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Capital Punishment: A Division of Magisterial Texts?

by

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Numbers 2266 and 2267 of the *Catechism of the Catholic Church* (1994) have had a profound effect on Western thinking since the clear direction of these societies is toward abolition (with the sole exception of the United States). The Catechism upheld the right of the public authority in cases of grave necessity to inflict the death penalty. This caused much indignation in the West, which had thought that the Catholic Church was doctrinally evolving in the direction of abolition. The question of the death penalty has become a burning issue particularly in the U.S. after the Supreme Court restored it after 1977. Only the U.S. of all Western democracies retains the death penalty.

Many national hierarchies had taken a stand against capital punishment as have recent Popes. Pope Paul VI in 1970 personally intervened to save the lives of six Basques at Burgos. On September 21, 1975 he implored the Spanish government to pardon some terrorists in Spain and on September 27, of the same year, he deplored the fact that he was not listened to. John Paul II in 1983 asked for clemency for those condemned to death particularly when it was for political reasons.

Archbishop John O'Quinn on the Vatican radio (1992) declared that the televising of the death penalty of Alton Harris was a barbarism. Three days later an editorial in the *Osservatore Romano* called "the Death Penalty: A Terrible Penalty of Hopelessness" (la pena di morte: uno strumento terribilmente disperato) and condemned the execution by lethal injection of Billy White in harsh terms: "It seems that a primitive instrument of violence appears in wealthy civilized societies to exorcise the contradictions and fraudulent despair of human living which has lost its sense of communion, the sacredness of life and despair for the future." Other articles in 1977 appeared in the same paper holding capital punishment incompatible with the inviolability of human life in all such cases. In the U.S. many local bishops as well as the Catholic Conference of Bishops have taken positions against capital punishment.

International bodies have taken positions against the death penalty from 1992 onward. Article 3 of the Universal Declaration of the Rights of Man, adopted by the U.N. in 1948 gives this directive: "Every person has a right to life, to liberty, to security of his person." Article 5 says: "No person can be subjected to torture, to cruel, inhuman or degrading punishments." In 1957, the European Convention Relative to Extradition recognized the right of a country which does not have the death penalty for certain crimes, not to extradite a person to a country which does. In 1969 the 4th article of the American Convention of the Rights of Man (in the negative) "strictly limits the application of such a punishment: not for political crimes, not for crimes committed by persons under the age of 18 or over the age of 70 and not for pregnant women." All these articles are taken up in article 6 of the Pact on "Civil and Political Rights" promulgated by the U.N. in 1996.

The European Parliament on April 22, 1980 passed a resolution directed to member states who had not yet abolished capital punishment encouraging them to abolish it. In 1985 the Protocole number 6 of the European Convention of the Rights of Man went into effect: "The death penalty shall be abolished. No one shall be condemned to this punishment nor executed."

In 1989 the U.N. adopted Protocole number 2 to the International Pact Relative to Civil and Political Rights "which declared that no one should be executed in the signatory states and these states commit themselves to take necessary measures to abolish the death penalty." Resolution A3-62/91 of the European Parliament (3/12/91) again invited "the member states where this punishment remains applicable in cases of particular crimes, to abolish it."

Was the *Catechism* wrong? Shall we say with one author that "the introduction of the death penalty in the context of the fifth commandment of the Decalogue produces an effect which is as contradictory as speaking about the rope in the home of one who has just hanged himself. In a global context of the whole *Catechism*, it is a terrible stain on a beautiful tapestry."

Can we reconcile this teaching with the counsel of St. Paul that we are to have in us "those sentiments which were in Jesus Christ" (*Phil* 2:5) or when the Apostle says that charity must rule in all things (*Col* 3:14) which is the pastoral rule used throughout the *Catechism* itself (N.25)? And finally, is such a punishment compatible with the Sermon on the Mount?

Our response must be nuanced and demands a study of the two documents of the magisterium: the *Catechism* and its correction in *Evangelium Vitae* (1995) in whose light the former must be read. Even Cardinal Ratzinger has said that a correction to the *Catechism* must be made in light of the encyclical (*Il Giornale* 3/31/95, p.8). The object of the following pages is to determine on what points this revision should be made. What is the underlying logic of both documents? It is only in understanding their teaching that we can go forward in Catholic thinking.

The Texts

The two texts should be compared side by side.

Preserving the common good of society requires rendering the aggressor unable to inflict harm. For this reason the traditional teaching of the Church has acknowledged as well-founded the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty. For analogous reasons those holding authority have the right to repel by armed force aggressors against the community in their charge.

The primary effect of punishment is to redress the disorder caused by the offense. When his punishment is voluntarily accepted by the offender, it takes on the value of expiation. Moreover, punishment has the effect of preserving public order and the safety of persons. Finally punishment has a medicinal value; as far as possible it should contribute to the correction of the offender.

CCC: 2267

If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means, because they correspond better to the concrete conditions of the common good and are more in conformity to the dignity of the human person.

Evangelium Vitae

55. This should not cause surprise: to kill a human being, in whom the image of God is present, is a particularly serious sin. Only God is the master of life! Yet from the beginning, faced with the many and often tragic cases which occur in the life of individuals and society, Christian reflection has sought a fuller and deeper understanding of what God's commandment prohibits and prescribes. There are in fact situations in which values proposed by God's Law seem to involve a genuine paradox. This happens for example in the case of legitimate defence, in which the right to protect one's own life and the duty not to harm someone else's life are difficult to reconcile in practice. Certainly, the intrinsic value of life and the duty to love oneself no less than others are the basis of a true right to self defense. The demanding commandment of love of neighbor, set forth in the Old Testament and confirmed by Jesus, itself presupposes love of oneself as the basis of comparison: "You shall love your neighbor as yourself" *Mk* 12:31). Consequently, no one can renounce the right to self-defence out of lack of love for life or for self. This can only be done in virtue of a heroic love which deepens and transfigures the love of self into a radical self-offering, according to the spirit of the Gospel Beatitudes (cf. *Mt* 5:38-40). The sublime example of this is the Lord Jesus himself.

Moreover, "legitimate defence can be not only a right but a grave duty for someone responsible for another's life, the common good of the family or of the State". Unfortunately it happens that the need to render the aggressor incapable

of causing harm sometimes involves taking his life. In this case, the fatal outcome is attributable to the aggressor whose action brought it about, even though he may not be morally responsible because of a lack of the use of reason.

56. This is the context in which to place the problem of the death penalty. On this matter there is a growing tendency, both in the Church and in civil society, to demand that it be applied in a very limited way or even that it be abolished completely. The problem must be viewed in the context of a system of penal justice ever more in line with human dignity and thus, in the end, with God's plan for man and society. The primary purpose of the punishment which society inflicts is "*to redress the disorder caused by the offence*". Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime, as a condition for the offender to regain the exercise of his or her freedom. In this way authority also fulfills the purpose of defending public order and ensuring people's safety, while at the same time offering the offender an incentive and help to change his or her behavior and be rehabilitated.

It is clear that, for these purposes to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender *except in cases of absolute necessity*: in other words, *when it would not be possible otherwise to defend society*. Today however, as a result of steady improvements in the organization of the penal system, *such cases are very rare, if not practically non-existent*.

In any event, the principle set forth in the new *Catechism of the Catholic Church* remains valid: "*If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority must limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.*"

Please excuse the long citations because it was necessary to show the parallelism of the texts as well as their differences. I have emphasized the text taken from the Catechism. The structure in these passages is exactly the same. The death penalty is present in both cases. Outside of radical necessity, other punishments must be considered in its place by states.

As to the differences between the two texts, it is clear that the encyclical has an original view which is an explication of the Catechism. The thought of the magisterium is more precise with regard to self defense - how far can the one who defends himself go? - and the punishment itself: its meaning, its end, its limits. These are the two questions which must be examined.

Self-Defense

Is the person condemned to death any longer an aggressor? He is present before us without defense; have we no other alternative than his death? Clearly the answer is no.

If there were only an individual defense, the answer is clear: the one whom we condemn and judge is no longer an aggressor. If we remain strictly on that

plane, to execute him would be simply legal murder.

The Catholic Catechism however is at a social and collective level. Both texts affirm that legitimate self defense can take place at the social level as well. Subjects are responsible not only for themselves but for others as well: "legitimate defense can be not only a right but a grave duty for some one responsible for another's life, the common good of the family or of the State" - appears verbatim in both texts. The common element between individual and collective self defense is the impossibility of defending oneself in any other way. Therefore motives of hate or vengeance are radically excluded as well as means which are disproportionate. The death penalty therefore is extremely restricted. Otherwise tribunals would be guilty of voluntary murder. *A direct intention to administer death must always be absent in the sense that if we could do otherwise, we would.* The only direct intention must be to protect oneself or others against a mortal danger (would a drug trafficker, rapist or molester of children be guilty of such mortal danger?)

The principle of legitimate defense therefore permits us to defend ourselves against an aggressor by mortal means. EV remarks that in such circumstances, it is the aggressor himself who exposes himself to death by his own action (but not in abortion where the child does not act unjustly; it is the abortionist who attacks unjustly.)

We are led to the same conclusion when we speak of the common good which is the very end and objective of society. The common good is the very possibility of the particular good of individuals. The one who endangers the common good not only destroys the possibility of the good of others but his own good as well. It is a form of self destruction which is brought to a logical conclusion when he loses his life. "Legitimate defense of persons and society is not an exception to the interdiction of the murder of the innocent which is the case with voluntary homicide" (CCC, 2263). Even "killing of the innocent" is useless. The maxim can be reformulated as follows: *You shall never act with the intention of killing but you can take all measures to defend yourself or defend those over whom you have responsibility and use all means necessary to do so even if you must use deadly means.*

Cases when a modern society can defend itself only by death penalty are difficult to imagine. The Catechism offers no example. EV is little more explicit: "Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent" (par. 56).

Punishment

Classical treatises on morality speak of the death penalty as a punishment which is divided into three functions

- vindictive to restore a disturbed order
- exemplary to dissuade others from doing it
- medicinal to restore and help the individual

Many authors believe that the death penalty solves none of them. It is not

medicinal because it gives no opportunity to the criminal to rehabilitate himself; it is retributive but this goes contrary to the whole Catholic tradition that each should get and receive humane treatment; and finally there is no proof that it serves as deterrent. There is no difference in the murder rate in those areas where the death penalty is practiced as distinct from places where it is not. In fact the vindictive function of punishment is very close to vengeance. Vindictiveness tends to mean a restoration of a disturbed order by punishing the criminal, thus restoring a rough equivalence between evil committed and evil received.

The two documents also speak of the medicinal function, contributing to the rehabilitation of the guilty one. Both functions should be present at the same time. If the punishment is purely vindictive this would testify to a total pessimism in regard to human nature incapable of redressing itself. But can the death penalty have a medicinal effect? Clearly not. By suppressing the individual, one eliminates all possibility of his rehabilitation into the community again. By condemning someone to death, civil authorities inflict a punishment which has no curative value and in this sense is not a true punishment.

From a Christian perspective we must first say that the death penalty can turn the criminal around and if this happens, the criminal is re-introduced into the community of the elect. From this perspective, this penalty has a medicinal value.

But we must also say that repentance is not automatic. It depends, on the one hand, on the freedom of the criminal, acting sincerely towards himself and his recognition of the truth before God and his openness to grace and on the other hand, to the grace of God. This double freedom no human tribunal can presume. All it can do is to give time so that the dialogue can begin between the evil person and God.

In addition, the death penalty is contradictory. It has a curative function only if we admit the relationship between God and man, between the freedom of man and that of God. It imposes on this relationship the obstacle of a time limit. It is therefore respectful neither of man nor of God which "forces his hand" so to speak. The mercy of God is great and we pray that it will save the criminal but it is absurd to count on divine mercy to justify the absence of human mercy. I condemn you to death hoping in the mercy of God — a presumption if there ever was one. I cannot have mercy so may God have mercy upon you. This is religious presumption.

The criminal constitutes a danger for society which cannot judge with certitude about his eventual conversion. Society must therefore deprive him of his freedom and cannot leave his rehabilitation up to himself. The only solution is to inflict a punishment of prison corresponding to his crime. The old logic of equilibrium has a value. If I have suffered in proportion to what suffering I have caused, I am free because I have paid my debt to society. EV evinces wisdom when it says that "the measure and the quality of the penalty must be attentively evaluated and determined." But if the death penalty is seen to be unjust, what can be just compensation for a homicide? We have seen that a proportional punishment for the crime is very much in order. The natural response is, life in prison.

But let us reflect on that for a moment. Does life imprisonment really respect

the human dignity of the criminal-murderer? Does it correspond to the medicinal function which is to re-insert the criminal back into society after a punishment? It deprives him of all hope in eventually returning one day to a normal life. We condemn him to perpetual punishment without a reason to live. In reality, we are condemning him to death after a more or less long agony. There must be another solution. Can there be rehabilitation or parole after a certain number of years? This is fiercely debated in our society.

Both documents repeat the following:

If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority must limit itself to such means because they correspond better to the concrete conditions of the common good and are more in conformity to the dignity of the human person. (CCC:2267, EV 57)

We have seen that the common good is not the sum of particular goods but the condition of possibility of the particular good of individuals. Each must contribute his part and the contribution of a repentant criminal is certainly an irreplaceable educative contribution. On the other hand, if it is a question of the conditions of possibility of life in society, the promotion of a climate of non violence is essential. The least we can say is that the right to kill recognized in the state is not favorable to such a climate of non violence. By executing the criminal, the state teaches that violence works. This becomes clearly the case when more and more people actually view these executions.

Moreover, since man's nature never changes, he is never radically corrupt. He remains the image and likeness of God and therefore always has an intrinsic dignity because the image of God in him can never be effaced or destroyed. *It is nature which is the foundation of rights.* What harms society is not the person of the criminal but his activity. We must therefore forbid and restrain his activity, not destroy his person.

The first right of every human person is the right to life and its firm recognition is one of the great fruits of this century. We must return more and more to our Christian roots which forbade the profession of soldier or gladiator as well as that of judge so as not to spill blood. The approval of the death penalty by Christians comes from pagan societies, not from our Christian roots.

EV says that the problem must be placed "in the cadre of a penal justice system which is more and more in conformity to the dignity of man and therefore in the last analysis, to the plan of God for man and for society." This plan of God is a plan for life which always hopes for the conversion of the sinner (EZ 18:23; Gen 4:18). In addition, if the state derives its authority from God from whom all authority comes, then it is God alone who gave life, and only he has the power to take it away.

Conclusion

The power of the state to kill is in direct contrast to the spirit of the Gospel in opposition, for example, to the Sermon on the Mount (Mt (5:38-39). The ideal which Jesus taught is the ideal of absolute non violence. And it is certain that

towards this ideal, all Christians must tend under pain of no longer being Christians. But tradition has never considered these presentations as formal orders, obligations which are always and under all circumstances to be followed.

It is true that to abandon oneself to God who alone will constrain the evil, to redress injustice and install a world where violence no longer obtains is a prophetic stance of a new world and a new order, is more in conformity to the message of Christ and can even give occasion for the Lord of History to install his kingdom on earth. If someone by virtue decides to live this ideal himself, he cannot impose it on the community collectively. If a person can renounce defending himself, can he renounce defending others when he is in charge? In our world which is less and less Christian, such confidence is to take an enormous risk and appears incomprehensible to many. Common sense - which almost always comes from unbelief - says that you can play with your own life but not with the lives of others.

The circumstances of our day which have made progress in the discovery of human dignity, have permitted the *Catechism* and *EV* to go further than the Magisterium has ever gone before in limiting the right of the state to inflict the death penalty by simply reducing this right to that of legitimate defense. The present culture has permitted us to go further in this limitation than ever before.

It is a precious gain for pro life, imitating God who is God of the living and not of the dead.