

CANON LAW / 2

The power of the Pope, a service to the transmission of the faith

ECCLESIA

06_12_2023

**Geraldina
Boni***



It is now evident that the limits of the Pope's power are the fruit and consequence of the *obædientia fidei* that cannot but accompany the path of the successor of Peter in faithfulness to the footsteps of Christ. Thus, unanimously rejecting a potestas absolute

illimitata [absolutely unlimited authority or power] in the Church, it is usually emphasised that the Roman Pontiff's power is 'fenced in' by divine law, both natural law and revealed law. In order not to make this assertion an abstract formula, a mere theoretical declaration devoid of concrete actual scope, it is necessary to fill it with content, as indeed theological and canonical doctrine has aimed to do, arriving at some widely shared and by now consolidated acquisitions, albeit in a variety of accents and always remembering the irreducibility of canonical categories to secular political models.

First of all, the affirmation that the pope is *legibus solutus* [freed from laws] can be understood exclusively in the sense that he is above positive law alone - to which he remains ordinarily subject, even though, as supreme authority, he can reasonably modify it - while remaining completely subject to and docilely obedient to divine law. In a concise illustration of what this entails, with a prevalent focus on the juridical profiles, it must be preliminarily reiterated that his jurisdictional competence must not invade the legitimate autonomy of the temporal sphere, as Vatican II also admonished (*Gaudium et spes*, 36), extrinsic only in those matters pertaining to the Church in order to pursue its supernatural end, the *salus animarum*, including those aspects relative to its organisation oriented to this mission.

The Pope's ministry then stands pre-eminently as a servant in the transmission of the Catholic faith and the sacraments, the preservation of the *depositum fidei* being the overriding and inescapable requirement of his ministry. "The Roman Pontiff is - like all the faithful - submissive to the Word of God", the Congregation for Doctrine's Considerations, already referred to, dryly attest: where the word 'submissive' conveys, for him, a title of honour and a task to be performed, certainly not a *deminutio capitis*.

The power of the Roman Pontiff must thus be realised in total respect of the episcopate, which is also of divine origin (*Lumen gentium*, 22), both in terms of what is due to the pastors in respect of the particular Church entrusted to them, not as mere vicars or delegates of the Pope, and in terms of the albeit different episcopal gatherings, innervated in the unfolding of the ecclesial experience. The rights of the faithful, deriving from their baptismal dignity and which call them to cooperate in the building up of the Body of Christ, are also an insurmountable barrier for the power, which must on the other hand endeavour to ensure that they attain the fullness of Christian life: rights, however, never to be considered as claims in opposition and antithesis to hierarchical authority, since they are all conspiring to the *bonum commune*.

Similarly, the demands emanating from natural divine law cannot be compressed or mortified, since they are expressed, inter alia, in relation to all

mankind. It is thus inadmissible to exercise power, even by the holder of the supreme potestas, that tramples on and conculcates the rights related to the dignity of the human person: for example, the right to life, to intimacy and privacy or to good reputation, but also - to refer to a sensitive area, today under the spotlight in the Church - the right of defence in a fair trial, the presumption of innocence, the protection of pre-existing acquired rights, not excluding that of not being punished for a prescribed crime.

There is, however, another order of limitations that are often overlooked or even misunderstood, and which it is eminently for jurists to highlight: those connected with the proper exercise of power. In recent years, I have dealt with this at length, with particular reference to recent legislative activity: highlighting the crucial importance of respect, even by the supreme legislator, for the legality in *legiferando*, i.e. compliance with the nomopoietic modalities and procedures contemplated, so as to ensure the necessary order, clarity and coherence of the legal system.

A frenetic, alluvial and chaotic overlapping of laws, i.e. of precepts that are articulated without an appropriate regulatory technique, and of provisions whose rank and legal scope appear nebulous and whose precise content cannot be deduced from a ritual promulgation according to the pre-established channels, would therefore be to blame; Likewise, so would be government resolutions not *secundum iuris normas* [not according to the rules of law] and exemptions from liability for the acts of persons vested with authority, even if suspected of illegitimacy; furthermore, it should be criticised that not exceptional but customary, even legislatively planned, approvals in a specific form by the holder of supreme power should be criticised, with the effect of making measures that are virtually injurious to rights in any way contestable. All this is to be censured by canonists, not for an academic and punctilious taste for abstract geometries, or for an almost mannerist or even *jus-positivist* reverence for legality and legal certainty. On the other hand, beyond the dangers to the very heritage of faith (inevitably underlying every normative prescription), it would above all be the living flesh of people - the faithful, but also citizens because of the innumerable and inseparable links between the spiritual order and the temporal order - that would be afflicted and lacerated where the norms are unreasonable, that is, not suited to the disciplined historical reality, thus seriously jeopardising that justice that by divine law is due to them and at whose service ecclesiastical authority, even the primatial authority, is placed.

Therefore, these restrictions, to which all holders of power in the Church must conform, are not merely formal or functional in nature, but intimately direct and shape the *bonum agere*, hence the substance and content of government, which otherwise, if

deviated from, risks undermining precisely those rights, which we have just mentioned, directly traceable to the divine plan, vulnerating precisely the iustitia corresponding to the divine plan, for which all ecclesial subjects must spend themselves. These are cornerstones grafted into the very constitution of the Church, completely alien, therefore, to the voluntarist logic of legality, inadmissible and deviant in the canonical order, in which, in fact, non auctoritas sed veritas facit legem [not authority but truth makes law].

With these last annotations it emerges once again how, entirely in line with classical wisdom, it is preferable and more congruous not to negatively enumerate restrictions to the supreme power of the Pope in a perspective of opposition or conflict: but rather to positively and constructively indicate and insist on connotations, qualities and requirements of good governance of ecclesial society, without their cogency being less stringent and obligatory for those invested with supreme power. Which, therefore, although not subject to any control or supervision, appeal or recourse, on the part of any human authority, must not for this reason be considered supra ius divinum [above divine law] and freed from the duty to operate constantly "*intuitu utilitatis Ecclesiae vel fidelium* - in view of the utility of the Church or of the faithful" (*Lumen Gentium*, 27a), always *in aedificationem et non in destructionem* [to build up, not to destroy] (as noted at Vatican I, recalling 2 Cor 10:8), being "proper to Peter to uphold and keep the Church united and firm in an indissoluble structure" (Leo XIII, Encyclical *Satis cognitum*, 1896), as "perpetual and visible principle and foundation of the unity both of the bishops and of the multitude of the faithful" (*Lumen gentium*, 23).

Second of a series of two

*** Full Professor of Canon Law, Ecclesiastical Law and History of Canon Law at the Department of Legal Sciences of the Alma Mater Studiorum University of Bologna.**