

THE CRISIS OF THE CHURCH / 4

The "state of necessity" alone does not legitimise the SSPX

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When reasoning about the canonical situation of the SSPX, it is necessary to always bear in mind some essential background historical elements. It is not 'Rome' that does not want to give the SSPX a place in the Church, but it is the Fraternity that has always

refused to enter it.

This happened in 1988, when Monsignor Marcel Lefebvre, its founder, signed the [protocol](#) of 5 May 1988 and the next day sent a communication to Cardinal Ratzinger in which he declared his intention to withdraw his signature; in the same communication he imposed an ultimatum on the Holy See that the episcopal consecration granted by Rome should take place by 30 June at the latest. On 24 May, Lefebvre upped the ante, requesting three bishops. On 30 May, Ratzinger informed Lefebvre that he would expedite the usual procedure for appointing a bishop, so that the consecration could take place on 15 August. Lefebvre refused, proceeding to consecrate four bishops on the date he wanted.

The Fraternity's subsequent contacts with the Holy See were characterised by ambiguity (for more information, see [here](#)), with the then Superior General, Msgr Bernard Fellay, first rejecting a practical agreement, and then giving the go-ahead for one. Then punctually rejected it.

Then came the changing of the guard at the top. A few months after his election as Superior General, Father Davide Pagliarani closed the discourse definitively, showing with extreme clarity his desire not to arrive at any regularisation: "even if in the future the Roman authorities were to retrace their steps, proposing a declaration in principle acceptable to us, what would guarantee us that, the next day, this declaration would still be sufficient for our interlocutors?" (quoted [here](#), p. 4).

To justify its position, the SSPX presents an argument that is essentially based on the intertwining of the state of necessity, *salus animarum* and the virtue of epikeia. In essence, the gravity of the current crisis - which we of the *Daily Compass* do not deny, on the contrary - would justify the suspension of certain canonical laws in order to achieve the goal of the salvation of souls, which is the *suprema lex* of the Church. Therefore, to achieve the supreme end the law aims at - the *salus animarum* - it is permissible at times to go against the letter of the law.

Let us start precisely from the epikeia. It is the same principle inappropriately recalled by Pope Francis in *Amoris Lætitia* § 304 to allow (in certain cases) Communion to the divorced-remarried. Now epikeia is that virtue that allows one to live according to the good intended by the law, when the latter, because of its universality, fails to provide for some particular situations.

First consideration: epikeia applies neither to moral absolutes nor to divine law.

Let us ignore the former, which is not required here, and come to the latter. Divine law, having God Himself as supreme legislator, is perfectly capable of foreseeing all situations; no particular situation escapes divine law and therefore no circumstance authorises contradiction of it. This is the fundamental reason why no human power, not even the Pope's *plena potestas*, can contradict divine law. Think of the sacramental marriage ratified and consummated. The *salus animarum* is therefore always perfectly fulfilled by conforming to divine law. And this even when it seems to us like the opposite. Let us take the case of an unbaptised child who is dying. If I only have a fizzy drink and not water, I cannot baptise him, even if the health of his soul is at stake; the baptism would be invalid. Why? Because the matter of the sacrament of baptism is of divine right and the Church cannot dispense with it.

Now, the point is precisely this: it is Christ Himself who gave Peter's successors the right to appoint bishops, either directly or by delegation, by virtue of the fact that it is through Peter that bishops receive all that they have, exercising then with full authority and not simply as 'delegates' of the Pope. And this is regardless of the historical forms in which this takes place; but it is a fact that, even when there was no *mandatum apostolicum*, the Pope could refuse an election, depose a bishop, prevent a consecration. It was and is in his full power, by virtue of the power of the keys given by Christ to Peter. This is the Catholic view. Nor is the objection valid that it was only with Pius XII that consecrations without a mandate were hit with excommunication (to tell the truth, St Thomas already provided for excommunication). The Apostolic See can increase or lighten the sanctions, but this does not change the nature of the schismatic act and the fact that it is a usurpation of the right that the Pope has received from Christ.

Closely related to the first point is the fact that it is precisely for the common good of the Church that it is not possible to consecrate bishops against the will of the Pope, because this would be a direct attack on the unity of the Church. St Thomas explains that the purpose of the law and the intention of the legislator is the common good; "if, therefore, precepts are given which imply the very preservation of the common good, or the very order of justice and honesty, such precepts contain the very intention of the legislator: therefore they do not admit of dispensation" (*Summa Theologiae*, I-II, q. 100, a. 8). And this is precisely what concerns the precepts on the consecration of bishops, as found in the texts of the Magisterium (some of which are cited in the previous articles).

Thirdly and finally: the epikeia interprets the objective intention of the legislator. But it is precisely the legislator - i.e. the Pope - who has spoken out against

the episcopal consecrations of Monsignor Lefebvre, by virtue of a right given to him by God himself, and who has never accepted the subsequent justifications of the SSPX regarding its interpretation of the *suprema lex* and the epikeia. Epikeia applies when the lawgiver is inaccessible, at least at the time when a choice must be made; and in the case of the SSPX, the lawgiver was not only accessible, but had actually been reached several times.

The FSSPX also claims a jurisdiction of supply - *Ecclesia supplet* - precisely because of the 'state of necessity'. The reference is to Canon 144 §1: "*In factual or legal common error and in positive and probable doubt of law or of fact, the Church supplies executive power of governance for both the external and internal forum*". Now, this supply coming from the Pope can be explicit or implicit. In the first case, it is made explicit in canon law, as in the case of the priest dismissed from the clerical state who explicitly receives jurisdiction from the Pope to absolve a dying person. In the second case, for the Church to supply it is necessary to assume the implicit consent of the legislator, hence of the Pope. But in the case of the SSPX, the episcopal consecrations did not take place simply *without the mandatum*, but explicitly *against* the prohibition of the Pope, who therefore explicitly refused to confer the judicial *missio*, on which jurisdiction depends.

The Church therefore cannot supply jurisdiction if its Head refuses the supply, but only supplies jurisdiction if the Pope explicitly or at least implicitly grants it. The state of necessity alone is not sufficient to demand supply. The "factual or legal common error" referred to in Canon 144 cannot even be called into play to support the validity of absolutions conferred by the SSPX before 2017. The Fraternity has unduly extended this to the faithful who attend their chapels, but the canon - as John Salza explains in crystal-clear terms (see [here](#) and [here](#)) - applies "when the majority of a community would conclude that the priest in question has habitual jurisdiction authorised by the local Ordinary". In practice, a parish community finds a priest in the confessional of its church who it believes has habitual jurisdiction. Indeed, the faithful who attend Catholic churches and sanctuaries are not required to ask the priest every time whether or not he has jurisdiction. If, however, that particular priest does not have the jurisdiction to hear confessions, the community is therefore in an error of judgement, in the presence of which the Church compensates. The canon exists precisely to protect the Catholic community in communion with the Church, not to legitimise the ministry of those who are not in communion with the Church.

The decisive point is that the faithful must assume that the priest in question has *habitual jurisdiction*, not supply jurisdiction; and they assume this by virtue of the

fact that they find the confessor in parishes and sanctuaries, and not in buildings used as community chapels that do not have jurisdiction. This fact is confirmed by the SSPX itself, which must precisely resort to the jurisdiction of supply, because it knows it does not have the habitual jurisdiction. Moreover, the canon in question makes no mention of the "state of necessity" as legitimising the Church's supply.

Again, the FSSPX, in order to justify why it continues to exercise an illegitimate ministry, refers to the principle of canonical equity found in can. 19: "If a custom or an express prescript of universal or particular law is lacking in a certain matter, a case, unless it is penal, must be resolved in light of laws issued in similar matters, general principles of law applied with canonical equity, the jurisprudence and practice of the Roman Curia, and the common and constant opinion of learned persons".

What is canonical equity? It is the principle that guides those who must apply the law of the Church when there is a *lacuna legis*, that is, when the law does not expressly provide for something specific. In these situations, as the canon says, one must keep in mind similar cases, the general principles of law, the legal tradition of the Roman Curia and the common and constant opinion of jurists.

First of all, let us point out that only those who are legitimately called to apply canonical law can avail themselves of canonical equity; the priests of the SSPX, having no canonical mission, cannot do so. Those who are called to do so, on the other hand, have always declared that the Fraternity performs an illegitimate ministry. Going into the substance, this principle cannot be used when dealing with divine law and not merely canonical law, because no *lacuna* can be attributed to divine law. Moreover, we are not in the presence of any *lacuna legis* in any case, because canon law clearly states what to do in the case of an illicit episcopal consecration and an illicitly exercised ministry. Lastly, as we have seen, canonical equity requires that we refer to similar cases, the practice and jurisprudence of the Roman Curia, etc. Now, similar (not equal!) cases all lead in one direction: consecrating a bishop against the will of the Pope is a schismatic act and clergy who exercise their mandate without a canonical *missio* do so illegitimately.

4. *The end*