

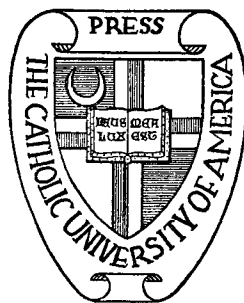
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~~W. J. Doherty, C. S. C.~~  
THE COMPETENCE OF CHURCH AND  
STATE OVER MARRIAGE  
—DISPUTED POINTS

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relatively perfect and necessary end.<sup>6</sup> The supremacy of the juridically perfect society, like its perfection, is to be understood in a relative sense.<sup>7</sup> For, in the generic order, one perfect society is indirectly supreme over the other. This indirect supremacy of the one over the other flows not from a comparison of their natures, but from a consideration of their ends. And so the Church, possessing the higher end in a superior order, is indirectly supreme over the State.<sup>8</sup>

#### B. THE POWER AND FUNCTION OF PERFECT SOCIETIES

##### 1. *The Relation of Origin and Power:*

If a society is formed in such a way that a new moral person is constituted and if it receives its power from without, then the measure of its power is determined by that of the original command.<sup>9</sup> The power of perfect societies is determined in this manner. For the power inherent in a perfect society is intimately bound up with the origin of that society in such a way that the necessary and proportionate power for the attainment of its end is established by the same law by which the perfect society was established. In brief, the juridic cause of a society is at the same time the juridic cause of its power.<sup>10</sup> And hence, if a perfect society has its origin in the natural law, its power likewise flows from the natural law; if it derives from the positive law, its power also emanates from that law. The Church, as has been observed, is a necessary perfect society which for its establishment is rooted in the divine positive law. Since, then, it has its origin through the direct command of God, the Church has also its

<sup>6</sup> Ottaviani, *op. cit.*, I, n. 33.

<sup>7</sup> Cavagnis, *op. cit.*, I, n. 60.

<sup>8</sup> Cf. Tarquini, *Institutiones Iuris Publici Ecclesiastici* (4. ed., Romae, 1865), n. 55; Wernz, *Ius Decretalium*, Vol. I, *Introductio in Ius Decretalium* (altera editio emendata et aucta, Romae, 1905), n. 10; Cavagnis, *op. cit.*, I, n. 404; Ottaviani, *op. cit.*, I, n. 26.

<sup>9</sup> The word *power* is used here to designate the concept of *auctoritas in se spectata* in contradistinction to the notion of *authority* in the sense of *auctoritas in subiecto*—a concept which is not of immediate concern in this context.

<sup>10</sup> Ottaviani, *op. cit.*, I, n. 29.

power from Him. The State, being likewise a perfect necessary society, is for its establishment grounded upon the natural law. Since, then, it derives its origin through that law, the State has likewise its power from God, i.e., from Him who is the author of the natural law.<sup>11</sup> And this, indeed, is altogether consonant with the Sovereignty of God, the Lord and Ruler of all; for "there is no power but from God."<sup>12</sup>

It is God who founded the Church, but it is men who give specific existence to the *form* in which the Society of the State actually manifests itself. In regard to the Church its Founder decreed as a necessity not only its existence but also its constitutional form of existence. In regard to the State God through the natural law decreed the necessity of its existence, but not the constitutional form of its existence. The latter determination was left to the free choice of mankind.

##### 2. *The Function of Perfect Societies:*

Man has a twofold destiny. By the natural law he is ordained to a natural happiness; and by that same law he must seek his natural end in a social order. In other words, he naturally seeks social perfection—a perfection which he can attain only through society. Man has also a supernatural end in the order of grace to which he has been elevated and destined by God. This perfection, too, he must strive to attain through society. In the present economy, however, there is no society ordained to achieve the total perfection of man in both the natural and the supernatural order. For Almighty God has committed the work of man's perfection to two authorities. He has divided the care of the human race between the Church and the State, the one to provide for man's supernatural welfare, and the other to aid him in reaching his natural happiness.<sup>13</sup> To the Church in her capacity as man's guide to heaven has been assigned the threefold charge of teaching, ruling, and sanctifying.<sup>14</sup> Her power is primarily,

<sup>11</sup> Leo XIII, ep. encycl. *Immortale Dei*, 1 nov. 1885, §2—*Fontes*, n. 592.

<sup>12</sup> Romans, 13: 1.

<sup>13</sup> Leo XIII, ep. encycl. *Immortale Dei*, §6—*Fontes*, n. 592.

<sup>14</sup> Matthew, 28: 18-20.

though not exclusively, in the spiritual order. The State, on the contrary, has as its chief duty to safeguard the well-being of both the individual and the community in the temporal order. Its function in regard to things supernatural is purely ancillary inasmuch as its responsibility towards religion is to aid and protect, to favor and sanction.

The provinces of these two powers are distinct yet co-ordinate, divided yet complementary. The orderly connection that exists between them has been compared to the union of the soul and body in man. Moreover, the quality and scope of that connection is determined not only from the natures of each society, but also from the relative excellence and nobleness of their purposes. Whatever, therefore, in human affairs is of a sacred character, whatever pertains either of its own nature, or by reason of the end to which it is referred, to the salvation of souls or the worship of God, is subject to the power and judgment of the Church. But whatever falls within the compass of the civil and political order should properly be subject to the civil power.<sup>15</sup> This again is according to the divine command: "Render, therefore, to Caesar the things that are Caesar's, and to God the things that are God's."<sup>16</sup>

## ARTICLE 2

### THE JURIDICAL RELATIONS OF CHURCH AND STATE WITH REGARD TO "RES MIXTAE"

In a general way the relations of the two species of perfect society have already been indicated. The indirect supremacy of the Church over the State by reason of the superiority of aim and purpose inherent in the former has been pointed out; a somewhat more specific indication of their relations has also been furnished in the treatment of their respective functions. Now there remains to be demonstrated the particular aspect of their juridical relations which is fundamental to the solution of the problems of competence that constitute the object of this study.

<sup>15</sup> Leo XIII, ep. encycl. *Immortale Dei*, §6—*Fontes*, n. 592.

<sup>16</sup> Luke, 20:25.

#### A. DEFINITION AND DIVISION OF "RES MIXTAE"

##### 1. *Meaning and Extent of the Term:*

Things may be considered as being of a spiritual, temporal, or mixed character. This designation is to be understood not ontologically but *finaliter*, i.e., from a consideration of their inherent ends or acknowledged purposes. Thus, spiritual things are those which, although material in themselves, exclusively tend or are ordered to a supernatural end. Temporal things are those that, even though they be not material in themselves, are ordained to a temporal end.<sup>17</sup> Things of a mixed character (*res mixtae*) are those which are directly referred to a twofold end, scil., spiritual and temporal, and according to either respect are under the disposition of the competent society.<sup>18</sup> Hence there is a distinction between the notion of *res mixtae* (things of a mixed character which directly tend both to a spiritual and to a temporal end) and the notion of *res mixti fori* (issues which in their character are concurrently subject to an equal competence exercisable by the Church and the State alike). The former concerns the competence of both societies over the same matter but under different aspects. In that case Church and State are both interested in the matter, not in a cumulative but rather in a discrete manner. *Res mixti fori*, however, are those things in which Church and State have a cumulative power in such wise that whichever society takes up the matter first has the right to go through with it.

*Res mixtae* in the strict sense are those which of their very nature, by virtue of their natural quality and purpose, directly tend to both ends at the same time. In the broad sense, the concept of *res mixtae* includes those things which of themselves tend directly to only one end, but which through some added quality are ordered to the good of the other society also.<sup>19</sup>

##### 2. *Classes of "Res Mixtae":*

A *res mixta* can be such either of its very nature or through a process which supernaturalizes its otherwise temporal character

<sup>17</sup> Coronata, *op. cit.*, n. 83.

<sup>18</sup> Ottaviani, *op. cit.*, II, n. 325.

<sup>19</sup> Ottaviani, *op. cit.*, II, n. 326.

or purely material content. The former (*res mixta naturalis*), while it remains within the limits of the order of nature, nevertheless is an object to which attaches a spiritual as well as a temporal import. Within this category, for example, would lie a marriage that is not endowed with the sacramental character. A *res mixta* which becomes such by being supernaturalized is one which by a positive act has been elevated to a higher order, to the supernatural order; such would be marriage raised to the dignity of a sacrament. A third class is sometimes distinguished as a *res mixta supernaturalis*. But a *res mixta supernaturalizata* and a *res mixta supernaturalis* are usually assimilated one to the other, for with regard to the question of competence they are both governed by the same juridic principles.<sup>20</sup>

Finally, there must be noted the two classes of effects possible to supernaturalized or supernatural matters of mixed character. Those effects which flow necessarily from the supernaturalized thing, and are so bound up with it that they can in no wise be disjoined therefrom, are called *inseparable*. Such inseparable effects cannot be made the subject of negotiation without at the same time having the substance of the thing to which they are annexed touched also. Two examples in point are the spiritual and supernatural graces and helps that necessarily proceed from Christian marriage, and the juridic condition of legitimated offspring. On the other hand, those effects which do not necessarily derive from the substance of a *res mixta* and are not unchangeably connected with it, but rather depend upon the command of positive law and therefore can be disjoined from the thing itself, are called *separable*. Moreover, when these separable effects are temporal, they are given the name of *merely civil effects*.<sup>21</sup>

#### B. THE JURIDICAL PRINCIPLES GOVERNING "RES MIXTAE"

Having in mind these concepts of the different kinds of *res mixtae*, and considering the notions of perfect societies as pre-

<sup>20</sup> Cf. Coronata, *op. cit.*, n. 87; Ottaviani, *op. cit.*, II, n. 327 and note 5; Cappello, *op. cit.*, I, 222.

<sup>21</sup> Ottaviani, *op. cit.*, II, n. 327.

viously set forth, one can establish certain definite juridical principles that must necessarily govern the power of such societies over matters that lie within the sphere of *res mixtae*. One may treat of these principles by attending first to the more general and then to the more particular divisions of matters or objects which are of a mixed character.

In the first place, *with regard to such matters, of whatever kind they be, civil society cannot make laws by prescind from related ecclesiastical legislation; but it is the duty of the Church and the State to legislate by mutual agreement, safeguarding always the superior claims inherent in the Church as a society of a higher order.*<sup>22</sup>

This principle follows from the fact that according to the designs of God the two powers to which He has committed the care of the human race should work together in harmony and concord for the attainment of their respective ends.<sup>23</sup> The Church, it is true, has by reason of its existence as a society of a higher order the prevalent right in a question of *res mixtae*. But she has always recognized a certain duty of negative justice that binds her to give consideration to the prior and just legislation of the State, and not to hinder without necessity the operation of such laws. The State, on the other hand, has a corresponding obligation to respect the canonical legislation on such matters: not to prohibit what is prescribed by canon law; and not to impose on their mutual subjects what is forbidden by the Church.<sup>24</sup> If this duty to legislate by mutual agreement were faithfully attended to much difficulty would be avoided. But when these two societies function separately and enact laws that prescind one from the other, conflict of legislation can and does easily arise. And hence, in the event of conflict, the State, being the inferior society, must give way to the higher authority of the Church.

The second principle may be stated thus: *As regards both the*

<sup>22</sup> Cavagnis, *op. cit.*, I, n. 423; Cappello, *op. cit.*, I, 223; Ottaviani, *op. cit.*, II, n. 328.

<sup>23</sup> Leo XIII, ep. encycl. *Immortale Dei*, 1 nov. 1885, §6—*Fontes*, n. 592.

<sup>24</sup> Cavagnis, *op. cit.*, I, n. 424.

*matters of a mixed character which are such of their very nature or essence, and also the effects which derive therefrom, each society can make laws that pertain to its own proper end.*<sup>25</sup>

In these matters, then, each society may exercise its power over that aspect which pertains to its own proper end in the spiritual or in the temporal order, provided again that in case of conflict there be safeguarded the superior claims of the Church over the State. The first part of this proposition follows from the independence which each of these societies enjoys; and the proviso is a corollary of the indirect superiority that the Church has been demonstrated to have over the State.

From this principle it is evident that a thing which of its nature is of a mixed character, even though it tend directly unto a spiritual end, does not by that fact lose its place in the order of nature as a thing ordained to a temporal end also. Hence the fact that instruction given to children in schools (especially to those in elementary schools) should concern also their spiritual welfare, does not withdraw the school from its place in the temporal order. On the contrary, the school must still fulfill in that order its task of providing the civic education of youth.<sup>26</sup> Since education is essentially a social and not a merely individual activity, and since it should strive for the perfection of the whole man in the order of nature and in the order of grace, the concern for achieving the purpose of education belongs consequently to both of these societies in due proportion. Thus, the State would have direct control over the temporal aspects of education; and the Church, direct control over the spiritual. But again by reason of her indirect superiority, the Church's power includes indirectly the temporal aspects that may be necessary for the attainment of her aims; hence she may control also the physical and civil factors in education as well as the religious and moral. The State, on the other hand, within the proper limits of its own order can control indirectly the curriculum in church schools by, for example, standardizing certain educational requirements. Another

<sup>25</sup> Cavagnis, *op. cit.*, I, n. 426; Cappello, *op. cit.*, I, 225; Ottaviani, *op. cit.*, II, n. 329.

<sup>26</sup> Ottaviani, *op. cit.*, II, n. 329.

example of a matter which of its very nature is of a mixed character may be found in a marriage that has no sacramental character, as, e.g., in a marriage between two unbaptized persons. Prescinding from the question as to whether the rights over such a marriage belong to the State *ex iure proprio et nativo* or only *ex iure devolutivo et hypothetico*, one must admit that the State is recognized to have certain rights over such a marriage; but her rights therein are by no means exclusive, for marriage even as a natural contract has a sacred character. Indeed, radically and fundamentally it is that very sacredness that places the power to dissolve the bond of marriage outside the competence of the State.

A third principle governing *res mixtae* concerns those that are either supernatural or supernaturalized. *The civil power can make no disposition with respect either to the substance or to the inseparable effects of supernatural or supernaturalized "res mixtae"; but the power of the State extends only to the merely civil (i.e., separable and temporal) effects of these things, the while it must preserve the proper subordination to the ecclesiastical law.*<sup>27</sup>

The reason for this is that such things are in and of themselves spiritual; this spiritual quality belongs to them either of themselves as supernatural things, or by their elevation to a higher order whereby they have become endowed with the nature of supernatural things. It is, therefore, only incidental that they have some temporal effects; and, consequently, it is only in a broad sense that they may be called matters of a mixed character. Since the Church alone has competence over things essentially supernatural, it is evident that she alone has full power over the substance of things that are supernatural or supernaturalized. The same is true in regard to the inseparable effects of these things, for, as has already been shown, such effects are intimately connected with the substance and follow its nature according to the principle *accessorium sequitur principale*. And, therefore, to that power which is competent to take cognizance of and to

<sup>27</sup> Cavagnis, *op. cit.*, I, nn. 428-432; Cappello, *op. cit.*, I, 225-229; Coronata, *op. cit.*, n. 87; Ottaviani, *op. cit.*, II, n. 330.

make regulations concerning the cause, it belongs also to dispose of such effects as are necessarily connected with the same cause.<sup>28</sup>

Concerning the merely civil effects, the State, it has been noted, can legislate provided that these civil regulations be not opposed to the laws of the Church. It is obvious from the definition of separable temporal effects that they are directed to the end which is proper to civil society; moreover, they do not derive from the substance of the thing and are not inseparably linked to it. Consequently, by nature they fall within the sphere of the temporal order and are subject to the power of the State. That competence over these temporal effects must, however, be exercised with moderation and with due regard for the spiritual substance from which they flow and over which the Church has full power. If, therefore, an unjust law is enacted by the State in such matters the Church can exempt her subjects from that law; and even if the law be useful from the viewpoint of civil society but is in any way harmful to the spiritual good, the Church again can exempt her subjects from its observance.

As an example of a supernatural *res mixta* one can point to baptism; by reason of its divine institution as a sacrament it lies outside the competence of the civil power which exists within the temporal order, and which, accordingly, cannot exercise its jurisdiction over a thing in the spiritual order. The State, then, could never settle the question of the validity or invalidity of the administration of baptism; but if a question of inheritance turned upon the baptism of some individual, the State could decide a point of bare fact as to whether baptism as a ceremony had or had not been administered to that individual.

The contract of marriage through its elevation by Christ to the dignity of a sacrament is in the class of supernaturalized *res mixtae*. Its substance is supernaturalized and consequently is wholly subject to the power of the Church. From such a marriage there flow certain effects which have an intrinsic and necessary connection with the substance of the thing, and are inseparable from it. Such effects are, for example, questions concerning the freedom of the parties to contract marriage, the

<sup>28</sup> Ottaviani, *op. cit.*, II, n. 330.

unity and indissolubility of the marriage bond, the legitimacy of offspring, etc. And, as previously pointed out, concerning these effects the Church alone is competent to make laws and to pass judgment. There are other effects that are connected only incidentally with the substance of the matrimonial contract, and are, in consequence, separable from it. Among such effects are the rights of succession in regard to nobility or in regard to property, the rights to share in an inheritance, dowry rights, etc. The State can make laws establishing certain conditions to be fulfilled in order that these effects may follow legally—provided, as always, that these conditions are not contrary to divine or ecclesiastical law.

In all questions concerning *res mixtae*, then, there should be preserved the fundamental competence of Church and State, each in its own proper order; and in the event of conflict the indirect superiority of the Church must, because of its higher aims, prevail. In conclusion, it may well be noted that the tendency of the Church has been clearly indicated by her insistent and repeated pleas for the maintenance of that harmonious union which should characterize the relations of the spiritual and the temporal authorities. For, as Pope Leo XIII has observed: “. . . in such arrangement and harmony is found not only the best line of action for each power, but also the most opportune and efficacious method of helping men in all that pertains to their life here, and to their hope of salvation hereafter.”<sup>29</sup>

<sup>29</sup> Ep. encycl. *Arcanum Divinae*, 10 feb. 1880, §22—*Fonte*, n. 580; English translation from *The Pope and the People* (London: Catholic Truth Society, 1937), p. 40.