THE BAR AND THE BENCH IN THE LIGHT OF CHRIST'S LAW

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THE CHRISTIAN PERSPECTIVE OF PROFESSION

'Profession' is usually defined as man's working activity engaging the whole human person in a well-defined role in society. According to J.M. Aubert, professor in the theological faculty at the University of Strasbourg, the generic element, common to all the professions, is the 'global activity to which the person consecrates himself and dedicates his existence, an activity which he views as a call to him, a vocation'.[1] The term 'vocation' is bound to strike a familiar note in the mind and heart of persons who call themselves 'Christian' and honestly strive to live up to all that that name implies. It cannot fail to recall to them the serious biblical exhortation, conveyed to Christians through the words of the Apostle Paul, to consider well and reflect deeply upon their profession, in order to discern and commit themselves faithfully to the activity by which they are called to achieve their fulfilment as men and as Christians through the service of God and their fellow-men. Such a thought-process, engaged in with the seriousness it deserves, inevitably leads to and terminates in the source of the individual Christian's profession or vocation, as defined above, namely, the mystery of God the Father and his love, as revealed and communicated to men in and by the person of his Incarnate Word, Jesus Christ, who being himself 'the image of the invisible God' and the perfect man, fully reveals man to man himself and makes his supreme calling clear.[2]

For very definite reasons this theological truth and mystical reality is frequently invoked to or evoked by Christian members of the medical profession. Christ Jesus is presented as 'the divine healer'; the Gospels record many instances of physical ills miraculously cured by Christ; he himself compared his mission to that of a physician who ministers to the needs of the sick. Frankly, I do not

[1] Jean-Marie Aubert: 'Profession as Function in Society', in *Concilium*, vol. 5 n. 5 (May 1969), p. 5.

[2] Cf. *The Documents of Vatican Council II:* Constitution on 'The Church in the World Today', n. 22.

see why the same theological truth and mystical reality should not be as relevant and meaningful to Christians dedicated to the legal profession. Not less than a divine healer, Jesus Christ is the divine defender of Truth and Justice; the Gospels register numerous examples of legal interpretations masterly pronounced by Christ; he himself implied his mission of advocate (helper and defender), when he promised that after the completion of his mission on earth, his heavenly Father would send another Paraclete (the Greek term equivalent to the Latin 'advocatus'). Moreover, he was looked upon as a 'iustus iudex', as he is called in the Holy Books and yet, by the strangest of ironies – humanly speaking – he was the victim of the grossest travesty of human justice, when he was pronounced innocent and handed over for capital punishment in history's most notorious judicial trial.

I feel justified, therefore in borrowing the following words, addressed by Cardinal Leon Josef Suenens, Archbishop of Malines-Brussels and formerly professor of Theology at Louvain University, to Christian doctors, and proposing to substitute the words 'doctor' by 'lawyer' and 'medicine' by 'law'.

'Which is the more correct?' asked Cardinal Suenens, 'to speak of a Christian who is a doctor, or a doctor who is a Christian? At first sight, the question seems otiose. But the fact is that it puts the question squarely: Is a Christian doctor first a doctor and then a Christian, or is he above all a Christian who practices medicine?' 'We need not hesitate', the Cardinal replied, 'about giving the correct answer. A baptized person, doctor or not, is first of all a Christian. This position is fundamental, and with the Christian doctor his being baptized a Christian is his dominant and substantial quality. Christianity is the first duty of his state in life and all the others have to be harmonized with it. It is the spirit underlying all his professional obligations'.[3]

When he wrote these words, Suenens was not just inverting the terms of the old dichotomy: professional activity – religious faith. On the contrary, he wanted to stress the point that professional activity, far from constituting a sort of sealed 'profane' compartment separated from and unconnected with a person's religious belief and so called religious 'practice', should itself be integrated with the practice of religious belief and transformed into its most convincing and credible evidence.

The clearest and most concise explanation of this fundamental Christian principle was furnished by the Second Vatican Ecumeni-

[3] Cardinal J. Suenens: *Love and Control* (Burns and Oates, London, 1962), pp. 127-128.

cal Council, which exhorted Christians, as citizens of two cities, namely the earthly and the heavenly, to strive to discharge their earthly duties conscientiously and in response to the gospel spirit, reminding them that by the Faith itself they are more than ever obliged to measure up to these duties, professional, domestic social, each according to his proper vocation. The Council branded the rather widespread dichotomy between religious profession and professional activity in the following strong terms:

'Nor, on the contrary, are they less wide of the mark who think that religion consists in acts of worship alone and in the discharge of certain moral obligations, and who imagine they can plunge themselves into earthly affairs in such a way as to imply that these are altogether divorced from the religious life. The split between the faith which many profess and their daily lives deserves to be counted among the more serious errors of our age'.[4]

It is from this premise that the Christian who professes and practices law, whether at the Bar or at the Bench, should begin, in earnest and sincere response to the God-given admonition, to consider well and reflect deeply upon his or her professional activity in the light of Christ's law or, in other words, in the light of the Mystery of God's love for the salvation of men made known in Christ Jesus, to comprehend the full meaning of the slogan appearing on the cover of this Law Journal, namely how faithful service to the law contributes to the true liberation of man.

I shall attempt in these paragraphs to list and explain, within the limits possible and permitted by the scope of this article, the main theological guide lines along which Christian legal men, whether lawyers or judges, desirous to ponder upon their professional activity in the perspective of Christ and his teaching, are called and expected to discharge the duties of their calling, conscientously and in response to the Gospel Spirit, in order to avoid the fairly common serious error of splitting their daily lives from the faith which they profess.

The Christian Lawyer

The lawyer's professional activities are concerned, generally speaking, with either civil or criminal cases. The former normally include those suits or actions in which the ownership or possession of property or the exercise of some civil right is claimed or contested. One of the first problems which may confront the lawyer, solicited to plead a civil law-suit, is that of the so called 'un-

[4] *The Documents of Vatican Council II:* Constitution on 'The Church in the World Today', n. 43.

just action'. May he lawfully, that is with good conscience, accept to offer his professional service to a client who requests him to plead on his behalf a civil case which the lawyer knows from the start to be unjust? The answer, dictated by the very justice he professes to serve, as well as by Christian charity, which Christ indicated as the hall-mark of his followers, is an unqualified 'no'. Theologians make it clear that the same unqualified negative answer extends also to the event in which the lawyer is aware that the eventual respondent, undoubtedly on the side of the right, is not in a position to disprove the unjust claim and will consequently lose the case. Honesty demands that the lawyer, requested to introduce an action which, after due investigation, he detects with moral certitude to be unjust, should inform his prospective client accordingly and decline the request. The operative words in the preceding statement are 'with moral certitude'. This means that if it appears to the lawyer that the prospective client's case is only probably just, he may not only accede to the request but, once he has decided to accept it, he can and ought to make use of all lawful means in order to consolidate the claim of his client.

A rather thorny moral problem arises if and when, what initially appeared to be a probably just claim and began consequently to be processed by the lawyer, is seen by the latter, in the course of the judicial process, to be undoubtedly unjust. The solution to this problem put forward by the greatest of all theologians, St. Thomas Aquinas, is the following: 'If in the beginning the lawyer believed the case to be just and afterwards in the procedure it becomes evident that it is unjust, he must not betray the case, in such wise as to help the other side, or to reveal the secrets of his case to the other party. But he can and must abandon the case or induce his client to yield or to compromise without injury to his adversary'.[5] The second alternative proposed in St. Thomas' solution, namely, persuading the client to withdraw the claim and recede from the action or to seek a fair compromise without, however, any prejudice to the certain rights of the other party, seems to be preferable, unless the client persists in his will to proceed with his action, now evidently unjust to his lawyer, in which case the latter has only the first alternative left, which is that of withdrawing from the suit. This mode of conduct was adopted by the Association of the Bar of the City of New York in its 'Canons of Professional Ethics' which, among the causes justifying an attorney or council to withdraw from an undertaking assumed lists the instance 'when a lawyer discovers that his client has no case'.

[5] *Summa Teologicae,* II-II, q. 71, a. 3, ad 2 um.

It may happen that a lawyer regardless of the preceding ethical and moral considerations, decides, for purely profitable motives, aptly described by the greatest Roman poet as 'auri sacra fames et scelerata sitis', decides to plead or to proceed with what he knows with certainty to be an unjust case, or to induce a client to introduce or prosecute an action which he forsees will be surely unsuccessful. Black sheep are found, unfortunately, among the members of all professions and vocations, not excluding the noblest and even the most sacred ones. What evaluation is to be accorded to these and similar modes of conduct in the light of Christ's law and teaching? Christian theologians are unanimous in their interpretation of Christ's teaching on justice and charity that the lawyer who knowingly and deliberately undertakes an unjust case shares with his client the moral obligation of making restitution to all who in consequence suffer unjustly. In like manner, the lawyer, who for his own personal advantage persuades his client to press on with a case which the lawyer knows only too well has no chance of a successful outcome, is obliged in conscience to refund to his client the financial loss incurred as a result of the prosecution of his action, if it is clear that the lawyer's persuasion was the decisive factor in the prosecution of the case. The same obligation binds equally in those instances in which the lawyer deliberately and needlessly protracts a case with the intention of multiplying the costs and enlarging his fee. Rightful cases are sometimes lost in court and clients with just claims sustain financial losses as a result of negligence or carelessness on the part of defence counsels who fail to study the legal points involved and to conduct the action with the attention and diligence duly expected from them. It should be obvious that the lawyer who is conscious of his guilt and of its consequence in this respect should advert also to his moral responsibility of making adequate compensation to his wronged client.

Ethicians and moral theologians do not omit to caution members of the legal profession to be particularly attentive and conscientious in accepting and conducting suits concerning claims for damages to person or to property, in view of the seemingly prevailing notion that no means, not even fraud and perjury, are deemed to be reprehensible in seeking to establish claims for damages from large corporations and companies. An honest lawyer cannot but promptly and decisively deny his services, if and when he is asked to press a claim for damages which he deems to be unfounded and unjust.

Occasionally the question is asked whether a Catholic lawyer may undertake a divorce case. This question will presumably recur

with greater frequency in our country in the wake of the Marriage Act enacted in 1975. Theologians remark that, generally speaking, the question must be answered in the negative. However, they qualify their negative reply in the following manner. If the divorce is sought for a marriage that is invalid before God, such as the civil marriage of a Catholic, the lawyer may accept the case, particularly if the intention of the person seeking the divorce is to rectify the state of his conscience. The same qualification extends also to the case in which the lawyer is given sufficient assurance that the civil divorce is being sought from a valid marriage with the sole purpose of seeking protection from molestation for one of the marriage-partners, neither of whom intends to contract a second marriage, provided that the acceptance of the case by the Catholic lawyer does not cause scandal. It should be remarked that this constitutes the exception rather than the rule, since divorce suits are normally introduced as a preparatory step towards re-marriage. For this reason, a fairly general consensus exists among theologians, in the sense that apart from the cases specified above, the Catholic lawyer must practically always refuse to undertake a petition for divorce even though the petitioners are non-Catholic, since it pertains to the teaching of the Catholic Faith that all valid marriages not only Catholic or sacramental ones, are indissoluble by human authority. I have described the consensus among theologians on this matter as 'fairly general' because some theologians reason that, since what is intrinsically wrong is not precisely the declaration of divorce but the consequent re-marriage, there could be, in particular cases, proportionately grave reasons morally justifying a Catholic lawyer to accept a divorce case with the usual proviso that no scandal is likely.

In our legal system, criminal trials are governed by the principle that the accused is presumed innocent unless and until he is proved with moral certainty to be guilty of the crime of which he is charged by a majority verdict pronounced before the court and founded on the evidence produced and examined during the trial. It follows that when the accused at a criminal trial pleads 'not guilty' to the charge brought against him, he is not deemed to be telling an untruth, even if he has committed in actual fact the criminal act of which he is being charged because his guilt has yet to be demonstated, proved and established beyond positive and reasonable doubt, for his innocent status to be transformed into the status of guilty. Accordingly, the lawyer may not only with a clear conscience undertake the defence of a person accused of a crime which the lawyer knows that person has committed, but he may also and

ought to utilize all objectively honest means to avert from his client, the defendant, the verdict of guilty. Means which are known to be dishonest are unjust and, consequently, morally unlawful. Objectively just and morally lawful means of defence include reference to and highlighting of gaps and inconsistencies in the evidence produced by the prosecution, mention of or emphasis on facts and details that would seem to indicate that the accused could not possibly have been at the place of the crime at the time when the crime was committed, relation of deeds and instances that picture the defendant as a person of integrity not likely to commit the crime of which he stands accused. Moreover, the defence counsel is considered to be acting also within the limits of justice and lawfulness if he tries to invalidate the indictment on legal grounds. From what has been said, it appears sufficiently obvious that the lawyer defending a person accused of crime may neither employ perjury nor suborn witnesses and induce them to lie. At no moment during the trial is the lawyer justified in violating truth. This does not mean, however, that, provided he restricts his words and actions to facts that are objectively true he may not present those facts in such a manner as to raise doubts in the minds of the jurors, which may induce them to give a negative verdict.

The question is sometimes asked: What should the lawyer do if one or more witnesses for the defence, without his knowledge or connivance, commits perjury on the witness stand by giving false testimony in favour of the accused? Is the lawyer obliged to denounce the perjury? May he in any way justly and lawfully take advantage of the falsely sworn statements in his defence plea? To these questions theologians are agreed in replying that, since he was in no way responsible for the false testimony, the lawyer has no obligation to denounce the perjury. They admit, however, that lawyer may find himself in a rather embarassing situation when the time comes for the summing up of the evidence, especially if the false statement is considered of a decisive nature. It is suggested that, while he may not propose the perjured testimony as something which he himself regards as true, the lawyer will not be violating the truth if he merely refers to the fact that such a statement was made and requests the jury to consider whether and how that statement could be reconciled with the charge moved against the accused.

In conclusion of this section it hardly needs to be said that the lawyer is bound to observe the strictest type of secrecy, namely professional secrecy, regarding knowledge and information entrusted by or acquired from his client in the discharge of his profes-

sional duties. Whether the obligation of professional secrecy in this field is so absolute as to admit of no limits whatsoever in exceptional circumstances seems to be a moot point, which I have neither the time nor the space sufficient to discuss in detail here. Just to illustrate my statement, I refer to the Canons of Professional Ethics adopted by the Association of the Bar of the City of New York: 'The announced intention of a client to commit a crime is not included within the confidence which he (the lawyer) is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened'.

With respect to the lawyer's fees, justice requires that they be reasonable. This means that the fee charged for professional service should conform to the standards adopted by men of integrity in the profession. It should go without saying that a client's mere ability to pay does not justify an excessive charge. Christian charity demands that the lawyer should not refuse his professional help at a reduced charge or even gratuitously to persons in need, to the extent that his personal circumstances permit. In this case, especially if the lawyer is assigned by the Court to defend an indigent person, the quality and standard of his service should not be different from or inferior to those employed on behalf of a paying client. In this way the Christian lawyer will be practically harmonizing his professional activity with his Christian profession or vocation.

The Christian Judge

The judicial doctrine derived from classical sources fails to give an exact definition of the Judge, but it limits itself to the description of his office or function. Examining the function of the judge in our time, the eminent Dutch Catholic jurist, Willem Ariens, who until a few years ago held the office of President of the Court of Appeal at Bois-le Duc in the Netherlands, prefaced his study with the following remark:

'Anyone embarking upon the examination of the demands that contemporary society places on the law is bound to proceed on the premise that the workings of the judiciary must continue to provide what has been traditionally expected from it; ensuring, with complete impartiality and with a conscientious application of the existing legal guidelines, that justice is done. These legal guidelines need to be embodied in laws, laws which will have to be applied according to objectives which can be deduced from the drafting of their provisions and the history of their origins. Where this gives

rise to injustice, this must be blamed on the legislator, since it is not in the power of the court to give a ruling which, however unjust, conflicts with the law'.[6]

Certain it is that this function of the judge to apply the law to the facts at issue within the framework of the positive norms established by the legislative Authority is one of tremendous responsibility, when it is considered that on the judgements given by legal men sitting on the Bench depend the property, the liberty and sometimes even the lives of their fellow-citizens. It postulates in the holders of this exalted office a high degree of wisdom, prudence and integrity. History and experience provide ample proof that the welfare of the citizens may remain safeguarded in no small measure by a capable and righteous judiciary, even when incompetence and corruption may have infiltrated the legislative and executive bodies of a country. The admonition of Ben Sirach: 'Seek not to be made a judge, unless you have strength enough to remove iniquities', is as valid and timely today as when it was first written by the inspired sage of ancient Israel in the second century before Christ. Indeed, only those legal man should dare aspire to a judge's cap who are conscious of being gifted with the intellectual and moral qualifications demanded by this high office.

In the face of the marked tendency of contemporary so-called 'permissive' society to disregard or reject objective standards of morality, it is of fundamental importance that Christians invested with the judicial function should be steadfastly mindful of the unchangeable principles of divine law relative to their official conduct. Once the basic obligation of a judge is to pronounce a decision or a sentence conformable to the facts presented and proved in testimony, he is expected to be as impartial and objective in his assessment of the facts as is humanly possible. In this respect the Canons of Judicial Ethics followed by the American Bar Association lay down that the judge 'should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favour, or that he is affected by the kinship, rank, position or influence of any party or other person. He should not be swayed by partisan demands, public clamour or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.

It is well known that in trials by jury, the facts of the case and the credibility of the witnesses are expected to be weighed and decided by the jurors and that the official duty of the judge is con-

[6] Willem Ariens: 'The Function of the Judge in our Time', in *Concilium*, vol. 5, n. 5 (May 1969) p. 49.

fined to decide points of law. It cannot be denied, however, that the attitude manifested by the judge throughout the judicial proceedings, and particularly his address to the jury, frequently exert a strong influence on the formation of their verdict. Theologians point out that the sentence, which is the judge's essential responsibility in the performance of his professional activity, must necessarily proceed within the framework of the law, he must in his eager search after the truth endeavour to form a moral conscience through the study of the judicial acts and documents and formulate his decision accordingly.[7]

In the light of these principles, it may prove helpful to consider and discuss briefly the more common conscience problems which confront judges in the performance of their duty, as was done in the previous section with respect to the lawyer's exercise of his professional activity. One of the first questions put forward concerns the moral obligation of the judge in the event in which he is confronted by the jury with the verdict 'not guilty', when from some extra-judicial source or even from personal knowledge he is morally certain that the accused actually committed the crime with which he has been charged, and conversely, when in the face of a verdict 'guilty', the judge knows from similar sources that the defendant is innocent. It is the unanimous teaching of theologians that in the former case, the judge is morally obliged to decide in favour of acquittal, if the evidence alleged in the trial is not sufficient to establish certain proof of guilt. The latter case is solved by theologians in the sense that the judge confronted by an innocent defendant who appears convicted by the available evidence, must do all in his power to arrive at the truth; failing which, if he remains firmly convinced of the innocence of the accused, he should give him the minimum penalty, once it is not in his power to acquit him. Another conscience problem not purely hypothetical, is the following: What should a conscientious judge do, if subsequent events prove that in pronouncing sentence he erred? The first consideration to be remembered here is that infallibility is not a human prerogative, not even on the Bench of Justice. Consequently, if the Judge is conscious of having conscientiously fulfilled his solemn obligation of studying the case carefully and has conducted it with his best ability and diligence, he may rest assured that he has done no formal or culpable wrong. If, on the contrary, he is aware that his erroneous judgement is attributable to negligence on his part in studying the case and devoting to it the necessary time and

[7] Cf. Roberti-Palazzini: *Dictionary of Moral Theology* (Burns and Oates, London, 1962) under the voice JUDGE, p. 668.

:ffort, or to his culpable ignorance he becomes morally bound, as n the case of the lawyer consciously undertaking and prosecuting ınjust lawsuits, to make restitution to those who have suffered naterial loss as a result of his negligence or incompetence. Of :ourse, the obligation of making restitution is still more evident ɔr stringent, if the material loss is caused not through erroneous udgement but through wilful injustice, motivated by considerations ɔf personal gain. In this connection, theologians investigate the ıuestion of 'gifts' offered to or accepted by judges. I prefer to use he word 'gifts' in place of the more despicable term 'bribe', which, ıs is well known, may be of various kinds. It should be quite clear hat if, in consideration of a gift, a judge pronounces judgement in favour of the party that has justice on his side, he should never:heless, return the gift, because he has sold a decision which he was already bound to render by virtue of his official position. If :he gift induces him to favour the side which is not in the right, he is morally obliged not only to give back the gift but also, unless :his is done by the party he has unjustly favoured, to make amends to the extent of the whole loss incurred by the victim of his injustice. Very wisely it is stated in the Canons of Judicial Ethics of the American Bar Association that the judge 'should not accept any presents or favours from litigants or from lawyers practising before him or from others whose interests are likely to be submitted to him for judgement'.

The last but by no means the least grave problem facing the Christian judge is that of the application of an unjust law. Theologians are agreed that in the face of an unjust law, a judge may not sentence the defendant to commit an immoral act or inflict on him a severe penalty, even if this entails the loss of his post or other grave consequences. This constitutes one of those grave, painful, at times heroic decisions, foretold by Christ the Lord in the Gospel, which test from its very depth the faith of those who profess themselves Christians. If, however, the principal act which is prescribed or prohibited by the unjust law is not in itself evil, the judge may apply the law which is considered to be unjust. As explained by Judge Ariens, the unjust law should be blamed on the legislator and not on the judge. This does not mean, however, that the judge is absolved of all personal responsibility in its application.

It is envisaged that certain dispositions of the Marriage Act, 1975, enacted recently in our country will present our judges with a number of delicate conscience problems touching matters of Christian religious belief and convictions. May, for example, a Christian judge pronounce null a consummated valid religious and

sacramental marriage, which by divine and Church law constitutes a divinely-joined bond, indissoluble by any human power, on the grounds of sterility in one of the partners, especially if the condition of sterility was unknown to both partners? Or for that matter, may the Catholic judge even take cognizance of nullity cases in marriages celebrated by Catholics in the religious form, when it is the teaching of the Catholic Faith that jurisdiction on the matrimonial causes of Catholics, affecting the marriage itself and not merely its civil effects, belongs exclusively to ecclesiastical judges, as declared in the Council of Trent?

It is certain that, whatever his Christian conscience may dictate to the individual judge, his declaration in these and similar cases cannot, be intended by him to mean more than a mere official declaration – and it may be necessary for him to make this explicit and clear – that the State regards the civil effects of that particular marriage as no longer existing.

Conclusion

I would like to close these considerations on the same note on which I opened them and by a reference to the same source, the teaching of Vatican Council II.

'Therefore, let there be no false opposition between professional and social activities on the one part, and religious life on the other. The Christian who neglects his temporal duties neglects his duties towards his neighbour and even God, and jeopardizes his eternal salvation... In the exercise of all their earthly activities, they (Christians) can thereby gather their humane, domestic professional, social and technical enterprises into one vital synthesis with religious values, under whose supreme direction all things are harmonized unto God's glory'.[8]

Need I add that I have said nothing new or uncommon in these papers?[9] I imagine that those readers who have persevered right up to this concluding paragraph may be telling themselves: 'We know these things; we have known them ever since'. In this case, it would not be out of place to remind them of Christ's remark to a prospective follower, who made the same comment: 'Very well, then; do them, and you will be saved'.

[8] *The Documents of Vatican Council II:* Constitution on 'The Church in the World Today', n. 43.

[9] I am chiefly indebted for this contribution to the studies on this subject by the late Professor Francis J. Connell, former Dean of the School of Theology of the Catholic University of America in his work entitled: *Morals in Politics and Professions* (The Newman Press, Westminster Maryland, 1961).