed or postulated state of nature for its inception, but one which takes the human being as rational and as free in his or her current existential reality. Since Rawls judged the

⁴¹ Cf. H.T. ENGELHARDT, *The Foundations of Bioethics*, Oxford University Press, New York, Oxford, 1986, pp. 104-121, 145-14, 216-241; ID., *Bioethics and Secular Humanism: the Search for a Common Morality*, SCM Press, London, Trinity Press International, Philadelphia, 1991, pp. 111-125.

concept of justice as too general to serve the purpose on its own, he argues for principles of justice, initially for justice as fairness, which rational and free people would most likely recognise and accept were they to reflect sufficiently on the matter. He presupposed them to be equal in being able to offer justifiable proposals for what is to count as just and to operate under a 'veil of ignorance', that is without any knowledge of their own or of others' positions in society which might otherwise influence what they would recognise and be prepared to accept⁴².

He states expressly that the purpose of these conditions is 'to represent equality between human beings as moral persons, as creatures having a conception of their good and capable of a sense of justice'. What is currently intuited as just, and specifically the rejection of religious intolerance and of racial discrimination, might be used as a check on principles which might emerge⁴³.

Having thus reduced the danger of prejudice and self-interest, he claimed that such people would be likely to be prepared to acknowledge two key principles of justice, the first that every human being should be able to enjoy the maximum degree of liberty compatible with a similar liberty of others and, secondly, that social and economic inequalities should be arranged in such a way that they may both be reasonably expected to be to everyone's advantage and also that they should be attached to positions and offices which are open to all⁴⁴.

These principles express criteria of fairness and such fairness is at the heart of the content of justice in this view. Within this framework Rawls argued that a legal system, seen as a system of coercion, would be necessary because people would not always act as they ought to do and because the security of living in an essentially just framework was necessary for society to function well and justly. Here the penal system was to be designed so that it was not arbitrary, that laws were known through proper promulgation, that judges were impartial, that exceptions were rationally justifiable and not abusive and so on. Law

⁴² J. RAWLS, *A Theory of Justice*, Belknap Press of Harvard University Press, 1971, pp. 17-22

⁴³ *Ibidem*, p. 19, 136-142.

⁴⁴ *Ibidem*, pp. 60, 302.

is seen as a necessary element in ensuring social collaboration, but justice is an intrinsic condition for whatever is to count authentically as law⁴⁵.

This latter requirement is rightly seen as distinguishing a system of authentic law from what is mere oppression. It is noteworthy that, for Rawls, this is a condition of social collaboration or of what we call life together.

These key elements of his theory constitute a comprehensive position which all free and rational persons would be taken to recognise and to which they would assent, in his hypothesis. However, the reality of pluralist society, as it developed over the last forty to fifty years, caused Rawls to change his views. He then advanced a theory of political liberalism which takes account of the multiplicity of comprehensive systems which different people and groups hold to give meaning to their lives. He distinguishes these according to whether they be religious or secular as respectively theological or philosophical, but he distinguishes them essentially from what he considers to be political, granting without difficulty that they may each inform and affect political systems and practice. What he takes to be key in this latter connection and development in his thought is that free and rational people in pluralist societies will accept that social cooperation, or life together, demands that ways of relating to one another be accepted, which proceed from a recognition of the liberty of each person as that which is to be honoured and respected in the process⁴⁶.

Here the political ideas of all involved would be tolerant of difference, would respect political procedures and especially would de-

⁴⁵ *Ibidem*, pp. 235-243.

⁴⁶ ID., *Saggi: dalla giustizia come equità al liberalismo politico*, Italian translation a cura di S. VECA, Edizioni di Comunità, Torino, 2001, pp. 286, 326; from the original S. FREEMAN (ed.), *Collected Papers*, Harvard University Press, Cambridge, Mass., 1999. For a discussion of the 'public square' in a secular society and for the role of those with faith commitments in such a system, see J.E. CAPPIZZI, 'Secularization in the Face of Pain, Suffering and Death' in E. SGRECCIA and J. LAFFITTE (ed.), *Alongside the Incurably Sick and Dying Person: Ethical and Practical Aspects: Proceedings of the Fourteenth Assembly of the Pontifical Academy of Life*, 25-27 February, 2008, Libreria editrice Vaticana, 2009, pp. 68-74; Italian version 'La secolarizzazione di fronte al dolore, alla sofferenza e alla morte' in ID., *Accanto al malato inguaribile e al morente: orientamenti etici ed operativi*, Libreria editrice Vaticana, 2008, p. 67-73.

mand recognition of liberty itself as a condition for rational public discourse and resolution of issues.

6.3. *Communicative discourse and life together*

The principled position advocated by Rawls has been challenged most notably by Habermas, who has sought to justify a system of communicative discourse as the key to life together in a pluralist society. This is seen as the best way for those with different understandings and principles who engage in mutual encounter and exchange to respect the liberty of all involved, to overcome conflict and to reconcile those at odds with one another. Here the emphasis seems to be again procedural more than content-based. Habermas' concept of the 'public square' stems from a recognition of the reality of secular pluralism⁴⁷.

For him, however, the question of communicative discourse is more profound. The reflection of popular will and hence liberty in a modern democratic state and in its juridical order is reflected in its institutions, elections and parliamentary members who take decisions, but there has to be implementation through an administrative or executive system and also through the juridical structures. Often there is the danger that those involved in any level of administration may be guided by criteria of efficiency, which may not or may no longer correspond to what various groups of the public wish. To dismiss the latter as irrational is to open the whole system up to the accusation of being irrational, since their decisions in elections will have been decisive in making the political system what it is. Habermas argues that it is important for communicative discourse to operate in restricting the administrative structures from functioning on the basis of mere efficiency or of political convenience or of ideology. Precisely, the free and rational contributions of the political community need to be able to be made and to exert their influence, through media, demonstrations and such like⁴⁸.

⁴⁷ Cf. J. HABERMAS, 'Sovranità popolare come procedura' in: ID., *Morale, diritto, politica*, Italian translation a cura di L. CEPPA. Edizioni di Comunità, Torino, 2001, pp. 92-99; original German 'Volkssouveränität als Verfahren' (1988) in *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Suhrkamp, Frankfurt-am-Main, 1992.

⁴⁸ Ibidem.

Certainly, what is proposed by Habermas has advantages in stimulating greater participation in the political process, in facilitating the expression of liberty, probably in channelling otherwise threatening and dangerous pressures, and in enabling some such system to function. It seems to avoid the need for hypothetical contracts and a priori commitments which played an important role in Rawls. On the other hand, precisely the lack of substantive content makes what Habermas proposes more open to the risk of abuse; it certainly seems to be more relativistic.

In fact, this approach of Habermas has the advantage of involving potentially far more persons in the practice of politics and, in this sense, of being more democratic. He rejects the various contractualist theories, from Hobbes to Rawls, and any other form of 'foundationalism' for law and bases everything upon the rationally based proposals for action and for laws which emerge or which are put forward from the public square. Those alternatives can then be evaluated through democratic procedures and what is judged best can be embraced and pursued⁴⁹.

7. Life together, right reason and the common good

It can be seen that both the principled approach of Rawls and to a greater extent the procedural focus of Habermas bring with them the real risk of relativism in morals and hence in law, since law will reflect the moral presuppositions of the system within which it is found. Life together in a significantly relativist perspective implies compromises which those who adhere to respect for the fundamental goods and for the integral human good of each and every human being from conception to natural death will not be able to make. At most, they will tolerate the wrong done by others, but they will not and ought not to commit that wrong themselves. The original position and basic principles of Rawls are what rational and free people would recognise under a veil of ignorance. It needs to be said that the intuitions which he posits as controls, namely religious toleration and the absence of racial discrimination have not always been seen as essential compo-

⁴⁹ Cf. B. MELHEVIK, *Rawls ou Habermas: une question de philosophie du droit*, Presses de l'Université de Laval, Saint-Nicolas, Quebec, 2001, pp. 46-47, 84-86.

nents of justice nor as keystones in a legal system of a democratic state, as American history even up to the end of segregation has manifested in the latter instance. However, it appears that Rawls seeks to combine or control through intuition what free and rational persons would recognise as justice. At issue here, as with other contract theories, would seem to be the perception that it is what such free and rational persons choose which becomes true, just and valid⁵⁰. The risk, on the other hand, with the more procedural political liberalism of Rawls and much more so with the communicative discourse of Habermas is that content is mostly reduced to liberty or autonomy and to whatever is 'rationally' decided, which runs the risk of not being content of great substance.

This is not to disparage the benefits which both authors offer. The mechanisms for reducing conflict in society, for eliciting consent and collaboration in a political process and in a society ruled by law are much to be preferred to tyranny, or totalitarianism or any other oppressive system. The problem is that democracy, for all of its undoubted advantages and superiority as a system, is not immune from difficulties. Rousseau's general will and its more recent adaptations in fascist, Nazi and communist régimes have produced democratic centralism or totalitarianism. Some modern theocracies seem to reflect aspects of these aberrations.

To respond that this applies to ideologically motivated systems of direct democracy or of democratic centralism does not remove the problem entirely. One major danger in a modern democratic state is precisely that of communication, since immediacy, massive dissemination of ideas of all sorts, technological means to amass pressure through the media, through demonstrations or through the postal system are enormous. Their many positive features should not mask the real danger that these are equally capable of becoming and of being used as instruments of manipulation. The Nuremberg Laws of 1935 and the Krystallnacht of 1938 had already shown how soon a democratic state can move in this direction. Nowadays, the inflation of 'rights' talk means that anyone or any group who thinks fit can 'as-

⁵⁰ Such approaches to moral truth are rightly rejected as incompatible with the true good of human beings and with Catholic doctrine: cf., JOHN PAUL II, *Veritatis splendor*, 6 August, 1993, nn. 35-36, 40.

sert' a so-called right, can organise a campaign to urge that this right be accepted and demand that it be publicly acknowledged and even be expressed in the positive law of a state or of states. Nor is it necessary to have a majority or to be a very sizeable group for this to happen. The skill of homosexual persons, of bi-sexual persons and of transsexual persons not just in campaigning for protection against violence and unjust discrimination, but in asserting 'rights' to marriage, to engage in intimate acts alleged to correspond to their sexual orientation or their sexual identity with other consenting adults, to have registers or formal legal documents altered to affirm their 'chosen identity' or their 'marriage' or 'civil partnership' and to constrain public bodies to enforce recognition by others of these latter has been considerable. Through the media, challenges through the judicial systems of various countries, sustained and at times aggressive campaigning, a clear minority (of persons in no sense homogeneous, since the realities reflected are so disparate) has functioned as a most effective political lobbying group, not least at the European Parliament. Decisions of that Parliament and of the European Court have exercised a notable political effect in numerous countries. Similar campaigns by radical feminists have resulted in very liberal legislation on abortion, on extra-corporeal reproduction and the like, far beyond the very legitimate concerns of those seeking equal pay for equal work, an end to exclusion from professions or jobs due to mere prejudice against women and so on.

These examples and the laws and regulations for monitoring many such practices betoken a massive change in Western society, to the detriment of marriage and of the family, with an implosion in the population in many countries, such that they are incapable of sustaining themselves as an indigenous population. Current tendencies reinforce this danger. It is suggested in Britain by a leader of a political party that there be legislation to require 'faith schools' to teach that homosexuality is 'normal and harmless', as part of challenging 'homophobic bullying' and that homosexual persons be able to use the term 'marriage' and not just 'civil partnership' for their unions.

The Equality Act of 2010 in the United Kingdom sought to consolidate previously existing equality legislation. As it stands, it would seem not to involve those operating and teaching in faith schools even with government funding in violating the laws on religious discrimination by teaching what their community believes, since the 'content

of the curriculum' was exempted from the Act. The Act deals also with discrimination on grounds of sex, race or disability, which is interpreted in Europe and in many member states of the Community very broadly as described. It would seem that, under the provisions of the Act, those teaching in Catholic schools would not be protected from accusation of discrimination on religious grounds, were they to teach Catholic doctrine in regard to the behaviour of homosexual persons and, probably, other persons too⁵¹. Such legislation would not be permissive in the sense of allowing certain things to be said, but would seek to impose a positive obligation to impart this opinion. The imprecision which abounds in political circles does not easily distinguish between the phenomenon or reality of homosexuality and voluntarily chosen and practised homosexual acts, but it may be assumed that these, together with homosexual partnerships and perhaps 'marriages' are in mind also, it being more difficult to put forward arguments as to why such activities should be judged in any way illegal if the phenomenon is affirmed to be 'normal'. Such an affirmation in a piece of legislation, morally speaking, would be no more than that, an assertion, ideologically imposed in the face of considerable debate in scientific and other circles as to the causes of homosexuality (nature or nurture or some combination, how far it can be avoided, etc.). After centuries of 'rights' talk and the arduously achieved recognition in the Charter of the United Nations and in most democratic constitutions, written or unwritten, of the rights to freedom of opinion, to its free expression, as well as to religious freedom and to freedom of conscience, it is instructive that the leader of an allegedly liberal political party, should seek so firmly to suppress such rights. Of course, natural rights cannot be truly suppressed either by mere positive legislation or by judicial sentences; they remain as before, as does the obligation to pursue and to state what is true.

⁵¹ The Equality Act was partly designed to unite in one Act various items of legislation against unlawful discrimination, would not make it an offence for foundation or voluntary aided schools (the category incorporates the majority of Catholic schools in England) or for independent schools in England since section 52 of the proposed Bill states that section 51 (c) (i), (ii), (iv) or 2 (a) 'shall not apply to anything done in connection with (a) the content of the curriculum (b) religious worship', HOUSE OF COMMONS, London, Session 2004-2005, Internet Publications: Other Bills before Parliament, Equality Bill, as ordered to be published on 2nd March, 2005, accessed on 15 January, 2010.

It was not only a prominent member of one political party which was active in this direction. Through the Equality Act, the British Parliament legislated to affirm the equality of persons in terms of race, sex and disability. There is some provision to allow religious groups to operate according to their beliefs in regard to restricting ministers to males and the like, but there are grounds for concern as to the interpretation and application of any such provisions, since a judiciary is also not immune from the radical pretensions of contemporary liberal ideology⁵². This is all the more the case with the European structures. Nor is it a question only of legislation and of judicial enforcement; the executive branch of government is enormously powerful and the directives of ministers do not have the technical force of legal decrees, but they do affect the interpretation and the implementation of laws, according to the same ideological presuppositions. Here objective moral truth and religious truth have very little place.

Rampant secularism and an underlying anti-Christian ideology have increasingly led to the marginalisation of those core truths and values, which in reality had given birth to respect for all human beings, for their fundamental goods and so for their corresponding fundamental rights. Detached from those roots, nurtured by an aggressive and radical Enlightenment interpretation of reason and of liberty, these contemporary tendencies seek to make life together possible on the basis of a toleration which is superficial and merely apparent, on the basis not of the truth about human nature and dignity and of its implications, but on the basis of what is merely affirmed or asserted, of what is most forcefully and loudly proclaimed and disseminated through the media and thus uncritically imbibed. The tendencies inherent in such a programme are profoundly illiberal. The risk implicit in such approaches is that life together may become possible eventually only within the limits imposed by reason of the force of ideology, thought control (since what others may affirm, teach and live by will be heavily proscribed), repressive executive and judicial enforcement in a totalitarian democracy under which Christianity and the profoundly humanising influence it has exerted over many centuries is further marginalised, privatised (also by restricting any clauses of conscien-

⁵² *Ibidem.*

tious objection to the realm of private opinion and private practice) and silenced.

John Paul II spoke about the need for an ‘ecology of the family’, a call reaffirmed by Benedict XVI and by Pope Francis, in the context of public concern for the environment⁵³. John Paul expressly warned that democracy implies neither that peoples choose what is right, good and just, nor that they pursue the common good, the latter not arising from the sum of their particular interests, but stemming from an assessment of those interest in the light of a hierarchy of values and of a ‘correct understanding of the dignity and the rights of the person’⁵⁴. The laws of countries reflect the philosophies and principles upon which their rulers and, in democracies, their peoples espouse. The exaltation of liberty to the point almost of an absolute, as seen above, has been damaging and its pernicious effects are felt still. Essentially procedural structures of justice and of law reflect and risk exacerbating these trends. Perhaps, Rawls was right to use the intuition that religious toleration and the avoidance of racial discrimination should be elements in any system of justice and of law. However, it is not whether people do or do not, would or would not, recognise or accept these contents of justice which is fundamental. Life together is fragile if it is based on what people will accept or would accept in an ideal situation or even under a veil of ignorance.

That people may acknowledge these may be an indication that they are part of natural moral law. The basic human goods which ought to be acknowledged and which ought never to be violated directly and deliberately (life, truth, the good, justice, fidelity, marriage, procreation, the quest for religious truth, etc.) are all goods which inhere in all human beings by virtue of their being such and not by virtue of their proclamation, popularity, recognition by others or even by law. These basic human goods and their integral inter-relationship which precludes them ever properly being played off one against the

⁵³ Cf. JOHN PAUL II, *Centesimus annus*, 1 May, 1991, nn. 37-39; BENEDICT XVI, *Caritas in veritate*, 29 June, 2009, nn. 44, 51, FRANCIS, *Laudato Si'*, 18 giugno, 2015, n. 155.

⁵⁴ Cf. JOHN PAUL II, *Centesimus annus*, n. 47. The document of the INTERNATIONAL THEOLOGICAL COMMISSION presents it as articulating the ‘requirements of (our) common humanity’: *Alla ricerca di un’etica universale: nuovo sguardo sulla legge naturale*, Libreria editrice Vaticana, 2009, n. 86.

other even in pressing circumstances constitute the only proper basis for life together and for those human laws which are needed to facilitate respect for them, their promotion and their realisation⁵⁵.

The abiding contribution of Thomas Aquinas has been to articulate the bases of many of these goods in terms of those ‘natural inclinations’ which human beings recognise by reason. The basic moral responsibility to pursue and realise these different elements of the human good, includes that relating to cooperating with one another as social beings on the basis of justice⁵⁶. St. Thomas emphasised that the moral demands pertaining to these goods are known by all in their basic principles, but, as for their more concrete implications, they may not necessarily always be recognised by everyone⁵⁷. The implications and the application of their demands to new situations demand the operation of this same right reason and their promulgation as laws so that what needs to be specified to enable their realisation and to avoid their violation can be known and can be implemented⁵⁸.

It is precisely the move from the moral demands which can be grasped by our reason which apply to each of us as individuals (*‘ius naturale’*) to their demands upon all of us in our social relationships in society (*‘lex naturalis’*) which requires human laws to regulate such relationships, but always and only in accordance with the fundamental moral demands pertaining to the basic human goods and to their integral fulfilment. It is the need to determine and to apply these to more

⁵⁵ Cf. J. FINNIS, *Natural Law and Natural Rights*, Clarendon, Oxford, 1980, pp. 85-95; G. GRISEZ, *The Way of the Lord Jesus*, I, *Christian Moral Principles*, Franciscan Herald Press, 1983, pp. 119-125; L. MELINA, *Cristo e il dinamismo dell’agire: Linee di rinnovamento della teologia morale fondamentale*, PUL, Mursia, Roma, 2000, pp. 141-155; ID., *Azione: epifania dell’amore: la morale cristiana oltre il moralismo e l’anti-moralismo*, Cantagalli, Siena, 2008, 57-75.

⁵⁶ Cf., St. THOMAS AQUINAS, *Summa theologiae*, I-II, q. 94, a. 2: ‘... Tertio modo inest homini inclinatio ad bonum secundum naturam rationis, quae est sibi propria: sicut homo habet naturalem inclinationem ad hoc quod veritatem cognoscat de Deo et ad hoc quod in societate vivat ...’. See also q. 90, a. 1 for the rational character of law as fundamental in regard to rational creatures.

⁵⁷ *Ibidem*, q. 94, a. 4: ‘... lex naturae, quantum ad prima principia, est eadem apud omnes..., sed quantum ad quaedam propria, quae sunt quasi conclusiones principiorum communium est eadem apud omnes ut in pluribus ..., sed ut in paucioribus potest deficere...’. See also 95, a. 1.

⁵⁸ *Ibidem*, q. 93, a. 3 ad 2: ‘... Lex humana intantum habet rationem legis inquantum est secundum rationem rectam ...’

specific and changing situations in ways which are just and equitable which calls for human laws⁵⁹.

This is true in both civil and canon law. Conversely, when human positive laws claim to impose a duty directly to violate a basic human good or claim to forbid the fulfilment of a strict duty in regard to such a good or when they claim to permit such a violation or prohibition, they lack the force of law. Despite the effective capacity of those in power to subject those who act in contravention of these pretensions to coercive sanctions, such sanctions then rest on no rational or moral foundation, but stem from merely coercive power. As expressed classically by St. Thomas, such laws, by contravening natural law, '... lack the true character of law and (are rather) a corruption of law'⁶⁰.

Life together, then, requires laws, but those laws need to be based on the objective and integral good of the human person and of all human persons (the common good). Otherwise, whether imposed arbitrarily, justified by reference to a supposed contract (historical, hypothetically enacted or hypothetically possible), democratically grounded (by legislation, through a referendum), the result of democratically permitted pressure group activity or the outcome of any other form of communicative discourse, they will lack all genuinely binding force. To paraphrase and use Rousseau against himself, whatever the power used to constrain compliance to such laws, their implementation would remain in reality an exercise of force and any external obedience extracted would never become a matter of duty (the duty is not to comply)⁶¹. The degree of voluntariness involved in such constrained acquiescence, together with the extent to which basic human goods were violated, would be the measures of the extent to which it was morally wrong and culpable.

⁵⁹ Cf. INTERNATIONAL THEOLOGICAL COMMISSION, *Alla ricerca di un'etica universale ...*, nn. 88-91. J. FINNS, *op. cit.*, pp. 185-188 gives a very interesting analysis of distributive justice, as distinct from legal justice, conceived in essentially coercive terms, to argue that the state's necessary role in its legal dimension must be grounded in the basic human goods (here especially of justice) and is not a matter of arbitrary decision.

⁶⁰ ST. THOMAS AQUINAS, *Summa theologiae*, I-II, q. 95, a. 2 '... Unde omnis lex humanitus posita intantum habet de ratione legis inquantum a lege naturali derivatur, si vero in aliquot a lege naturali discordet, iam non erit lex, sed legis corruptio.'

⁶¹ Cf. *supra* note 37.

8. Canon law and life together in the Church

8.1. Some general remarks

It is time now to examine some aspects of life together when people are properly under the jurisdiction of two distinct, inter-relating bodies, specifically of Church and state. Life together is not just a matter of evaluating the extent to which each may make laws, but of how those laws should be enforced. Mutual respect for distinct spheres of responsibility for the common good in its distinct, though inter-related, dimensions cannot be limited to the legislative activity of either, but needs to address the administrative or executive and, in some instances, the judicial. Laws which are not enforced can damage the common good, respect for the law as such and for the entity which has responsibility for it; in particular, those who have been victims of an injustice will suffer further where laws pertaining to their situation are inadequate or, where they are adequate, where they are not implemented effectively.

The laws of the Catholic Church contain both divine laws, which the Church does not establish as such, but which it declares and which it does not consider itself able to change as well as truly human or ecclesiastical laws, which come into being by being promulgated or established as laws by the legitimate superior in respect of his proper subjects⁶². Both types of law are important for life together in the ecclesial community of the Church as a whole and in its various parts and aspects.

On the one hand, it would be possible to affirm simply that the Church needs laws to operate as a distinct entity as does any society (*'ubi societas ibi lex'*). Beyond that, the degree of independence or of autonomy for the Church, vis-à-vis governments of states led to the theory that the Church is a perfect society (*'societas perfecta'*), not in the sense of not having sinners in its midst (the recent scandals of sexual abuse of minors by clergy is one demonstration of the fact that, while the Church is indefectibly, perfectly holy at every moment of its existence by virtue of its union with Christ in the Holy Spirit (*'semper sancta'*) and while this can be seen to some extent in the holiness of

⁶² Cf. J-L. SCHOUPE, *Le droit canonique: introduction générale et droit matrimonial*, Story-Scientia, Bruxelles, 1991, pp. 82-88.

the lives by some of its members, it is nevertheless not yet perfectly holy in all of its members and we need always to grow in goodness and holiness (*'semper sanctificanda'*) by conversion to the fulness of Christ's truth by the assistance of the Holy Spirit, with whom we are deliberately and perseveringly called to cooperate until, we pray, we are fully united to the Blessed Trinity in the communion of heaven, when perfect, irreversible holiness will exist in all members of the Church⁶³.

The Church's law certainly seeks to defend and to promote justice within its own community of believers in Christ. Even though it was judged eventually that, despite original intentions and despite extensive work on drafts, there ought not to be a fundamental law of the Church (*'lex Ecclesiae universalis'*), when the Code of Canon Law of 1917 was being revised after the Second Vatican Council, nevertheless, the elaboration of rights and duties of the faithful (all those baptised in Christ) as a whole, of the lay faithful in particular, of the clergy, of those living the consecrated life and of those in societies of apostolic life reflects much of what would have been in such a law and speaks loudly for the Church's pressing desire to be just in the way its members deal with one another and in how they relate to other people⁶⁴.

The law of the Church is not just designed to facilitate life together for a particular group of people who merely want something different. Rather, both its law and life together for its members are essentially grounded in its vocation and in its mission, in Jesus Christ and in His Gospel. These are the indispensable reference points for the Church's law which it seeks to enshrine in its declaration of what divine law is and which it seeks to advance also through ecclesiastical laws which aim to safeguard and to structure the conditions for the fulfilment of that mission⁶⁵. On the one hand, the Code of Canon Law of 1983 for the Latin Church, and also the Code of the Catholic Eastern Churches of 1990, would fit in with the view of law as a juridical

⁶³ SECOND VATICAN COUNCIL, Dogmatic Constitution on the Church, *Lumen gentium*, n. 8.

⁶⁴ A. GAUTHIER, 'The progress of the "*Lex Ecclesiae fundamentalis*". In: *Studia canonica* 12 (1978), pp. 377-388 at pp. 377-381, p. 387.

⁶⁵ Cf. G.J. WOODALL, *A Passion for Justice: An Introductory Guide to the Code of Canon Law*, Gracewing, Leominster, 2011, 7-18, 62.

order to enforce given positions or with the view of law as facilitating dialogue and communication between different entities to ensure the peaceful co-existence of pluralist societies, as well as with the view of law as an instrument of justice. These various inter-connections mean that canon law, at least to some extent, can participate in and assist a more harmonious life together in the broader communities in which we live.

8.2. Canon law and civil law and life together

8.2.1. Some examples of mutual toleration

To a considerable extent, in many countries, the Church's canon law functions as an instrument of life together for those bound by it because the local civil authority does not seek to interfere with it, regarding it as a particular set of regulations which individuals and associations choose to observe and apply to themselves without calling into question directly the laws of the particular state in a given instance; in other words, they regard it to some extent as a private matter for those involved. This has many advantages for the Church, since, in these areas, she is free to operate according to the mandate she has received from the Lord in conducting her mission.

For example, investigations and declarations of the nullity of marriages according to canon law do not usually create problems for civil authorities, either because the civil law reflects canon law to some extent in these areas or because the processes and decisions are regarded by civil law as private and as being without effect in civil law. Of course, either where there is a concordat with a state or even without such an arrangement, a marriage which is declared null by the Church is often not considered null by the state. If those free to marry according to canon law try to do so without further ado, there is likely to be a case of bigamy under civil law. Here, the responsibilities of the Church are not restricted to the obvious aspects of canon law, but pertain also to the situation of people under civil law where they are living. The Church seeks to ensure that marriages are conducted normally only where they will be valid both in canon law and in local civil law, something rendered relatively straightforward where there is a concordat, since this would feature in the terms of any such legal doc-

ument⁶⁶. Irrespective of whether or not there is such an instrument, however, the Church's law forbids the celebration of weddings where the marriage would not be valid in civil law, unless there is the specific permission of the bishop, which should only be granted where it is civil validity is impossible and where there are grave, pressing reasons for going ahead (cc. 1071 § 1 2°, 1083 § 2)⁶⁷. The marital status or otherwise of persons before the civil law relates to the 'civil effects' of marriage, which may cover also their level of taxation, rights of residence, of work or of citizenship or to a passport. Canon law is interested in the civil effects of canonical marriage precisely to protect and to foster the just treatment of those involved and, in this way, to try to make life together in the Church and in a given land possible, harmonious and just (cc. 1134-1140).

Another dimension of everyday existence of concern to the Church relating to this theme is that of contracts and finances. Here there are very definite laws in canon law which affect what a bishop, a parish priest or pastor, a superior of an institute, another juridical association may do. Almost always, amongst other laws, there are laws requiring either consultation (for lower levels of expenditure or of value) or consent (for expenses or sales over a specified limit determined according to law) for the acquisition or the sale of the Church's temporal goods or for major alteration to them. One of the conditions which is almost always required, if it is possible to obtain it, is that any contract or other action (including the establishment of a fund, for instance, to support the clergy), should also be valid in civil law (cc. 1274 § 5, 1284 § 2, 2°, 3°, 1290, 1293 § 2, 1296). This is common sense, since building something new, making a major alteration, if it were not valid also in civil law, could mean that others could challenge what was done, demand compensation (at times for vast sums of money) or expose those involved to sanctions which might even include imprisonment, for violating some civil law. Here, it should be

⁶⁶ Cf. ITALIAN BISHOPS' CONFERENCE, *Decreto generale sul matrimonio canonico*, 5 novembre, 1990, especially parts II, III and IV on the duty to celebrate marriage with civil effects and on the norms to follow to ensure that this is done, in CEI, *Direttorio di pastorale familiare per la Chiesa in Italia: annunciare, celebrare, servire il 'Vangelo della famiglia'*, Fondazione di religione di 'San Francesco d'Assisi e Caterina da Siena', Roma, 1991, pp. 221ff, especially pp. 226-235, nn. 1-35.

⁶⁷ *Codex iuris canonici* (1983).

noted that priests acting without observing the procedures laid down in canon law risk exposing themselves personally to action in civil law, and also in canon law in some instances. A pastor who undertook a major decoration of the sanctuary of the church, with the agreement of the parish finance committee and of the parish pastoral council (the latter not canonically required here), but without the consent of the bishop, having consulted the diocesan finance committee, might well find himself in that position (c. 1291)⁶⁸. Whether or not those who thought their interests damaged acted under canon law, any action in civil law would be likely to put the priest concerned in serious difficulties, since civil law, where it has no specific provisions, will often judge on the basis of whether the rules and procedures of the entity concerned have been followed and, in this case, they would have been violated. Thus, it can be seen that law as an instrument of life together, here civil as well as canon law, would operate to protect the common good against an individual or a group acting *ultra vires*.

8.2.2. The scandal of sexual abuse of minors jurisdictional conflict?

There has been and there remains considerable tension in the relationships between canon law and civil law in some areas of penal law and notably over the sexual abuse of minors by clergy or by other members of the Church. This cannot be considered to be a matter which affects only one or two countries, nor is it restricted to very rare instances. In a number of countries over the last twenty-five years, there have been scandals; the Murphy Report on the archdiocese of Dublin, released in November, 2009, has been devastating both as to the events described and in regard its criticisms of the way the Church authorities dealt with complaints about such abuse⁶⁹. It is true that the vast majority of people would never have heard of paedophilia many years ago, that earlier attempts to treat it as essentially a matter of im-

⁶⁸ C. 1291 places a condition of permission from the proper authority as a condition of validity in cases involving alienation of or major alteration to the stable patrimony of the entity concerned above the limit of value set by the competent authority (eg. of the diocese in respect of the parish).

⁶⁹ THE MURPHY REPORT, *Commission of Investigation: Report into the Catholic Archdiocese of Dublin*, July, 2009, actually released in November, 2009, pp. 186-187, nn. 12.44-12.49 *et passim*, accessed 30 November, 2009 from The Irish Times: www.irishtimes.com/indepth/november2009/dublin-diocesan-report, parts 1 and 2.

moral behaviour needing penitence and correction, then as a psychologically based problem needing therapy, have proven to be woefully inadequate, and that the presuppositions affected secular as well as ecclesiastical perceptions in recent decades. Nevertheless, the gravity and the extent of the problem are recognised by many now. One aspect of the issue which bears upon our theme is exactly how the Church's penal law and state penal law ought to (have) respond(ed) in the face of allegations of this kind when levelled against clergy.

For law to function as an instrument of life together, the law has to exist, it has to be known and it must be implemented; legislative, executive and judicial dimensions are all necessary. As far as canon law is concerned, there have been laws specifying this behaviour as a canonical crime, a critically important fact, since only if a person has committed a canonical crime can that person be liable to canonical punishment: '*nullum crimen, nulla poena sine lege*'⁷⁰. Prior to the Second Vatican Council, there were norms issued by John XXIII on various abuses, mostly on the sacrament of penance, but one of the crimes for which procedures were laid down was the sexual abuse of minors by a priest, called in those norms the 'worst crime' ('*crimen pessimum*')⁷¹. The Second Vatican Council's pastoral constitution on the Church in the modern world has been thought to have been highly optimistic. It is certainly true that very little is said about sexual morals, apart from marital, and that the question of disordered sexual desires or disordered sexual concupiscence was not included in the

⁷⁰ Cf. c. 1321, which specifies that, for a canonical crime to be committed, there has to be the external violation of a law or of a precept, imputability on the part of the perpetrator and, normally, a penalty, even undetermined, attached to a crime by law or by a precept to which he was legitimately subjected. The last canon of Book VI on penal law is said to be an exception in the sense that it is a general penal law which thus does not specify a particular crime, but does provide for punishment where there is an external violation of a law of God or of the Church not provided for elsewhere in the law, but for which grave considerations of justice and/ or of the need to repair scandal require such penal action (c. 1399), cf., A. BORRAS, *Les sanctions dans l'Église: commentaire des canons 1311-1399*, Tardy, Paris, 1990, pp. 13-25. In fact, there is provision for 'a just penalty' in this canon; it is more the generic nature of the crime which makes this canon distinctive.

⁷¹ Cf. JOHN XXIII, *Crimen sollicitationis*, March, 1962; C.J. SCICLUNA, 'Sexual Abuse of Children and Young People by Catholic Priests and Religious: Description of the Problem from a Church Perspective' in R.K. HANSON, F. PFÄFFLIN and M. LÜTZ (a cura di), *Sexual Abuse in the Catholic Church: Scientific and Legal Perspectives: Proceedings of the Conference 'Abuse of Children and Young People by Catholic Priests and Religious'* (Libreria editrice Vaticana, 2004), pp. 13-22.

Council's careful and rich treatment of marriage, even though it had previously figured as one key element in moral theological and in Magisterial treatments of marriage. The explanation for this was that the Council Fathers wanted to give as positive a presentation as possible in a context of dialogue with the modern world.

To say that the very liberal moral climate consequent upon the sexual revolution of the 1960s may well have had its part to play in disposing people to behave in this abusive way to the young is to make a valid point, since clergy and those trained for the priesthood have lived in a cultural context in which moral norms in most other areas of sexual behaviour have been ignored and abandoned. It is also entirely legitimate to note that the prevailing moral relativism more broadly will have played its part and that the proportionalism elaborated and adopted by many dissident moral theologians and taught in many seminaries over recent decades will have been imbibed by some, so that what is taught to be objectively immoral by the Church's Magisterium, such as sex outside of marriage, might be only 'premorally' wrong or wrong in principle, but perhaps legitimate in a given instance where there were pressing circumstances and a proportionate reason for setting aside that norm on occasion. It was not that theologians of a proportionalist stamp would have condoned the sexual abuse of minors, but, rather, that the way of making moral judgments which proportionalism proposed may well have been a factor contributing to the gravely misguided moral thinking of those clergy who have perpetrated such outrages⁷².

Catholic moral theology has put forward the 'good of the child' (*bonum prolis*) as one of the basic goods of marriage and has interpreted this, since it was first articulated by St. Augustine, not just as being open to the gift of new children through procreation, but also on the basis of their upbringing or rearing or education, including their religious birth through baptism and their religious upbringing as one of the faithful. It is this good of the child which is directly violated by the sexual abuse of minors and which needs to be protected by careful

⁷² Cf. BENEDICT XVI, Interview to journalist at the beginning of his Apostolic journey to Australia on the occasion of World Youth Day, 12 July, 2008, www.vatican.va/benedict-xvi/viaggi/Sydney (Australia).

and effective procedures and norms which need to be binding upon those who work with children⁷³.

At this level, the ‘paramouncy principle’, recently introduced into English jurisprudence, properly applies⁷⁴.

Once there is an allegation of child sexual abuse made against a cleric or against anyone else, procedures are needed, in the state as well as in the Church, which ensure both that the matter is effectively pursued and dealt with under penal law and that the child concerned is effectively protected. Addressing ourselves here to the law as an instrument of life together, it must be evident that failure to pursue the enquiry vigorously means undermining the basis of life together by leaving an alleged abuser free to continue to act against the victim and/ or to victimise others. Although in some cases, there had been attempts at therapy and evaluations from psychologists, there has been much legitimate criticism of the practice of moving priests from one parish or position to another, where they had access to and abused other children and youngsters and of concern for the well-being of children and young people being neglected to prevent ‘scandal’, even in cases where abuse was known or seriously suspected to have occurred⁷⁵.

⁷³ Cf. St. AUGUSTINE, *De bono coniugali*, nn. 1-5 in J-P. MIGNE, *Patrologiae latinae*, series latina prior, XL, pp. 373-396 at pp. 373-377; St. THOMAS AQUINAS, *Summa theologiae*, I, q. 98, a 1; Supplementum, q. 49, a. 2, q. 65, a. 1, 3; G.J. WOODALL, *Humanae vitae Forty Years on: A New Commentary*, Family Publications, Oxford, Maryvale, Birmingham, 2008, pp. 83-89, 143-153.

⁷⁴ Cf. THE CUMBERLEDGE COMMISSION, *Safeguarding with Confidence: Keeping Children and Vulnerable Adults Safe in the Catholic Church: The Cumberledge Commission Report*, C.T.S., London, 2007, p. 89, nn. 7.4, 7. 5 (i). The presumption of innocence, under current European and English law, is due to a defendant in a trial and to one under criminal investigation by police or the Crown Prosecution Service and in such a trial the highest standards of proof of guilt are required, *Ibidem*, n. 4.15; outside of these precise situations, the paramouncy principle seems to prevail. The earlier Nolan Report, *A Programme for Action*, London, 2001, had invoked the latter in connection with child sex abuse in an investigation he had been asked to undertake by the Catholic Bishops’ Conference of England and Wales.

⁷⁵ Cf. THE FERNS REPORT *presented to the Minister for Health and Children in Ireland*, October, 2005, by the Ferns Inquiry under Mr. Justice Francis D. Murphy into allegation of sexual abuse by Catholic clergy in the diocese of Ferns in Ireland between 1962 and 2002, pp. 171-173, 198, Conclusion and Recommendations A (ii), 3, p. 247, D, 6, pp. 254-255. See also some examples from The Murphy Report, 2009, pp. 186-187, nn. 12.44-12.49, p. 216, nn. 15, 20-15.21, pp. 237-238, nn. 16.70-16.73, pp. 476-477, nn. 30.25-30.27, 526-528, nn. 35.56-35.62. The former, Ferns Report, under Justice Francis Mur-

As far as the law is concerned, the 1983 Code of Canon Law recognised that perpetrating an external act against the sixth commandment with a minor (under 16 years of age) was one of a number of possible aggravating factors in respect of the crime (c. 1395 § 2). After scandals had hit the Church, new norms were introduced by John Paul II in 2001 (*Sacramentorum sanctitatis tutela*), making the age for future cases for the crime of sexual abuse of a minor 18 and extending the period before which the crime would be proscribed 10 years after a victim had attained their 18th birthday, as well as giving the Congregation for the Doctrine of the Faith, as a tribunal, exclusive competence for dealing with such cases⁷⁶.

In one sense the issue appears to many to be a conflict between Church and state judicial systems and, to that extent, it might be thought to mirror the issues at stake in the Becket dispute of the 12th century, when Henry II of England's attempts to make his law applicable to all without exception ran up against the objections of his Chancellor who had recently been made archbishop of Canterbury, that 'benefit of clergy' meant that clergy should be tried by Church courts and not by secular courts⁷⁷.

phy, should not be confused with the latter, the Commission of Investigation Report into the Catholic Archdiocese of Dublin, under Judge Yvonne Murphy, and known as The Murphy Report, produced in July, 2009, but made public only in November, 2009, the delay being due, apparently, to concern over the impact of any statements upon proceedings against individuals discussed in the Report before the Irish courts. References are to the version published by the Irish Times: www.irishtimes.com/indepth/november2009/dublin-diocesan-report, parts 1 and 2.

⁷⁶ JOHN PAUL II, Apostolic letter *motu proprio*, *Sacramentorum sanctitatis tutela*, 2001; cf. B.E. FERME, 'Graviora delicta: the apostolic letter M.P. sacramentorum sanctitatis tutela' in Z. SUCHECKI (ed.), *Il processo penale canonico*, Lateran University Press, Rome, 2003, pp. 365-382.

⁷⁷ Cf. Decretal of Pope Alexander III to king Henry II of England, instructing the king not to send officials to arrest a sub-deacon accused of murder, since the Church courts had jurisdiction over the cleric and not the secular authorities (the instruction coming after an appeal to the Pope, since such officials apparently had acted in this way). The date of the decretals is not known, but it is estimated to have been cc. 1162-1165, the major dispute between Henry II and the new Archbishop of Canterbury, already the king's Chancellor, having arisen after the Constitutions of Clarendon, 1164, forbidding appeals to Rome and insisting on clerics being tried in secular courts for certain crimes. Cf. C. DUGGAN, 'St. Thomas of Canterbury and Aspects of the Becket Dispute in the Decretal Collections' in ID., *Decretals and the Creation of 'New Law' in the Twelfth Century: Judges, Judgements, Equity and Law*, Ashgate Variorum, Aldershot, Brookfield USA, Singapore, Sydney, 1998, pp. 87-135 at pp. 99-100: 'Quae superni dextera conditoris te ampliori potentia decoravit ... regie tuitionis pre-

In fact, the parallel is not that close. The modern world has long since superseded the rival claims of Pope and Holy Roman Emperor to universal jurisdiction as a practical political issue. In actual fact, while the authority of the Pope is universal and while neither the Pope nor the Holy See may be judged by anyone (cc. 1404, 1406), the Church acknowledges practically that a priest or deacon accused of theft, of murder, of drunken driving will be judged by the law of the land in which the alleged offence has been committed. There is also no doubt that the Church's social doctrine upholds the right and the duty of the state to legislate for the common good and to operate just and equitable systems of the administration of (state and international) justice⁷⁸. John Paul II affirmed that: 'Authentic democracy is only possible in a state ruled by law and on the basis of a correct understanding of the human person...'⁷⁹. Indeed, recent Papal messages for the world day of peace have sought to promote the concept of 'legality' as a key to peace and to peaceful co-existence in our world⁸⁰.

As far as the Church is concerned, there are in existence laws proscribing child sexual abuse as a canonical crime and there are procedures for dealing with accusations that such a crime has been committed. Fundamentally, the Code envisages a preliminary investigation, whose purpose is to establish whether or not it appears that a canonical crime has been committed and also whether a given individual, the accused, appears from what can be demonstrated to be the person who has committed it (c. 1717). This is not a trial, nor are we talking here about proof of guilt, but, rather, of whether there is enough to show that a canonical crime has occurred and that this person has a

sidium exhibere. Lator autem presentiam subdiaconus I, nomine ... ordine iudiciario experiantur'.

⁷⁸ Cf. SECOND VATICAN COUNCIL, *Gaudium et spes*, n. 74; PAUL VI, Apostolic letter, *Octogesima adveniens*, 14 May, 1971, n. 46; BENEDICT XVI, *Caritas in veritate*, 29 June, 2009, nn. 24, pp. 41, 55.

⁷⁹ Cf. JOHN PAUL II, *Centesimus annus*, n. 46.

⁸⁰ Cf. ID., Message for the World Day of Peace, 1 January, 2004, n. 5, calling for education in legality and for laws within states to be based on the higher and universal principles of natural law, a call echoed by BENEDICT XVI, Message for the World Day of Peace, 1 January, 2008, n. 12, insisting that the juridical norm which regulates relationships between persons has to be based upon the moral norm rooted in the nature of things.

case to answer or not⁸¹. If both of these questions are answered in the affirmative by the preliminary enquiry, then the Code specified that one of two procedures should be followed: preferably the judicial process or trial, since that ensured the accused of a better right of defence or, for serious reasons, an administrative process (c. 1718). It is now a matter for the Congregation for the Doctrine of the Faith to assess these options once a diocese or religious institute or association of apostolic life has conducted a preliminary investigation and has come to the point just noted. The trial should then proceed (or the administrative procedure), with a sentence or judgment at first instance, to be confirmed or overturned at second instance and a final decision to be made at third instance if need be.

In other words, the Church has the ecclesiastical laws and legal procedures needed to deal with cases of child sexual abuse. They have been developed more recently as inadequacies have been shown and, like all human law, can be improved further in the future if need be. There were laws in the Code and procedures in different countries under the Bishops' Conferences to address accusations of paedophilia. A large part of the recent and current problem is not the lack of laws and procedures, but the failure to apply them and to apply them effectively. It has been argued, with some reason, that bishops have been more than willing to operate within their jurisdictions where what has been done was desired by many people (as with nullity of marriage investigations) and might be thought to have brought them popularity, but that they have been far more reluctant to engage in penal law⁸².

More generally, it needs to be said that there has been a gross optimism about human nature to the extent that the very legitimacy of having penal law in the Church has been brought into question, but the idea that the Church can simply function by means of mercy is false. It needs to be recalled that God is the true administrator of justice and that justice was especially to be administered in His name to those most in need, the widow, the orphan and the stranger (Dt. 24: 17-18; cf., Ex. 22: 21-23; Ps. 72: 4, 12-13; 146 8-9). Here it is the

⁸¹ A. CALABRESE, *Diritto penale canonico*, Libreria editrice Vaticana, 2006, 3° edizione, pp. 145-153.

⁸² Cf. J. LLOBELL, 'Contemperamento tra gli interessi lesi e il diritto dell'imputato: il diritto all'equo processo', in D. CITO (ed.), *Processo penale e tutela dei diritti nell'ordinamento canonico* (Giuffrè, Milano, 2005), pp. 63-143 at pp. 95-96.

abused child or young person who is entitled to justice both from the Church and from the state; the accused person is also entitled to a just investigation and trial, but, if proven guilty, is to be punished accordingly. The recent scandals are all the more serious for the fact that victims and their claims have often been neglected and further abuse, unwittingly or through negligence, thus facilitated. The lack of expertise in Church penal law in some places, the complexity of the procedures and the fear of local judgments being overturned in Rome, have led some bishops not to pursue the penal processes when they ought to have done⁸³.

Thus, it would seem that it is not the lack of penal law in the Church which has led to the current crisis, but the failure to use what was there. Law cannot function as an instrument of life together if people are ignorant of it or are afraid or neglect to use it; it will be a dead letter for many people in such a case. Since 2001 matters are much clearer, even though the restrictions on the functioning of the accused which were previously dependent upon specific factors obtaining (c. 1722) are now normally applied unless specific factors indicate otherwise and the Congregation for the Doctrine of the Faith in its capacity as a tribunal or court of the Church can ensure cohesion, expertise and consistency of treatment on a proper canonical basis⁸⁴.

Life together in different countries requires that laws be used to prosecute and punish those guilty of child sexual abuse. It should not be a case of either Church courts or civil courts; both are needed. The Church does not make the claims it made in the Middle Ages about dealing exclusively with clergy accused of crimes. It should be understood by people in the Church and more broadly that the Church lacks coercive power; it cannot arrest anyone, nor compel people to give evidence, nor imprison people. On the other hand, its procedures at times can go further than courts in many modern states; for instance, tribunals can accept hear-say evidence under certain circumstances. The Church can take action against its members and, when proven guilty of a canonical crime, punish them accordingly, which, in the case of a

⁸³ Cf. *The Ferns Report*, pp. 157-158.

⁸⁴ Cf. JOHN PAUL II, *Sacramentorum sanctitatis tutela*; WOODALL, *A Passion for Justice ...*, pp. 558-559.

cleric, can involve, and now often would involve, dismissal from the clerical state⁸⁵.

The state's right and duty to act against those accused of criminal acts demands that such persons not be shielded by the Church. An improper 'respect' for the position of the priest apparently led some police forces not to investigate properly when accusations were made. Figures of authority in the Church have been accused of covering up cases of abuse and of not referring cases to the police for fear of provoking scandal. This is, in truth, an added scandal. Apart from a priest who hears something in confession and who cannot act, therefore, without violating the seal, a priest, like any citizen or other person in a state, becomes an accessory after the fact if he does not inform the police when a serious crime has allegedly been committed. It is a matter of justice that the victim be heard and the case be investigated thoroughly. It is also a matter of justice that an accused person be presumed innocent unless and until proven guilty; no 'paramouncy principle', valid and important as it is for procedures to be observed in allowing people to work with children, for pursuing accusations of abuse fully and for ensuring those responsible for such abuse not work with the young or have access to them, should undermine that. The Church tribunal can suspend its activity while a civil criminal case proceeds; if guilt is established, proofs established in the state case can be introduced into the Church procedures and further action can be taken according to Church law, which would certainly mean restrictions upon ministry no longer as a precaution but as a sanction, and may well mean dismissal from the clerical state⁸⁶. Life together means respect for law as an instrument of justice, but it means respect for the law both of the Church and of the state in their respective spheres of operation. Law then can function in both spheres to protect the *bonum proles*, the good of the child.

8.2.3. Secrecy and law

One problem which has been raised by many critics of the Church is that it is secretive in its procedures. This risks furthering the impression that all the Church is interested in is protecting priests,

⁸⁵ *Ibidem*.

⁸⁶ Cf. WOODALL, *A Passion for Justice* ..., pp. 521-543.

whatever they may have done. This is not what the Church's law envisages nor what anyone would properly want.

Many procedures in canon law are conducted without being open to the public. This has many advantages, in that those who give evidence in relation to a nullity investigation, for example, can be sure that the matter is not going to be divulged in the press or become a subject of general gossip. Yet, it is important to realise that such procedures are not part of the internal forum, which operates under strict privacy in the confessional as far as the confessor is concerned and which is confidential in other instances (such as in spiritual direction without confession); it is under the external forum and is technically a public matter. Indeed, most law is of its nature concerned with matters which are public in principle and most law operates publicly. This is to be expected, since it concerns the common good of a community and not just the private interests of an individual. That being the case, it might be asked whether there should not be a more explicitly public aspect to certain parts of canonical penal law. At issue here are at least two questions, one relating to the law as it is promulgated and the other to the conduct of penal proceedings, at least in the judicial process or in a trial.

For the first, that of promulgation, it appears almost a contradiction in terms to have laws promulgated which are occult or secret. Human laws are to govern human communities and need to be capable of being known; indeed, the key point of their promulgation is that it becomes known thereby what the law is which binds people. When the Church promulgates laws which affect issues of much public debate or controversy, it would appear to be right for laws to be made known through promulgation in the normal way and not to be restricted to certain groups of officials within the Church. Life together is not only realised through the observance of law, but law is a valuable instrument rendering such life in our communities possible. When there is grave concern about the sexual abuse of minors, that in itself argues for a normal promulgation of new laws. Where there is the suspicion that some bishops, priests and others have covered up the wrongdoing of priests, the secrecy of such legal texts adds to the impression of a cover-up and undermines further that trust in the Church's authorities which there should be. It is true that the norms of 2001 did not concern only the question of the sexual abuse of minors and that, fol-

lowing the text of John XXIII, many other provisions related to specific aspects of the sacrament of reconciliation. In that case, either part of the document could have been declared occult in a normally promulgated law and promulgated in part in a different way or two different laws could have been promulgated. New norms about other clerical conduct, operating under the auspices of the Congregation for the Clergy since 2009 are occult; why they should not be known, since they concern the common good of the Church and attempt to deal with difficult cases of clergy who, if guilty, are in a position objectively at odds with the clerical state, is not clear. At least some bishops seem never to have seen or heard of John XXIII's norms; it may be presumed that they remained in a secret archive and, if the former bishop died or was transferred, their presence and import were not made known to his successor. This is less likely with the norms of 2001, initially occult, and those of 2010 which replaced those earlier provisions, but the existence of these laws, including the procedures involved, needs to be made known also to those who teach and who study canon law; otherwise, bishops seeking advice and those seeking expert advocates will be disadvantaged and the Church's service of children, of legality and of the common good will risk being compromised, which, in turn, risks damaging her capacity to discharge her mission in the world.

The second issue, that of the actual implementation of the norms, applied to specific cases may be thought to require secrecy at times, to protect the reputations of those involved unless and until they are proven guilty (not to protect them from trial and punishment). That would not mean that the laws themselves could not be known. Even under this second aspect, however, trials in most countries are public, although closed or secret sessions are possible at times. This can give rise to idle curiosity and gossip and it can lead to media interest of a kind and at a level which may put those involved in preparing and in judging the case under severe pressure, at the risk of provoking a grave miscarriage of justice. The outcry in France over cases of paedophilia in St. Omer a few years ago, the uncritical reliance of a young and relatively inexperienced *juge d'instruction* and then of those judging the case upon testimony of a number of children who, it turned out, had been spoken to by the same lady and whose accounts rested largely upon gossip between themselves, led to up to 17 persons

being imprisoned for a number of years, one of whom committed suicide, four of whom were found innocent and the others having their guilty verdicts quashed. The succeeding uproar at the grave inadequacies of a system which had led to such dubious convictions led to the French Parliament ordering an investigation into the case and even into the French judicial system. In the eventual Report, the dangers of public opinion and media pressure provoking a travesty of justice, but also the inadequacy of the rights of defence and the neglect of the presumption of innocence, were highlighted.⁸⁷ One passage in the Report is worth particular notice:

‘We know that too often presumption of innocence gives way before a presumption of guilt. Those who were shouting the loudest to complain against the imprisonment of innocent people in the Outreau case, were they not the very ones who were shouting the loudest to have them thrown into prison? In certain cases, the pressure of society is such in effect that the fear of not condemning the guilty is so strong that we increase the risks of prosecuting and of imprisoning the innocent. And where there is no longer any place for reflection, where revulsion carries away reason, we come to the point of the disasters of the Outreau case’⁸⁸.

The scandal of clerical sexual abuse has largely been that of those who have perpetrated such outrages not being properly investigated nor brought to trial, but the risk of miscarriages of justice of the kind

⁸⁷ Documents issued on 7 December, 2005: N. 2725 ASSEMBLÉE NATIONALE: Rapport (de M. Philippe Houillon, Député) ... sur la proposition de résolution (n. 2722) de Mm. Jean-Louis Debré et Philippe Houillon tendant à la création d’une commission d’enquête chargée de rechercher les causes des dysfonctionnements de la justice dans l’affaire dite d’Outreau et de formuler des propositions pour éviter leur renouvellement; <http://www.assemblee-nationale.fr/12/rapports/r2725.asp>, accessed 2 August, 2006, Introduction. Report of M. Philippe Houillon to the French Parliament on the Outreau Case, n. 3125, <http://www.assemblee-nationale.fr/12/rap-enq/r3125-tl.asp>, accessed 24 March, 2007, pp. 261-262.

⁸⁸ *Ibidem*, p. 3: ‘Hélas, la réalité est parfois loin des principes et l’on sait que trop souvent la présomption d’innocence cède le pas devant une présomption de culpabilité. Ceux qui criaient le plus fort pour dénoncer l’emprisonnement des innocents d’Outreau, n’étaient-ils pas ceux qui avaient crié le plus fort pour qu’on les jette en prison? Dans certaines affaires, la pression de la société est telle en effet et la peur de ne pas condamner un coupable si fort, qu’on multiplie les risques de poursuivre et d’emprisonner des innocents. Et quand il n’y a plus d’espace pour la réflexion, quand la révolte l’emporte sur la raison, on en arrive à des désastres comme celui d’Outreau.’ (my translation).

just noted are real and real injustice is all the more likely where there is no trial, under civil or under canon law. Where indications of the canonical crime of child sexual abuse and of the putative responsibility of a particular individual appear to be well grounded from a preliminary investigation, there should be a trial, unless guilt is admitted. Canonical penal procedures are not open to the public. Perhaps some way of making at least the verdict more generally known, unless a person acquitted does not wish it, might be considered in the interests of the common good. Further reflection may suggest that this common good and the Church's contribution to it in cases such as these may be better served by procedures which are more open, so that justice can be done and can be seen to be done.

Conclusion

Life together requires some level of social cohesion and its effective promotion has led to the development of laws as one very useful instrument to facilitate it. To some extent any system of laws or mores will suffice to render some kind of common life possible. Even a dictatorship or a totalitarian regime can function on that basis and, to some extent even more effectively than in a democracy, since the power to impose decisions and the will to do so are not lacking in such cases and the system can then be more efficient as a mechanism of coercion than can some democratic judicial systems.

Yet, the mere functionalism of a system, oppressive or liberal, is inadequate for human beings, since it involves accepting that some of their basic human goods are ignored or, more usually, are directly violated. The moral basis of a system of justice which is founded upon respect for all basic human goods and for their integral development is not to be considered an ornamental addition, but is truly a prerequisite for an authentic system of law. The inter-action of different legal systems, such as a state system and the canon law of the Church, is not always straight-forward, but neither is it impossible to envisage as a complementary structuring of life together, even in the face of very real and serious problems affecting our contemporary societies. Human law, and that includes merely ecclesiastical law, does develop in response to needs and perceptions in different times. State laws should recognise also the entirely legitimate interests of the Church in caring

for its people. Yet, we do not yet live in the perfection of the communion of the saints in heaven. In a world and in a Church whose members are not yet perfectly united to the Lord, there should be a mutual willingness to appreciate what each can and should do through its laws to protect the good of children and to see where penal law of state and of Church can and should operate in a way which is complementary to make life together safe for all concerned, especially for the most vulnerable. The final end of human existence and the focus of the Church's mission, given her by the Lord, is the beatitude of perfect, definitive communion in Him through the Holy Spirit with the Father. The perfect justice is granted as God's final gift to those definitively admitted to that state which makes them perfectly just. On earth, such justice is not yet achieved, but its pursuit as a basic human good is at the root of the state's right to exist and to function and is also at the heart of the Church's mission in spreading the Gospel. The continuing need for state and Church to develop further human laws which promote and defend human dignity in terms of all the basic human goods, including justice, and to apply and implement them justly is evident, if life together is to be rendered better and if it is to be more fully one of genuine hope for all concerned.

Summary: The article arises from a reflection on 'life together' in the context of the STOQ project of a few years ago. It examines the role of law in society (*'ubi societas ibi lex'*), as an instrument of life together. The possibility of an existence in society, even in the circumstances of the absolute monarchies of centuries gone by or under totalitarian or theocratic or otherwise oppressive governments cannot be denied. The article surveys various political theories which have been developed in history to try to justify the role of the state and to ground both its authority and the duty of subjects to obey it and its laws. It undertakes a criticism of 'totalitarian democracy' and of democracy *tout court* as inadequate foundations for law. It proposes justice which is not merely procedural, but rooted in the basic human goods, as a necessary foundation of law and makes some remarks on unjust laws. It concludes with some observations on ecclesiastical laws, both in the legislative and in the judicial spheres, in the context of the relationship between the respective competence of civil and of ecclesiastical law.

Key Words: law, society, justice, the foundation of law, unjust laws, ecclesiastical laws.

Sommario: L'articolo scaturisce dalle riflessioni sulla 'vita insieme' nel contesto del progetto STOQ di qualche anno fa. Prende in esame il ruolo della legge nella comunità (*'ubi societas ibi lex'*), come strumento della vita insieme. La possibilità dell'esistenza nella società, pure in circostanze dell'assolutismo monarchico di una volta o sotto dei governi totalitari o teocratici

o altrimenti oppressivi non si può negare. L'articolo percorre diverse teorie politiche che si sono sviluppate nella storia che tentavano di giustificare il ruolo dello stato e di fondare sia la sua autorità sia il dovere dei suoi sudditi a obbedire loro e alle loro leggi. Intraprende una critica della 'democrazia totalitaria' e della democrazia *tout court* come fonti inadeguate della legge e propone una giustizia non soltanto procedurale, ma una che sia radicata nei beni umani fondamentali, come fondamento necessario, accennando alle implicazioni delle leggi ingiuste. Chiude con delle osservazioni su delle leggi ecclesiastiche, sia in chiave legislativa sia in chiave giudiziale, nel contesto del rapporto tra competenza legale civile e quella ecclesiastica.

Parole Chiave: legge; società; giustizia; fondamento della legge; leggi ingiuste; leggi ecclesiastiche.