

Notes on Underlying Assumptions, Implementation, and Flexibility
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Relevant texts

- Monica Hellwig, "Higher Education and the Catholic Church: Some Underlying Assumptions," *Current Issues in Catholic Higher Education* 20/2(2000), 27-39
- Charles H. Wilson, "Implementation of *Ex Corde Ecclesiae* in the United States; the Civil Law Implication for American Catholic Colleges," *ibid.*, 21/2(2001), 27-37
- Bishop Leibrecht to ACCU on the flexibility of the norms (ACCU February 2, 2000) in *Catholic International* 11/2(2000), 217-218

Higher Education and the Catholic Church: Some Underlying Assumptions¹

Hellwig identifies three general areas where individuals with roles in Catholic higher education and the church may proceed from different assumptions: ecclesiology, institutional history, and jurisprudence.

1. Ecclesiology

Ecclesiology—the nature and function of the church—can emphasize the whole community of Christians and their calling and task in the world or the hierarchic structure of the church. At least since the Second Vatican Council, these different emphases have influenced thinking within different groups within the church with a sharp difference in the understanding of the way the two aspects related to each other.

- One emphasis: Church is a community of disciples. The main element is the vision and Spirit of Jesus expressed in the constant prophetic striving of this community to meet the changing needs and challenges of transforming the world in various times and places.
- Alternative emphasis: Church is essentially a timeless structure of governance and of sanctification through the sacraments. In this view the structure itself is of the essence and is essentially unchangeable because it is seen as divinely instituted even in many of its details (including aspects that can be shown historically to have developed long after the time of Jesus). One corollary of this view is that it appears necessary for any initiative or institution claiming to be Catholic to be under the direct control of the hierarchy.

Hellwig concludes that to understand the hidden assumptions of *Ex Corde* implementation, it is necessary to know how the second emphasis is deeply entrenched in our history and that history is full of struggles over the tendency of institutional structures to outlive their useful purposes.

¹ The following text and outline are freely excerpted, quoted, and/or paraphrased from Monica Hellwig, "Higher Education and the Catholic Church: Some Underlying Assumptions," in *Current Issues in Catholic Higher Education* 20/2(2000), 27-39

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- Principle of collegiality: Because of the two differing fundamental ways of thinking about the church that became evident in the Council itself, there has been continual tension over this principle of collegiality in the decades since the Council. This tension has existed at various levels: between the Roman curia and the bishops' conferences around the world, between the various components of individual dioceses, and between the church hierarchy and the laity in various church ministries. For any enterprise known as Catholic, there is some church responsibility for its values and principles. Tensions arise over how and by whom such church responsibility is to be exercised. The intent of the Council was clearly to re-emphasize collegiality in order to adapt better to the demands of the modern world and the complexity of a global extended community.
- Principle of subsidiarity: much of the official documents of the Council assume the principle of subsidiarity. This is the understanding that what can be done adequately by individuals should not be taken over by public authority. If Catholic colleges and universities can function both as places of learning and as Catholic under the leadership of their boards of trustees and their presidents, there should be no hierarchic intervention in their governance of their teaching and scholarly activity.

2. Institutional History

The second area of differing assumptions is in the perception of the institutions of higher education themselves. The canonical legislation presupposes that all institutions will fit into the categories explicitly listed in the Constitution itself. However, the histories of institutions of American Catholic higher education are not uniform, nor are their constitutional structures and the nature of their relationships with local bishops. Both foundations and subsequent relationships with local bishops have often been quite informal. Colleges began for different reasons and in different ways.

- Accountability: colleges and universities are accountable in multiple ways to governmental as well as professional bodies, including state law, federal law, voluntary accreditation associations, and contractual arrangements with employees. Given this multiple accountability, one condition for maintaining a strong Catholic character is the need to build consensus about the focus and character of the school among faculty and administrators on a collegial basis rather than through some authoritarian structure. Effective philosophical and theological formation of students should include classes that are relevant to questions that the students have.
- Relationship with bishops: relationships of higher education institutions with the bishops in whose dioceses they are located have generally been informal and friendly. Such relationship is typically American. It seems to be very poorly understood in curial circles. As a consequence, there has been some disorientation in many US institutions over the imposition of the new canonical norms in the Code of Canon Law of 1983. This leads to Hellwig's third area of different assumptions.

3. Jurisprudence

There are some very important differences in the ways that societies of common law tradition and societies of Roman law tradition (on which the Canon Law and its customary interpretation and administration are based) understand the concept of law.

- Common law tradition: the law is there to protect the rights of the individual in support of the common good of society.
- Roman law tradition: the law has not been primarily concerned with safeguarding the rights of the individual but with maintaining the stability and continuity in a predictable, orderly, easily governed society.
- Common law tradition: having left people as free as possible to shape their own lives, when this does not work in some way, we legislate and expect the law to be obeyed and applied strictly without exceptions. We appreciate judges who are strict constructionists of the written law. We legislate minimally and apply strictly.
- Roman law tradition: Canon Law tends to be legislated and administered in the exactly reverse fashion. Legislation is comprehensive but application is adaptive, sometimes to an astonishing degree.

Although we might train Catholics to look at church law quite differently from the way they look at the civil law of the country, there is no guarantee that courts or those responsible for dispensing public funds would make a similar accommodation. It is more likely that the Code of Canon Law will be read in the same way as legislation by Congress or state legislatures, assuming that the words mean exactly what they say and are to be applied that way in all cases.

4. Conclusion

There is a culture gap which is expressed in the way the church is understood, in the way the institutions are known and regarded, and in the way the function of law is perceived. The most practical solution is likely to be negotiated solutions item by item. Regarding the *mandatum*, the stepping stone to solution might be conversations about the nature and functions of theology between bishops and those theologians engaged in undergraduate teaching in our colleges.

Civil Law Implications for American Catholic Colleges²

Wilson addresses how civil law might impact an institution's implementation of the General Norms of *Ex Corde Ecclesiae* and the Particular Norms adopted by the American bishops. He discusses the legal autonomy of Catholic colleges and

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universities, changes in institutional governance due to adoption of *Ex Corde*, possible civil court challenges to the *mandatum* and likely judicial response, other potential court challenges, and the impact of adoption of *Ex Corde* norms on eligibility of Catholic colleges for public aid.

- Legal autonomy: under civil law, the institutional church and its hierarchy are external to the American Catholic colleges and pronouncements of the institutional church (such as *Ex Corde Ecclesiae*) have no legally binding effect unless their governing boards expressly adopt them. Under civil law, the governing authorities have the autonomy to embrace *Ex Corde* and particular norms in their entirety, to reject them outright, or to modify their terms and adopt the modified versions.
- Changes due to adoption: to the extent that an institution adopts in whole or in part, it must then amend its governing documents accordingly. If a college adopts the *mandatum* requirement, it must amend its faculty handbook to state the requirement for *mandatum*, how the *mandatum* is obtained, and the consequence of not seeking or obtaining a *mandatum*. Perhaps more significant is the Particular Norm that Catholics constitute a majority of the faculty and that Catholics who teach at Catholic universities exhibit appropriate integrity of doctrine and probity of life.
- Civil court challenges to *mandatum*: will civil courts accept cases for adjudication and rule on the merits of a theologian's challenge to the *mandatum* requirement? The likely answer is no, due to a principle which Wilson calls religious autonomy.
- Other potential court challenges: if a Catholic college's adoption of *Ex Corde* and the Particular norms appears to embrace the majority Catholic faculty provisions, any non-Catholic candidate for employment or promotion or tenure who is rejected could have a claim of employment discrimination under Title VII. Inclusion of Canon 810 (including the "integrity of doctrine" and "probity of life" provisions) could lead to challenges by Catholics on the faculty. The concern is that an institution should not be characterized as "pervasively sectarian" because this could be a dispositive reason for an educational institution to be ruled ineligible for public aid.
- Eligibility of Catholic colleges for public aid: this is a complex issue. Wilson reviews two key Supreme Court decisions that involved public aid to church-affiliated colleges and which established the eligibility of such colleges to receive public aid without violating the Establishment Clause of the First Amendment. As a result of these decisions, the role that religion plays in a Catholic college's academic program became the constitutionally relevant inquiry. The essential question now is this: will the courts find that Catholic colleges that adopt *Ex Corde Ecclesiae* and the Particular Norms still match the *Tilton/Roemer* profile?

The 'Flexibility' of the Norms³

Bishop Leibrecht presents a viewpoint that I find stands in sharp contrast to Hellwig. He emphasizes that "The chief purpose of the norms, as found in the introductory statement of the Particular Norms is to 'assist Catholic Colleges and Universities in their internal process of reviewing their Catholic identity.' The norms are implemented according to the internal processes by which colleges and universities describe their Catholic identity." He identifies the responsibility of the colleges and universities to apply the general and particular norms to their own circumstances and relevant federal and state laws, regulations, and procedures. Bishop Leibrecht then quotes specific examples of flexible language in the implementation documents for the Catholic character of the board, faculty, and president, the importance of those who are not Catholic, and the *mandatum*.

Discussion Questions

1. Is it time to move beyond the discussion of the *mandatum* requirement and focus instead on the norms that require action on the University's part?
2. Should more attention be given to the implications of the norms relating to faculty composition and behavior?
3. Does the flexibility in the norms identified by Bishop Leibrecht provide some reassurance that implementation of *Ex Corde Ecclesiae* can help Catholic colleges and universities define their Catholic identities more clearly?

³ Bishop Leibrecht to ACCU on the flexibility of the norms (ACCU February 2, 2000) in *Catholic International* 11/2(2000), 217-218