REVITALIZING THE ECCLESIASTICAL PENAL SYSTEM: AN EXAMINATION OF OPPORTUNITIES FOR RESTORATIVE JUSTICE WITHIN CATHOLIC CHURCH'S SANCTIONING FRAMEWORK

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Abstract:
According to an October 2023 panoramic report that was released by the Vatican's Fides News Agency, there were 1.375 billion Catholics in the world, representing an overall increase of 16.24 million Catholics compared to the end of 2020 (Lodigiani 1-9). The Catholic Church, just like any society that transit from being simple to complex due to population growth, is experiencing tensed relationships that are caused by the breaking of ecclesiastical laws that are meant to keep relational ruptures at bay within it. As the relational problems become more complex so also are canonical crimes such as delict against the sixth commandment of the Decalogue, offences relating to faith, morals, sacraments and the management of temporal goods. Hence, in the light of the Latin dictum ubi societas ibi ius (wherever there is society, there is law) the Catholic Church has in recent times reformed its penal system to address the crimes and offences that are committed by its members. In spite of the efforts being made by the Catholic Church to maintain order within its ranks through the pursuit of justice through the observance of judicial penal process that sometimes lead to the imposition of penalties, it is yet to achieve its goal of repairing scandals, restoring justice and reforming the offender. The finding of this paper is that there are provisions of the 1983 Code of Canon Law that propose the avoidance of conflicts at all cost and the need to search for alternative routes other than judicial penal process in the reformation of offenders. This paper will employ the dialectical method in its investigation which will, through reasoned argumentation, view the positions of the proponents of stricter and a more humane application of penalties with a view of arriving at a reformatory process that lies in the middle - the restorative justice.

Key words: Penal system, Sanctions, Access to Justice, Restorative justice, Social order.

Introduction

The penal system of a society exists mainly to ensure that order is maintained within the polity. Man lives in a web of complex relationships that bring together people from different backgrounds to eke a living for themselves within the same social space. Because of the existence of conflicting interests of those living within the same social space, the emerging cases of individual clashes, the disruption of cohesion and civil cohabitation abound; hence the necessity of deploying a system that guarantees order. The Catholic Church, being a reality that brings together men and women from across the globe, irrespective of race, culture and color to pursue a creedal orientation that lead to the ultimate salvation of souls, has within her substratum, palpable features like, visibility, independence, externality, territorial boundary, people, laws (*lex fundamentalis and Codex Iuris Canonici*) and leadership structures that reflect the constitutive elements of a perfect society. Although the Church is a perfect society, her social character cannot be likened with any other reality of human aggregation because her specific orientation and finality are the salvation of man. Thus, considering the sacramental structure and the salvific mission of the Church, is it proper for her to inflict penalties on those who disobey her laws? Is the imposition of sanctions by the Church not a contradiction of her seminal teaching as regards the freedom of religion and the right of an individual to choose how he/she would want to live his/her life? Pope Paul VI declared in *Dignitatis Humanae* that:

> No one therefore is to be forced to embrace the Christian faith against his own will.... It is therefore completely in accord with the nature of faith that in matters religious every manner of coercion on the part of men should be excluded (par. 10).

In the light of the principles being employed to ensure social order within the Catholic Church, the above Papal declaration may seem to have created a major problem because the classical penal system of the Catholic Church may be viewed as an instrument of a coercion to embrace a faith which is diametrically opposed to the position of the Second Vatican Council that prohibits any form of "coercion to believe" (Botta 11). In spite of the doubts that may exist in the mind of many with regards the existence of a Penal System within Church, it is instructive to note that it has nothing to do with the proscription of the religious freedom of anyone. In fact, De Paolis has argued in favor of the institution of ecclesiastical penal system thus:

> As long as sin exists with the violation of the norms regarding ecclesial coexistence, it is precisely necessary that in order for the Church to suitably pursue the mission entrusted to Her by Her Founder, must have a coercive means, so that the necessary ecclesial discipline can be guaranteed for the Supreme Good, that is, the salvation of souls (445).

This work is an attempt to argue in favour of the Catholic Church's sanctioning framework as it is found in her penal system. It will further maintain that it is in the nature of the Church as a perfect society to impose sanctions on her erring members and will equally evince the rationale behind the imposition of sanctions in the Church. Moreover, the paper will argue in the affirmative that there is nothing wrong with the existing ecclesiastical sanctioning framework on the one hand and will propose a flexible, participatory and problem -solving alternative in repairing the disruptions caused by delicts within the ecclesial communities on the other hand.

Ecclesiastical Penal System and the Maintenance of Social Order

The word "penal" ordinarily suggests punishment or a form of punitive measures. The word Penal is therefore defined as, "Punishable; inflicting a punishment; containing a penalty or relating to penalty" (Black 1133). Legal experts have always viewed the Penal method as one of the techniques of social control and it exist mainly in "the realm of the criminal law" (Shikyil and Gidado 86). The thrust of this technique is the creation of rules to prohibit certain deviant behaviour. In the civil society, the penal system involves the maintenance of law enforcement agencies like the police force to prevent, detect and prosecute infractions or contravention of the penal law. Shikyil and Gidado contend that:

> The application of penal method is found preferable as an engineering mechanism of social control because of the fundamental injustice existing in society which creates tensions, leading to deviant behavior. When a person is denied social justice, he or she is likely to revolt against society and engage in deviant or anti - social acts. In this regard, the only effective means available to society to contain such deviants is the penal method which does not(sic) only prevent further anti-social behavior because of incarceration and such related punitive devices but the method has a stigmatizing or labelling effect which serves as a break or wedge to deviant behavior (87).

Although sanctions are hinged on tripod principles of retribution, deterrence and rehabilitation, reality checks have revealed that the method is not without its defects. The method may instead of rehabilitating, educating or reforming an individual induce a sense of revulsion in him or her against society thereby making him/her harder or emboldened

in his/her anti-social behaviour. It is evident from the postulation of Shikyil and Gidado that there are other methods that can be used to foster social control in the society.

Correspondingly, like the civil society, the Church has an inherent right (*ius nativum*) and proper right (*ius proprium*) to exercise power over the offending members of its community and to impose on such offenders, appropriate penalties, censures and penances (Can. 1311). The natural right of the Church to impose penalties is grounded in the reality of the Church being founded by Jesus Christ and therefore, by divine will. This right is proper in the sense that it is exercised by the Church in its own name, and it is not performed in the name and under the Civil Authority. Undoubtedly, in the exercise of these *ius nativum* and *ius proprium*, the Church is expected to be guided by the personalist principle that guided the redactors of the Second Vatican Council drafters of the *Codex Iuris Canonici* (CIC 1983) that places accent on the significance, uniqueness and the inviolability of the human person. Hence, the *Codex Iuris Canonici* has eliminated every doubt about the prevalence of the medicinal character of canonical sanctions. The underlining doctrine of ecclesiastical penal system seems to stress, not without ambiguity though, that the interpretative key of the Church's teaching on sanctions points to the fact that they have been decreed for the purpose of healing (Riondino 17). It is for this reason that Bishops and Ordinaries who have the power to impose sanctions should never be oblivious of the fact that they are Pastors and not Persecutors, Healers and not Torturers. There is no ambiguity therefore that:

> Penalties in the Church seek to promote the very purpose of the Church, namely the 'salvation of soul' (*salus animarum*), which is the axiom of Canon Law. The Church, by means of disciplinary norms, also fosters the integral unity and communion (*communio*) of its members by repairing those deficiencies in the individual good and the common good that have come to light in the anti-ecclesial, criminal, and scandalous behavior of the members of the People of God (John Paul II 422-427).

It is deducible from the position of the Phenomenologist that sanctions and/or penalties are like the sacraments of restoration of order that was broken by a delict/crime.

This paper maintains that the purpose for which penalties are imposed by competent authorities in both the civil and ecclesiastical legal spheres is to mend and to heal the ruptured relationships that stifle growth within the society and that a penalty lacks exclusive foundation in the commission of a delict but also in the imputability of the delict on its author and the derivative responsibility thereof.

The Rationale for Canonical Penalty

Some Canonists have maintained that the veritable instrument the Church possesses in the maintenance of an order (*bonum ordinem*) that is ruptured in the community of believers is the power to sanction (*potestas coactiva*). De Paolis, is one of the proponents of the absolute exercise of the Church's Power to Sanction (*potestas coactiva*) and he maintains that the "Church, as a visible society, needs to regulate the conduct of her members in a desirable manner. When the misdeeds of the Church members are of serious nature and they have become public and clearly contrary to faith, morals and discipline of the Church, the community must respond to them with sanctions" (27). In his reflection on the need for competent ecclesiastical authority to pursue primarily the restoration of ruptured relationships in the Church, Neli holds that:

> The coercive power of the state (Church) is considered to be corresponding to the requirement to oversee the common good, to contain the spread of behaviors

> injurious to human rights and the fundamental rules of civil co-existence. Appropriate measures of penalty are established to remedy the disorder caused by offence and to contribute to the correction of the offender. But punishment does not serve merely the purpose of safeguarding the public order and guaranteeing the safety of persons; it becomes as well an instrument for the correction of the offender, a correction that also takes on the moral value of expiation when the guilty party voluntarily accepts his punishment. Therefore, a twofold purpose is in the mind of the Legislator: first, encouraging the re-insertion of the condemned person into society; and secondly, fostering justice that reconciles, justice capable of restoring harmony in social relationships disrupted by the criminal act committed (9).

The proponents of absolute use of *potestas coactiva* seems to gloss over the *mens legislatores* (the intention of the law maker) of Canon 1341 which encourages *inter alia* that it is only after ascertaining juridically that an offence has been committed and after exhausting other means of pastoral solicitude, fraternal correction and reproof that a recourse to penal process should be made as a means to repair scandal, restore justice and reform the offender. This must be done in pursuance to the laid down process being provided by the Supreme Legislator and the imposition of the penalty must be as an *extrema ratio* (last resort). In the light of canon 1341, this paper maintains without equivocation that sanctions and penalties in ecclesiastical penal system are not ends in themselves, but they are actually a means to an end. It is only the failure of pastoral solicitudes and the insufficiency of other means of repairing scandal (*scandalum reparari*), restoring justice (*iustitiam restitui*) and the reformation of the offender (*reum emendari*) that will lead to recourse to penalties. To achieve the medicinal (*reum emendari*-reformation of the offender) and expiatory (*scandalum reparari* –repairing of scandal and *iustitiam restitui* –restoration of justice) end of a (penalty), the Ordinary is called to use other means that is not penal, which is a last resort, after having developed a correct and balanced judgement, which attest to the use of the other means that are mentioned in the norm (Cf. D'Agostino 114; Riondino 14).

Maintenance of Ecclesiastical Order and the Protection of Individual Freedom

A discerning observer of curial activities affirms that one of the daunting tasks of the Church's hierarchy is the struggle to strike a balance between maintaining ecclesiastical order and protecting individual freedom. Among diocesan consultors who aid the Ecclesiastics to discharge their duties as it is prescribed in the Code of Canon Law (CIC 1983), there are those who for lack of appropriate term, the researcher may loosely refer to as the “Conservatives” who advocate for the promulgation of stricter administrative acts that will proscribe the insidious spread of heinous crimes like delict against the sixth commandment of the Decalogue, heresy, apostasy, misappropriation of funds and disobeying liturgical norms, just to mention a few, that are gradually becoming prevalent in the Church. On the other side of the divide the competent authority will have to contend with a certain school of consultors that the researcher will refer to as the “liberals” for want of appropriate term, who advocate for a more humane application of ecclesiastical laws in the treatment of delicts. They hold that the use of stronger crime control measures will endanger the values of justice and due process. In the light of such pulls, the competent authority will be expected to be effective in the screening of suspects, thorough in previous investigations, compassionate in determining of guilt, intentional in the pursuit of justice for the victim and clement in the imposition of sanctions. They claim that “strict measures are ineffective because the answer lies in reshaping the lives of offenders and changing the social and economic conditions from which criminal behaviors springs” (Packer 8).

Since most Competent Ecclesiastical Authorities are pulled between imposing stricter measures and tampering justice with mercy in the face of delict that ecclesiastical order and the Code of Canon Law (CIC 1983) is silent about, or rather is not exhaustive in enumerating the other means to be used in ensuring order within the ecclesial community, it will be safe to propose restorative justice as one of those means that were not mentioned by the Supreme Legislator.

The Concept of Justice

There is no generally acceptable single definition of the word justice. However, it can be said to be: treatment of people fairly and morally right; the fact that something is reasonable and fair; the legal process of judging and punishing people; a fair result or punishment from a law court. The word justice is a common parlance that spices conversions across board. It is on the lips of everyone nowadays. Alubo lends his voice to the plethora of debates on the ambiguity of the concept of justice thus:

> The classical definition of justice comes from people such as Plato, Aristotle, Saint Ambrose and Saint Augustine expressed in a single phrase *suuncuique* or 'to each his own'. It is an extremely difficult term to define. There is indeed no term more difficult to define like justice. Tyrants, autocrats, rebel leaders, freedom fighters, Nazis, Fascists, democrats and lawyers alike have their perceptions of what justice entails (2).

Similarly, Edgar Bodenheimer in his Treatise on Justice affirms that:

> The concept of justice has many dimensions: among its numerous facets are avoidance of injury, fulfillment of obligations, granting opportunities for the satisfaction of basic material and non-material needs, concern for freedom, equality and security, fairness of compensation in contract and tort, proportionality of reward and punishment (8).

It is because of such divergent views on justice that the moment a Competent Ecclesiastical Authority decides on a matter that has the capacity to disrupt ecclesiastical order you will naturally have a barrage of splitting opinions depending on where one stands.

It is intended in this work that a simplistic definition of justice is given, devoid of any legalese that would have been employed by canonists and legal experts. The paper therefore adopts the definition that is given by the Catechism of the Catholic Church, that, “justice is the disposition to respect the rights of each and to establish in human relationships the harmony that promotes equity with regard to persons and to the common good. It is distinguished by habitual right thinking and the uprightness of ones conduct toward one's neighbour” (1807). Justice is therefore a tripartite affair in the ecclesiastical penal system. It means justice for the complainant, justice for the accused and justice for the Church.

Access to Justice

The term access to justice just like justice does not have a universally acceptable definition. Scholars have given it different definitions depending on their backgrounds and their area of specialty in the law profession. In the context of this paper, access to justice shall include:

> The opportunity an individual or persons (natural or artificial) have to approach the machinery of justice (in this case, the international, regional or sub-regional framework or institutions or structure) to seek redress where his or their rights are

> threatened or violated and obtain a fair, affordable, accessible, respectful and efficient legal process, either through formal or informal legal system such as judicial, administrative, or other public process, resulting in just and adequate outcome (Rhode no. p).

The Church has always provided channels through which justice can be obtained by those who are aggrieved by the actions of some members of the Church, actions that threatened harmony and peaceful co-existence. It is for this reason that you have within the Church various tribunals (those of the first instance at the diocesan level, the second instance at the provincial level and the third instance, the Roman Rota and the Apostolic Signature). However, in spite of the existence of various channels through which people can access justice in the Church, a combination of various factors that range from the dearth of judicial personnel, cultural biases that forbid the search for justice, the fear of being libeled as 'a trouble maker' and the conspiracy of silence which is the secret agreement to keep silence about an occurrence, situation, or subject especially in order to protect selfish and parochial interests.

Pope Francis has advocated for access to and speedy delivery of justice. Most of the judicial reforms that have taken place in Church during his Papacy from the promulgation of the document *Mitis Iudex Dominus Iesus* (The Gentle Judge, Our Lord Jesus) of 2015 to *Pascite Gregem Dei* (Tend the Flock of God) of 2021 in which he reformed Book VI of the Code of Canon Law are aimed at enhancing access to justice. In fact, the mien of the Pope and the content of his writings and discourses have indicated his predilection to the dispensation of justice to all. In his address to the Members of Italy's High Council of the Judiciary, Pope Francis addressed them thus:

> You are called to a noble and delicate mission. You have the responsibility of responding to the demands of the people for justice, which in turn demands truth, trust, loyalty, and purity of intention. You are called to listen to the cry of those who have no voice and who suffer injustice because your vocation is a duty at the service of human dignity and the common good...The justice system requires periodic reform. It was St Catherine of Siena, one of the patron saints of Italy, who taught that in order to reform something, one must first reform oneself. In the context of a reform of the judicial system this means asking "for whom" justice is administered, "how" it is administered, and "why" it is administered. "For whom" justice is administered implies a relationship in a world that has become more connected but that has paradoxically become more fragmented. In this context, restorative justice, based on relationships, can be recognized as the only true antidote to revenge and oblivion, because it looks to the re-composition of broken bonds and allows the reclamation of the land stained by the blood of the brother.... (no. p).

It is obvious that everyone would love that he/she is treated fairly and what is his/her due is being given to him/her but in the light of the factors that militate against proper access to justice in the Church and the African cultural practices that advocate for alternative dispute resolution methods such as mediation and conciliation, which are within the realm of substantive justice, this paper proposes the incorporation of restorative justice into the ecclesiastical penal system for a holistic justice delivery.

Restorative justice and the Church's Penal System

Restorative justice has been defined by a number of scholars, and therefore requires no further elucidation, but in the context of this paper, the author will adopt two definitions. Firstly, restorative justice is defined as "a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs

and obligations, in order to heal and put things right as possible" (Marshall 37). Secondly, it is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behaviour. It is best accomplished through cooperative processes that include all stakeholders" (Zehr 37). Thus, Restorative Justice is a process that is relatively new in the search for the best means to mend ruptured relationships that are caused by the commission of delict. It brings together all the parties with a stake in a particular delict that is committed for a frank conversion on how to collectively resolve the impasse, deal with its corollaries and prevent future reoccurrence. According to Debra Heath-Thornton, "restorative justice, includes direct mediation and conflict resolution between the offender, the victims, their families, and the community. It holds the offender accountable to the other parties while also providing the offender with learning experiences that offer law-abiding lifestyles as realistic alternatives to criminality" (no. p).

Although, the 1983 Code of Canon Law provides that "all Christ's faithful and especially Bishops, are to strive earnestly, with due regard for justice, to ensure that lawsuits among the people of God are as far as possible avoided, and are settled promptly and without rancor" (1446); it is observed however that most judicial officials in ecclesiastical tribunals and commission of inquiry will prefer to go the tortuous way of judicial process which in most cases does not take cognizance of the victims perspective in the matter under trial. It is the will of the Legislator that trial must be avoided as far as possible. A parallel study of Canon 1341 of the 1983 Code calls for refraining from undue preponderance towards the retributive approach to justice when it affirms that all means, including pastoral solicitation must be employed to correct an offender before the imposition of penalties.

There are situations in which a matter may be considered a *res iudicata* (a matter judged) by a tribunal or a commission of inquiry but you will notice that both the victim (complainant) and the offender (defendant) will continue to nurse a feeling of dissatisfaction which will eventually transmute into contempt to every form of judicial or administrative processes that are put in place to bring justice because they feel that the issues are not properly addressed. One of the reasons why this feeling of despondency in the judicial system is created is because very often a crime goes beyond the creation of rift between friends, relatives, neighbours and communities; it equally produces a hostile relationship where no previous relationship had existed (Sharpe). An often overlooked result of crime is that victim and offender have a relationship- they have a painfully negative experience in common. Left unresolved, that hostile relationship negatively affects the welfare of both. Therefore, in the words of Debra Heath-Thornton, justice requires restoration for victims, offenders and communities affected by crime. To promote healing, society must respond to the needs of victimized parties as well as the responsibilities of offenders" (no. p).

The participatory nature of restorative justice offers the victim who suffers physical or mental injury, emotional suffering, economic loss or substantial impairment of his/her fundamental rights to dialogue with the offender who through acts or omissions that are in violation of criminal laws operative within the ecclesiastical penal system causes a disruption within the ecclesial communities.

Since the Church's intention in all her dealings is geared towards directing every Christian, nay every person of good will to attain the destiny God has assigned to each and every one; the ecclesiastical penal law and the procedural process being provided by the Supreme Legislator to guarantee social order must be particularly conscious of the dignity of the human person and attentive to the specific conditions and situations of every single culprit and victim. In order to achieve a positive outcome of the medicinal and expiatory purposes of restorative justice, values such as truth, fairness, physical and emotional safety of participants, inclusion, empowerment of participants, safe guarding of victims'

and offenders' rights, reparation, solidarity, respect and dignity for all involved, voluntariness and transparency of process and outcomes must be guaranteed.

The Imperfection of Penal Systems and a Case for Restorative Justice

There is no penal system that is perfect. The ecclesiastical penal system is imperfect but it is its imperfection that makes the Church to constantly exhort the offender to interiorize the reformatory values of the system and to seek reconciliation with the victim (see Canon 1446 CIC 1983). The ecclesiastical penal process is not the sporting system where everyone is bent on winning. The ecclesiastical penal process is oiled by the search for truth, the reformation of the offender and the reparation of scandal. It is for this reason that the Church cannot be indifferent in the face of a delict that springs within its belly: if the Church fails to act, it would be a betrayal of its mission and on the part of the Pastors it would mean that they have failed in their responsibility.

We have seen from the onset that despite the imperfection of the ecclesiastical penal system, the imposition of penalties in the Church is directed to the achievement of the canonical goods: i) for the good of the individual offender and for the integrity of the community; ii) for the conversion of the offender; iii) for provision of certain spiritual goods to induce the delinquent to repentance; iv) for prevention of crime (canonical offences); and v) for the warning of other members. It is essential to note that the good being pursuit through the imposition of penalties in the Church are not different from the goals on which the civil legal system stand. In fact:

> The law comes in to create a balance by ensuring that the tripod stand called justice, is firmly on its feet by striking a balance with the victim who has been wronged, the society whose norms and values are upset and the wrongdoer whose rights cannot be in abeyance even after commission of an offence. Ideally, this synergy ought to be perpetually maintained but is not the case in our experience with the legal system (Ballason 120).

The tenor of ecclesiastical laws as are contained in the 1983 Code of Canon Law has offered a ground on which restorative justice can be introduced within the legal framework of the Catholic Church's penal system. Canon 1341 provides that the imposition of penalties must be an *extrema ratio* (last resort); Canon 1446 provides that Ecclesiastics and the Lay faithful must avoid as far as possible every law suit and must amicably resolve every rancor and lastly, Canon 1713 provides that for the avoidance of judicial disputes, settlement and reconciliation should be pursuit and when they fail, one or two arbiters should be invited to mediate. Consequently, this paper posits that due to the imperfection of the penal system in the provision of justice, restorative justice will be a paradigm that will foster responsible and conciliatory functions. However, if in the course of mediating process, it becomes clear that the offender (defendant) is recalcitrant and contemptuous to the process and all efforts to make him//her take responsibility of his/her action after it is proven through investigations that he/she is guilty of the crime and it is clear that he/she might fall into contumacy and the community might be unsafe with him/her running around with a strut; this paper's standpoint is that the Competent Ecclesiastical Authority should impose the penalties in accordance with the provisions of the law.

Conclusion

Crimes were committed from the inception of the Church and punishments were equally meted out, sometimes with ferocious intent. But up until today, the reasons for which penalties have been imposed, viz, retribution, deterrence, rehabilitation, repairing of scandal, restoring justice and reforming the offender seem to be a pipe dream. This is

probably because of the ineffectiveness of the strict measures being taken to mend the relational ruptures that are caused by the commission of crime in the Church. The conjecture of this paper therefore is that the responses to crime in the Church cannot be limited to punishing, nor can they be configured to retaliations for the offences committed; but must favor suitable methods that place at the center of proactive and retroactive response to crime, the recognition of the responsibility of the offender towards himself and towards the victim. Because it is only encounter with the face of the other that engenders the assumption of responsibility for the crime committed.

This paper does not pretend to be exhaustive in its treatment of the Church's Penal System that is found in Book VI of the 1983 Code of Canon Law. The paper cannot be exhaustive in treating the penal system of the Catholic Church because it is an area that is so vast, an area that with the *motu proprio* of Pope Francis, *Pascite Gregem Dei* (2022), has gone through a reform. In spite of its deficiencies in terms of the coverage of the themes, it is hoped that the position of the paper would increase further research in the development and deployment of restorative justice within the Church's penal system.

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