Canon Law and Constitutional Law : A Lawyer's perspective

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1. Introduction

Canon law has substantially contributed to the development of constitutional law and legal culture around the world. It has left a mark on the jurisprudence of every country, more specifically on that of the west. In respect of the Catholic Church, the object of Canon Law, is to serve as a legal instrument, for the life of the People of God, so that the community of faith can translate the values of the kingdom, into reality, in accordance with the demands of justice and mercy. Faith needs to be reflected in a legal arrangement. However, as the faith is lived in a social, political, economic and cultural context, the Canon Law has to meet the challenges in their respective domains. Therefore, by its very nature, Canon Law has a duty to cope-up with the challenges of times and the context. Theology provides vision for the Church, whereas Canon Law provides norms, tools and a system for action. That is the reason, in spite of the wall of separation between the Church and the State, there is a constant interaction between Canon Law and Civil Law.

In some of the western countries, there is an agreement or *concordat* between the Church and the State, whereas in the Asian countries, such as India, there are no defined frontiers, between the church law and the state law. These frontiers become clear through praxis and in the bilateral march of law. It may be in the form of a conflict or convergence. However there are personal laws, codified or customary, in respect of different religions in India, including Christianity. In this context, unless we develop a dialogical openness towards civil law, canon law may become, either irrelevant in the civil society or considered as a site of conflict.

From the perspective of a civil lawyer, I will confine my introduction to certain insights, from the perspective of constitutional law, and more specifically, from the perspective of the basic structure doctrine of Indian Constitutional law. It is not a scientific paper. It is only a loud-thinking, with a view to enrich our system of ecclesial governance.

2. Basic Structure Doctrine in the Indian Constitutional Law

The civil law in India is rooted in the Indian Constitution, which is a social document reflecting the collective consciousness of the people, providing a body of norms and procedures, to protect the individual and the community and to accommodate the new

political and social developments. Even though it is the longest written Constitution in the world, it further develops every day, expanding its domain in every walk of life through judicial legislations and precedents. This is possible through the interpretation of various laws, by the constitutional courts. The binding precedents through the *ratio-decidendi* is an accepted form of march of law in Indian jurisprudence. But whatever be the development or amendment of law, certain fundamental concepts in the Constitution cannot be altered. This is called the "basic structure doctrine" in the constitutional law.

This doctrine is the balancing wheel, to uphold continuity amidst change. The basic structure of the Constitution is the anchorage of the permanent will of the community, as enshrined in the Preamble to the Constitution and elucidated in the Fundamental Rights and the Directive Principles of the Constitution. The Fundamental Rights are based on human dignity and the Directive Principles are based on common good. By a nuanced and juridical constitutional interplay, they result in social justice. By the amending powers of the Parliament, the basic structure of the Constitution cannot be tampered with. This is the golden rule of constitutional law, protecting the basic structure from the vicissitudes of politics. The vires of any provision in the Constitution or any legislation or executive fiat can be tested for its constitutionality, as against the basic structure of the Constitution.

Similarly, in Canon law, there has to be a hierarchy of absolute truths and the hierarchy of relative laws. In this respect, we can refer to the last of the Canons in C. 1752, wherein it is stated," observing canonical equity and keeping in mind the salvation of souls, which in the Church must always be the supreme law". That apart, '*Love of God and the Love of the Neighbour'* is held to be as the greatest commandment, and forms the basis for canonical governance, referred by St. Augustine, as *Doctrina Salutaris* or Foundation of Christian Faith. They also talk about the fundamental canonical norms or *Lex Ecclesiae Fundamentalis* or the charter of canonical norms or the Constitutional Law of the Church to be promulgated in the light of the norms of the Second Vatican Council. It is a question whether the canonical provisions can be challenged based on this Fundamental Doctrine of the Church. Therefore, there has to be a hierarchy of laws within the canonical scheme of governance, wherein a subordinate canons can be tested for their canonical vires, as against the fundamental or Constitutional law of the Church. Any Canon has to be tested against the above referred basic doctrine of the Church. Not all the Canons stand on equal footing on the scale of priority.

Now, we have to consider, what are the elements that constitute the basic structure of the Indian Constitution:

a. The Rule of Law
b. Separation of Powers
c. Right to Equality, Freedom, Life and Liberty
d. Secularism
e. Independence of the Judiciary
f. Procedural Propriety, Transparency and Information

These principles jointly form the bed-rock of the Indian Constitution, over which the super-structure of the life of the people and the governance of the State are intricately structured.

a. The Rule of Law:

Dicey, the father of the *doctrine of rule of law* contends that, "where there is discretion, there is room for arbitrariness." The doctrine of rule of law connotes the absence of arbitrary power and restriction of the discretionary power. That means the person in authority does not enjoy wide, arbitrary and discretionary powers. The rule of law always raises a question: "Is the intention of the legislator, more important than the wording of Law?" The legislator loses his/her power, on the law, immediately after the promulgation of the same. Only when there is ambiguity, in the text, the legislator can play a part. The duty of upholding the primacy of the text is an absolute condition, for the future credibility of Canon Law. This is referred to in Canon 17 of the present code as follows:

> *"Ecclesiastical laws are to be understood according to the proper meaning of the words considered in their text and context. If the meaning remains doubtful or obscure, there must be recourse to parallel places, if there be any, to the purpose and circumstances of the law, and to the mind of the legislator."*

This canon indicates loyalty to the text and in ambiguity to purposive interpretation. This kind of interpretation is also recognised under constitutional law in India. But it is problematic when the local legislators interpret the universal law, with an object of pastoral equity, the vires of which cannot be immediately confirmed.

But, in the canonical system, the legislator is the judge and the head of the executive, and he remains the master of the text. In case, if the content of the text does not please him, at the moment of implementation, there is a possibility that, the legislator can invoke his power of

interpretation and read his intention into the text. This is the supremacy of the ecclesial power over legal orthodoxy, which is detrimental to the rule of law. The Rule of Law becomes subservient to the Ruler of the Law. Therefore, the doctrine of rule of law is diluted, in the process of canonical interpretation. This position is unacceptable under civil/constitutional law. Though there is a commission for interpretation of Canon law in Vatican, there is no permanent organ at the local level.

b. Separation of Powers:

In Civil Law, there is a clear separation among the three organs of the State, namely, the Legislature, the Executive and the Judiciary. Unlimited powers jeopardise the freedom of the people. It will lead to authoritarian and oppressive form of governance. The rule of law, not only confers power on each organ, but also seeks to restrain these powers. Constitutionalism recognises the need for governance, but insists upon the limitations or the jurisdiction of the governmental powers. These checks and balances among the three organs, are intended to prohibit the exercise of uncontrolled and arbitrary powers.. In order to maintain the dignity of the person and the common good of the people, in-built restrictions are required on the governance of the ruler.

Under canonical governance, there is no clear-cut separation of powers. Due to concentration of various powers on the Episcopal office, there is a conflict of interest, that may lead the discretion to prevail upon the rule of law. Though Canon law provides for limitations to the power of governance, only the Holy See can monitor. Apart from that, there is no monitoring system in various countries or in the local church. In this respect, even the Episcopal conference or the Regional councils are not vested with the power to monitor the same. The Canon Law requires to initiate a critical examination, to evolve a viable separation of powers, without diluting the unique identity and the character of episcopacy. The new Code may address this issue.

c. Equality, Freedom, Life and Liberty:

These three values form the golden triangle in the Indian Constitution, based on human dignity, resulting in human rights. Any law has to satisfy the compliance of these constitutional norms.

i. Equality demands equality of status, opportunity, equal protection of law and equal treatment before law. Any discrimination on the basis of caste, sex or religion cannot be

tolerated under the rule of law. The Church being a hierarchical structure, the question of equality contemplated under Canon 208 is only a vision/ aspiration and its implementation is impractical. The Canon Law by its very nature, empowers the Bishops, Clergy and the religious, whereas the scope for the power of the laity is highly restricted. While accepting in principle, the democratic governance in the Church, there is no corresponding mechanism for a participative democracy, at different levels of canonical governance. This has to be a serious concern and a challenge for the canonists.

The canonical concern of equality does not address the question of caste- hierarchy in the Indian society, having impact over the Indian Church. The Indian Constitution has many provisions and special laws under Civil Law, to address the issues of caste-discrimination, inequality and untouchability. But, Canon law does not have any specific provision to address this issue. Similarly the question of racial discrimination, in the context of tribal communities, is alsonot addressed by Canon law. This is a matter of serious concern for the Indian canonists.

Similarly, there is no basis to ascertain gender equality within the Church, so long as the theological question of ordination to women is not resolved by the Church. As such, the canon law can only act upon a theological decision and cannot go against the same. However, we accept that absolute gender equality is not a reality, in the governance of the Church, and this position militates against the principle of Constitutional equality. It is beyond the scope of Canon Law.

ii. The right to freedom implies the freedom of speech and expression, freedom of worship and religion, freedom of assembly and association, freedom of residence and movement, freedom of occupation and profession, etc. Within the Church, the avenue for freedom of speech for the laity, is very narrow. The right to freedom of speech and expression is an area, which needs to be expanded under the canonical scheme of governance. Any criticism has to be understood as an opportunity for dialogue and growth.

The right to worship and religion cannot be fully exercised without the corresponding rights under Civil Law. The Indian Constitution provides for the same. Being a minority religion, in a majoritarian, hindutva ambience, this right to religion has to be prudently protected and promoted. The canonists have to be all the more alert to the

growing intolerance of the majority community in India, due to divisive political agenda.

iii. The right to life and liberty is sought to be expanded in to different areas of human life, such as right to food, shelter, health, education, employment, environment and in short, a life with dignity. This right to life and liberty has been sufficiently expanded under the social teachings of the church. However, there is no parallel development, under the canonical scheme, which is a matter for reflection.

d. Secularism:

The freedom of religion and secularism are the two sides of the same coin. Once upon a time, the Church was allergic to secularism, in the light of the French revolution and renaissance. But in the Indian context, religious freedom cannot be understood or interpreted or practised without secularism. Inter- religious dialogue and cross- cultural transactions demand a re-visit into the canonical scheme of secularism.

The constitution protects not only the freedom of religion, and for that reason, any faith and belief, including atheism. This is rooted in human dignity resulting in human rights. The biblical basis of human rights is rooted in the doctrine of human beings created in the image of God. But, the secular principle of human dignity is prior to the Church and to the State. It is accepted by the teachings of the Church. There had been great movements in the society to identify the origin of human dignity and broaden the scope of human rights, irrespective of religion, race, colour, sex or belief. The Church has learnt a lot from these historical moments. The principles of freedom, self determination, equality, justice, participation, inter-religious solidarity and universal brotherhood can be realised only in a secular context, especially in India. This broad vision has to be canonically interpreted for religious freedom in a multi-religious, multi-cultural, multi-lingual, multi-ethnic context.

e. Independence of the Judiciary

Whenever the legislature or the executive acts in excess of jurisdiction, the judiciary steps in. The jurisdiction of the Supreme Court or the High Court is very wide. These constitutional courts have the power of interpretation, to test the constitutional vires of any decision,. Many laws are struck down or provisions are read down. Any governmental action can be scrutinized to assess whether it confirms to the constitutional norms. The judiciary has a duty to protect the fundamental rights of the people and plays the role of a guardian of human dignity and common good. Any person complaining of breach of

fundamental right can invoke the High Court or the Supreme Court, not only in personal interest, but in a pro-bono action. An independent judiciary, vested with the power of judicial review, is part of the basic structure of the constitution.

The canonical scheme has to be re- visited at the universal and local levels, to assess the quality of its independent judiciary, to intervene into the subordinate legislations and executive/administrative orders. Secondly, there is no scope for legal assistance under Canon law, for the aggrieved faithful, except in matrimonial issues. The other contentious issues are overlooked by the authorities and there is no provision for free legal aid, on par with civil law. In this respect, canon law has to explore the possibility for independent judiciary. How far it will be a workable system, in respect of local churches, throughout the world, is a big challenge.

f. Procedural Propriety, Transparency and Information:

During the colonial regime, secrecy was the rule of governance, whereas information to the citizens was an exemption. In the democratic scheme of governance, it is the other way about. Recently, right to information has become a statutory right, which is a fall-out of right to democratic life and liberty. The right to information is basic for transparency, accountability and procedural propriety in the governance. The principle of natural justice is common to both the constitutional governance and the ecclesiastical governance. Even the judicial process can be monitored on a day-today basis by any citizen. In this respect no litigant is left in the dark. Any judicial process once initiated, reaches a logical end, either acceptable or unacceptable. The provisions for appeal, revision or review are well defined and practical.

A critical assessment of the internal life of the Church, the transparent institutional/ecclesiastical structures, and well defined procedures, are demands of our times for fair canonical governance. Opaque procedures and unaccountable manipulations in the name of faith and doctrine will erode the credibility of ecclesiastical governance. Without procedural propriety, the modern society, will not accept the canonical decisions. It is antithetical to modernity and an informed society, which militates against the proclaimed objects of the Second Vatican Council, the *aggiornmento* and dialogical openness. The principle of Bernard of Clairvaux, that, 'whatever concerns everybody, has to be deliberated together', is the guiding principle of procedural law. But it is being overlooked at every turn. The canonical procedures have to be upgraded, in the light of information-

communication technology. The procedure has to be transparent, systematic and time-bound. A touch of professionalism is required or otherwise, the canonical process stands the danger of being rejected as obsolete and outmoded. Merit and excellence have to replace mediocrity in the canonical procedures.

The local church has to provide an in-house mechanism for redressing the grievances of the people of God. Otherwise, they cannot be prohibited from having recourse to common law in the civil courts. For this purpose, a reformation of structure is quite urgent. The CBCI/CCBI or the regional Episcopal Councils have to provide a mechanism for Arbitration Mediation and Conciliation, instead of indirectly forcing the people of God, to take a recourse to the Vatican, as no other avenue is open. It is not possible, due to distance, time, money and the mode of functioning of Dicasteries/ Signatura or Romana-Rota, for everyone to have a recourse. For this purpose, the Episcopal organizations in India, have to act as legal-entities and not simply as associations.

3. Conclusion

It will be a futile exercise to compare the governance of the 'people of God' as against the governance of the citizens in a secular democracy, but for a common ground, though minimal. The ecclesial governance is propelled by faith , grace, mercy, charity and love for salvation of souls. None of these elements have a role in secular governance of the citizenry. It is purely on the basis of secular values such as justice, liberty, equality, fraternity and sovereignty of the people. However, there are common grounds such as human dignity and common good, enunciated in the basic structure doctrine. In this respect, the Church can learn from the governance of the civil society. Drawing from secular sources and the faith experiences, the ecclesiastical legal frame can be enriched, empowering the people of God. The Church is ready to learn from the signs of the times, from the history and from the secular society. The God of truth and justice is God of history, experienced in time and space. This is the principle of contextualization. Let us be open and humble to learn from the secular democratic governance of the Indian society, so that the Indian Church can serve the world better. We welcome the light and the spirit, from any source, in tune with the Second Ecumenical Vatican Council.

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