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Terence E. Tierney

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SHOULD CHURCH LAW ADOPT ARTICLES OF IMPEACHMENT?

REV. TERENCE E. TIERNEY*

Unsurprisingly, the recent crisis in America surrounding the possible impeachment of the President has raised provocative questions in and around the area of due process of law. Since numerous forms of legitimately constituted law provide for some form of due process, it seems altogether fitting that the Church's judicial procedures involving due process ought not to remain static, but should be reexamined in the light of the profound questions raised by the impeachment process.

Lest we put the cart before the horse in this rather delicate matter, let us first situate the impeachment process within its proper context and attempt to ascertain if this civil procedure is indeed a viable process worthy of consideration for incorporation into Church law. We have already taken many valuable legal lessons from American civil law and the English common law and incorporated these into our canon law, at least on a territorial level. The Canon Law Society of America drew up the present due process procedure and it has been ratified by Church authority.

Before one can even begin to consider the establishment of some form of ecclesiastical impeachment, we must first introduce within the Church structure a system of ecclesiastical election whereby men come to assume a particular Church office. Hence, the enormous question of the desirability of an electoral process must be wrestled with prior to the erection of any form of articles of ecclesiastical impeachment. The electoral and impeachment processes should be considered as a whole since, generally speaking, impeachment should be invoked only when the question of removal from an elected office is at issue.

Significantly, we have already existing within the Church the concept of elective office, *e.g.*, the Priests' Senate, the Diocesan Pastoral Councils, the Personnel Director, and the Members of the Personnel Board. Logically then, the context for valid consideration of ecclesiastical impeachment already obtains. Furthermore, the question of pastoral accountability must also be raised here since the structuring of a viable system of accountability must be present if the concept of impeachment is ever to be invoked.

*B.A., Wadhams Hall, 1973; J.C.B., Catholic University, 1974.

One must be enabled to make a valid judgment upon the circumstances which could be considered grounds for an impeachable offense. Arguably, the impeachment process is a method for calling one to account. Clearly, this is true, but it is too drastic a means for rendering one accountable. The Church needs a thoroughgoing and pervasive system of pastoral accountability. Simply stated, election and accountability must first be established before the Church can move to adopt and circumscribe articles of ecclesiastical impeachment. Lest one be tempted to misinterpret, the Church must not adopt the United States Constitution's provision for impeachment, neither in entirety nor in part.

Impeachment is not a criminal proceeding with a view to inflicting a penalty. A particular man is not on trial in impeachment. Rather, one's conduct in office is that which is at issue. Although this might sound like ecclesiastical hairsplitting, in cases of utmost seriousness the drawing of fine lines of distinction is crucial for a precise understanding of exactly what is at stake in a proceeding of this sort. Impeachment is removal from office and nothing more. It is a legal procedure, properly so-called, and nothing more. It ought not to be considered a penalty for misconduct even though at times this will be the basis for the removal. Impeachment is, quite simply, a judicial procedure recognized by law through which a public servant is removed from the position of public trust and accountability for the given cause of inability to fulfill his mandate of office.

Canon law recognizes two forms of trials: First, the contentious trial which involves litigation with a view to establishing justice, and second, the criminal trial which involves litigation with a view to administering a penalty. But impeachment is not to be understood as either one of the above. Instead, it should be viewed as *sui generis*. No other existing procedure is identical to the impeachment process.¹

The concept of removal or impeachment from office is not unprecedented in the Church. One need only look to the 1917 Code of Canon Law to find the pristine basis for ecclesiastical impeachment. At issue here are canons 2157 through 2161 of the Code.² Parts of these canons were further expanded by the Decree of the Pastoral Office of Bishops, *Christus Dominus* #31,³ of the Second Vatican Council and the subsequent enabling legislation, an apostolic letter issued *motu proprio* by Pope Paul VI (August 6, 1966), *Ecclesiae Sanctae*.⁴ Compellingly demonstrated therein are

¹ Rembar, *How Much Due Process is Due a President?*, N.Y. Times, July 21, 1974, § 6 (Magazine), at 22.

² Cann. 2157-61 deal with procedures for removal of pastors, distinguishing between "removable" and "irremovable" pastors.

³ Second Vatican Council, *Christus Dominus*: Decree Concerning the Pastoral Office of Bishops in the Church (Oct. 28, 1965) [hereinafter cited as *Christus Dominus*].

⁴ Apostolic Letter *Ecclesiae Sanctae*: Norms for Implementation of Four Council Decrees (Aug. 6, 1966) [hereinafter cited as *Ecclesiae Sanctae*].

the principles upon which impeachment is based. These canons, together with the Conciliar Decrees *Christus Dominus* and *Ecclesiae Sanctae*, hint at what is an impeachable offense already recognized by Church law. Yet it devolves upon the highest Church authorities and legal experts to adopt the standards and substance of an impeachable offense. We can only, at this time, call upon those in key positions of influence to spark debate along these lines.

The 1917 Code of Canon Law states in its canon 2147: “pastors [even “irremovable” ones] may be removed from their parishes for reasons that, *even in the absence of offense on their part*, render their ministry harmful or at best inefficacious.” The italicized language clearly indicates that not all removals are for reasons of “criminal or otherwise libelous activity.”⁵ The Fathers of the Code were wont to point out that one can be removed for reasons which do not affect the man *qua* man but only his exercise of office.

The Code further outlines the reasons for removal from office: lack of requisite skill; *permanent*, physical or mental disability; antagonism of parishioners, even if not justified; loss of reputation; probability of occult crime; and maladministration of church property.⁶ In the eyes of the Fathers of the Code, any of the above constituted an “impeachable” (in the proper sense of removal) offense.

While the Code refers to pastors *per se*, it is logical to conclude that the question of office is more encompassing and of weightier proportions than the office of pastor alone. If pastors are subject to impeachment even under the “old” law, is it not reasonable to suppose that today a more far-reaching outlook obtains whereby all offices in the Church should come under the same heading and be subject to the same procedure?

Looking to the *Ecclesiae Sanctae* #20, it can be discovered, or at least it appears to be certain, that the title and office of “irremovable pastor” is no longer recognized by canon law. Since the *Ecclesiae Sanctae* #20 treated the removal of pastors under the heading “removal, transfer and resignation of pastors,” it is likely that this concept of “irremovable pastors” has been suppressed. That the *Ecclesiae Sanctae* treated the same material as in canons 2147, 2157, and 2161 is compellingly verified. Therefore, it is reasonable to conclude that the concept of “irremovable pastor” has ceased to be a category in law by virtue of canon 22, the extrinsic cessation of law, which states that latter law will be deemed to have re-

⁵ Can. 2147, § 1.

⁶ Can. 2147, § 2 outlines the reasons for removal from office: 1. inexperience or permanent mental or physical infirmity; 2. manifest antagonism of parishioners that would impede the pastor's useful ministry and is unlikely to cease within a short time; 3. loss of reputation; 4. a probable crime imputed to a pastor, even if it is secret; and, 5. faulty administration of church property leading to great damage.

pealed former law if the latter law deals with all of the subject matter of the former law.

The *Ecclesiae Sanctae* #20 reads:

Without prejudice to the law in force with regard to Religious, the bishop can legitimately remove any pastor from a parish whenever his ministry, even through no grave fault of his own [again the criminal disclaimer], becomes harmful or at least ineffective for any of the reasons recognized by law,⁷ or for another similar reason⁸ according to the judgment of the bishop, following the method of procedure established for removable pastors until the revision of the Code.⁹

It is noteworthy that this represents in unarticulated form the ground rules for a valid establishment of ecclesiastical impeachment. The Church in its own way has already erected an underdeveloped impeachment procedure. Through this discussion the soul of the due process involved is that which can be called the adversary dimension. The laws of both Church¹⁰ and state¹¹ recognize and acknowledge that one cannot be deprived of personal rights, privileges, or property—understood as reputation, privacy, etc.—without due process of law.

In an impeachment trial, however, the above are not centrally at issue.¹² Rather, the overall welfare of the community, its views to good order, and the spiritual and ecclesiastical vitality of the people of God are at stake. The representatives of the community, namely the Diocesan Pastoral Council and the Priests' Senate, should be empowered to vote an incumbent out of office once misuse of office or inability to properly carry out one's office of service has been verified. It may happen that impeachment involves neither *crime* nor *any* insinuation of misconduct or incapacity, but only the loss of community confidence.

In impeachment neither the establishment of certain or grave presumptions nor the certification of overwhelming proofs is required. The conclusion to vote impeachment should rest on the evidence submitted, but the judgment need not be beyond a reasonable doubt. To vote impeachment one must apply an evenhanded approach to the question of office, and one's conclusion ought to be grounded somewhere between absolute certainty and one's "sixth sense" suspicion. To be sure, the gap

⁷ Can. 2147, § 1 (footnote added).

⁸ Can. 2147, § 2 (citation omitted) (footnote added).

⁹ *Ecclesiae Sanctae* #20, based on *Christus Dominus* #31.

¹⁰ That Church law recognizes and acknowledges that one cannot be deprived of personal rights, privileges, or property without due process of law can be seen from the Canon Law Society of America's due process structure and even the 1917 Code of Canon Law itself.

¹¹ U.S. CONST. art. II, § 4 (impeachment); U.S. CONST. amend. V (federal due process requirement); U.S. CONST. amend. XIV, § 1 (state due process requirement).

¹² Rembar, *How Much Due Process is Due a President?*, N.Y. Times, July 21, 1974, § 6 (Magazine), at 22.

between the two is wide, but in this process latitude is indispensable. The execution of ecclesiastical impeachment must reflect flexibility and openness and ought not to be tightly structured.

Assuming the Church agrees to place into motion the apparatus necessary for a pervasive electoral process, it must again be repeated that in order to ascertain evidence for impeachment, an ecclesiastical system of accountability is imperative and indispensable. For in order to pass judgment on a man's responsibility, we must first devise a system which is capable of monitoring a man's responsible execution of his office.

All officeholders, upon assuming office, must understand, recognize, and acknowledge that public ecclesiastical office is not a form of personal property which one must fight to preserve at all costs.¹³ Rather, it is a community trust which the people have a right to recall and regarding which they have a right to demand an accounting. Needless to say, the ecclesiastical impeachment process must be conducted publicly, since it is the public who bear the responsibility for impeachment. The ascertainment of community opinion via ecclesiastical pollsters should not be disregarded. Public opinion remains forever essential to a properly conducted impeachment process.

What is at issue in the impeachment process is the community welfare—the welfare of the people of God over and against an individual's position in office. Although the adversary dimension is always elemental, resignation is, whenever possible, preferred and encouraged. If impeachment is inevitable, however, it must then be conducted deliberately. Together with the adversary dimension, a speedy trial assures that due process will be accorded. The "due process" that is required is not the criminal due process that protects an accused's life, liberty, and property, none of which is at hazard here. "It is rather the due process that pervades the entire Constitution and all our law. . . . The kind of fairness that due process calls for here is fairness to the people"¹⁴

The Church is already possessed of some elective positions and offices. The "vision" of the Church should be directed to the time when most offices are elective, with the right in the officeholder to appoint the necessary assistants to facilitate workable arrangements so that gospel service is properly carried through. The Priests' Senate and the Diocesan Pastoral Council are the organs which ought to be setting into motion and erecting the apparatus for accountability since they are in the best position, as representatives of the priests and people, to vote an impeachment motion.

In order to be considered for elective office, a nomination should be submitted to a nominating committee established by the Priests' Senate and the Diocesan Pastoral Council. This committee would have the tasks

¹³ *Cf. id.*

¹⁴ *Id.* at 24.

of winnowing nominees and drawing up job qualifications and adequate job descriptions. Certain offices will require personal qualifications beyond that which is ordinarily possessed of priests. Religious Education Director, Tribunal and Chancery staff, Personnel Director, Counseling Services, and Communication Apostolate are illustrative of this category. In order to be competently administered, these offices require advanced education. Once one is nominated and elected, the monitor of accountability is placed into action. Whenever a consistent pattern of abuse, mishandling, incapacity, lack of community confidence, etc., exists, the process necessary for impeachment should be set into motion. Parenthetically, canonical impeachment might be used by religious seeking to ameliorate intolerable situations surrounding their religious superiors.

Finally, if pastors and officeholders can be removed from their offices according to an already existent "canonical norm," I suggest that we have a "precedent for impeachment" already acceptable to the people of God and the higher echelons of ecclesiastical government.

This proposal will appear to some to be quite mad. But, on balance, it represents a viable attempt to call into question the apparatus which leads one to reach such a conclusion—the apparatus that provides for the filling of gaps which occur with all too frequent regularity, the apparatus which holds one in an office beyond his time or despite his demonstrable inability to cope adequately. When a man does not prove equal to the task, for whatever reason, common sense dictates that he should be relieved of his responsibility. It is to the overall good of the community that these observations are directed. It is for establishing reconciliation and healing among the people of God that these proposals are offered. It is to allay the fears fostered by secretiveness that such an open process as ecclesiastical impeachment is necessary. Impeachment is a hedge against intransigence and a medication for the wounds of *admiratio* (astonishment, scandal among the faithful) which is a direct result of clerical secrecy.

Our objective is to do nothing but call attention to a viable, but in many ways unrealistic, option in canonical procedure. Perhaps we have stirred the waters of Siloam. Perhaps we have even ignited a legal conflagration. Perhaps we have called attention to an unspeakable problem. Measure it how you will, at least open dialogue and open airing of grievances will serve to promote the gospel spirit of justice and truth. Canonical process is spoken of esteemedly but much too lightly, for most of us are afraid of the truth. To take due process seriously is to commit yourself to the truth about which the prophets spoke so eloquently. But the prophets were driven out of town. Impeachment is a word which today fills many with fear, for it comes perilously close to exposing those sins of which all of us are guilty. But if the church community is ever to enjoy the "liberty of the Sons of God," procedures such as ecclesiastical impeachment are required, for the truth, Christ Jesus informs us, will set us free!