

## CANON LAW Liberative or Restrictive?

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### I. Introduction

'Law', as a term or concept, has always something to do with order, justice, and common good. Laws have relevance mainly in the context of a society or community of human beings. One of the things that a human being likes most, generally, is to be free and independent. To a great extent, it is good and healthy for the growth, development, and blossoming of both individuals and communities/societies. At the same time, it is our experience that human beings cannot remain isolated islands. Relationship is one of the important characteristic features of human beings as social being. Therefore, while exercising and enjoying his/her freedom for one's own personal growth, he/she should not forget the fact that the other also has the same amount of personal freedom and wants to benefit from it. Here arise the questions of law, order, justice, and common good. One of the things that man most dislikes or resists or even hates is control, restrictions and limitations or boundaries.

Imagine the situation where everyone wants to exercise his/her freedom in the time, place and a manner that appeal him and him only. Conflicts and clashes and even destruction of the individual and society are certain. For example, consider the air, rail and road traffic rules. The red, green, and yellow lights along the roads do constrain the passengers, especially those travelling by vehicles, but it is with a view to saving many lives and avoiding chaos, confusions, and unnecessary delay. In this background of human likes and dislikes, this issue of *Journal of Dharma* dealing with the question whether religion and law are forces of liberation or not is very relevant and effective. In the following pages, my attempt is only to pose certain challenges for the readers to decide for themselves, if the laws, especially, in the church, are liberative/salvific or restrictive and destructive.

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## 2. The Ultimate Goal of Canon Law

The *Codex Iuris Canonici* of 1983<sup>1</sup> consists of 1752 canons that govern the external life of the Church. After having enumerated 1751 canons dealing with various themes, the last canon of the code states: "Salvation of souls is the supreme law in the Church."<sup>2</sup> It needs no interpretation; it is intelligible to every faithful with normal human reason. It means all the above laws, that is, the 1751 canons of the code are to facilitate the soul of the faithful to be free from earthly entanglements and to attain eternal welfare. All other laws are to assist the attainment of this ultimate aim as far as the Catholic Teachings and legislations are concerned. This seems, however, to be a highly spiritual goal. But man is not only spiritual; he is endowed with a body as well. That is, he lives in this visible world of material realities as a social human being. Therefore, church has also to take care of various other aspects that concern the integral growth of the individual. .

Vatican Council II teaches that man is at the same time a complex reality: "The society structured with hierarchical organs and the mystical body of Christ, the visible society and the spiritual community, the earthly church and the church endowed with the heavenly riches, are not to be thought of as two realities. On the contrary, they form one complex reality which comes together from a human and divine element."<sup>3</sup> Besides, he is also a social human being. He lives and acts in this society. Therefore, as a social human being he has to relate himself to the environment and the people around. That is, while one is striving to achieve perfection and the aforementioned ultimate goal, he has, at the same time, also to be aware of the fact that he lives in this world encountering all raw facts of life. His onward march should not in any way hinder others also from pursuing the same or even other goals they have.

The members of this larger society belong to various religions, sects, and denominations. The Supreme Being or God is addressed differently by diverse religions. All of them speak about salvation or its equivalent, but in various ways. Whatever the differences are, it is a fact that all religions

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<sup>1</sup>*Codex Iuris Canonici*, Auctoritate Ioannis Pauli PP. II promulgatus, AAS 75 (1983), Pars II, 1-317; for the English version used in this article, see The Canon Law Society of Great Britain and Ireland, *The Code of Canon Law*, Bangalore: Theological Publications in India, 1983. Further references to this document will be given as CIC.

<sup>2</sup>CIC 1983, c. 1752.

<sup>3</sup>LG, 8.

profess and stand for noble values. The ways and means they propose to their followers are also different. In many parts of the world there exist, in the same place, several religions and religious communities. India, for example, is known for its religious pluralism and secularism. In this sense we can say that man does not simply exist but *coexists*; so is the case with all religions. Coexistence is possible only if there is mutual understanding, recognition, and harmony. This means that man, while being free and enjoying his freedom, has to respect the freedom of others also.

As there are differences in the thinking pattern, value systems, language, religio-political, and economic contexts, formation and various other factors, this harmony need not spring spontaneously in the society. Therefore, there emerge norms, rules, and regulations in order to prevent disharmony and disunity and to bring about order in the society. Besides the rules and regulations that every state or country legislate in view of common good, various religions or sects also will have their own written and unwritten rules and regulations.

In such a context, a discussion on religion and law as forces of liberation is very relevant. For, religions cater to the spiritual wellbeing of the faithful, at the same time, without neglecting the secular dimension of their lives. Jesus told: "Render, therefore, to Caesar the things that are Caesar's, and to God the things that are God's" (Mt. 22:21). Law, in general, takes care of justice, order, and harmony in society in view of the individual as well as the common good. For instance, canon law, the laws of the Catholic Church, canonizes several of the civil laws which are inevitable for the societal life and for the achievement of the set goals.

### **3. The Function of Law in the Church**

Is law liberative or restraining? A reflection on the function of law in any society would give us an answer to the question. The function of laws in a society is to facilitate social cohesion, order, and the safety of all. Positively, law brings about circumstances and atmosphere that facilitate the creation of order, harmony, and unity in the society ensuring justice and common good; negatively, however, law prevents the emergence of circumstances and atmosphere that would create or enhance chaos, confusion, disharmony and discord in the society.

Here, one has to be very prudent and cautious. Otherwise law might turn out to be a burden that constrains the subjects as well as the legislators themselves. If one becomes a slave to the laws and regulations in the

society, it would do more harm than the desired good. If the spirit of the law, that is, the real meaning, function, purpose, and scope of law, is forgotten or neglected there might arise the danger of slavery to law. Ledilsas Örsy characterizes this danger as “sickness of legalism.”<sup>4</sup> For legalists, law is the most important thing; the spirit and values that, in fact, motivate the creation of a particular law, for them, would become insignificant or totally irrelevant. Örsy writes:

No one has given a better description of the havoc that it can cause, especially in religious communities, than Paul. The problem, of course, had been identified by Jesus who showed dramatically how the right order was reversed: in the understanding of the priests and lawyers, the law of Sabbath became a value in itself and displaced the very value that it was meant to support in the first place.<sup>5</sup>

He also points out that such sickness may bring about various consequences such as disorders and disunity. Jesus who came not to destroy laws but to fulfil it (Mt. 5:17) questioned the legalism of the Pharisees and the Scribes when he said: “Sabbath is not for Sabbath but for man” (Mk. 2:28). By inviting them to revive the spirit of law, Jesus wanted to liberate them from slavery to the letter of the law.

If law and the legal structures are looked upon as end in themselves, the aforementioned danger is due to emerge. In fact, law is not an end in itself, instead, it functions as an instrument, a specific, powerful, coercive and persuasive instrument that binds and prompts the subjects to assimilate the values. Wherever due freedom and justice are curtailed, blocked, or denied to the individuals, law comes as an aid in regaining and restoring the same by legal protective measures. Law prompts the subjects through creative ways, directions, and suggestions and with juridical effects to assimilate the values, to recognize the freedom and rights of other fellow human beings, and to mete out justice to all. If this prompting also fails to bring about the desired effect, then it binds the same subjects with some sanctions. These prompting and binding are not to be viewed negatively, but positively. For, this is to ensure, enforce, and enhance the freedom of all. Those who hold on to individual interests, or are selfish, consider that these rules might seem to be restrictive.

If we look into the emergence of laws it would be still clearer:

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<sup>4</sup>Ladislav Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, Collegeville, Minnesota: The Liturgical Press, 1992, 95.

<sup>5</sup>Örsy, *Theology and Canon Law*, 95.

... the reasons behind the emergence of most of the complex rules, regulations and other restrictive measures that govern the society are the anomalies or chaotic circumstance that arose in the society in the course of human history. Whenever such things happened they needed to be controlled, checked and set aright so that there emerged an atmosphere conducive to the life and smooth functioning of the society as well as individuals.<sup>6</sup>

Indicating the life enhancing dimension of law in any society, the author of this article pointed to an example in a previous issue of the *Journal of Dharma* thus: "For example, recently in the wake of the September 11, 2001 attack on the World Trade Centres in America, almost all nations especially the developed countries have established very strict and tight security measures for the screening of the passengers and their flights. One may think that it has made life very miserable and that it curtails one's freedom to travel anywhere freely. But in fact such kinds of restrictions are to ensure and protect the lives of hundreds and thousands who travel by flights."<sup>7</sup> Are these very stringent check-in measures not a limitation to the freedom of the individual? Indeed, in one way! Apparently, the passenger, while going through all sorts of interrogations and clearances, loses much of his time, sometimes even money and so on. But are these limitations or restrictions not liberative? For the hundreds and thousands of passengers who daily travel by flight and their near and dear ones and dependents, these limitations are certainly a comfort! They liberate the passengers from unnecessary anxiety over the safety of their flight. It depends on how one looks at law. The readers can, therefore, decide if the laws are liberative or constraining.

#### **4. Biblical Basis for the Liberative Function of Law**

God of the Old Testament (OT) makes a covenant with the Israelites. This covenant is the foundation of all laws in the OT. The election of the people of Israel and the act of their liberation come out of God's mercy. The Decalogue (Ex. 20:2-17; Dt. 5:6-21) or the Ten Commandments<sup>8</sup> are both

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<sup>6</sup>Cherian Thuduparampil, "Life and Law: Canon Law and Its Life Enhancing Dimensions," *Journal of Dharma* 30, 1 (January-March 2005), 42.

<sup>7</sup>Thuduparampil, "Life and Law," 43.

<sup>8</sup>George Nedungatt, "Law in Old Testament," Unpublished Class Notes, 7. He holds that these Ten Commandments are, to use the modern terminology, both "canon law" and "civil law" for the Israelites.

the ethical and juridical laws for the Israelites. "Say therefore to the people of Israel, 'I am the Lord, and I will bring you out from under the burdens of the Egyptians, and I will deliver you from the bondage, and I will redeem you with an outstretched arm and with great acts of judgment, and I will take you for my people, and I will be your God; and you shall know that I am the Lord your God, who has brought you out from under the burdens of the Egyptians'" (Ex. 6:6-7). In the Book of Deuteronomy we read: "I am the Lord, your God, who brought you out of the land of Egypt, out of the house of bondage. You shall have no other gods before me" (Dt. 5:6-7). We see that the God of Israel, out of his mercy, elects them and liberates them from the bondage of the Egyptians. "For you are a people holy to the Lord your God; the Lord your God has chosen you to be a people for his own possession... It was not because you were more in number than any other people that the Lord set his love upon you and chose you..." (Dt. 7:6-7). Also, it was not because of their righteousness either (Dt. 9:6). The God of Israel presents himself, thus, as the God of liberation. He offers them political or social as well as spiritual freedom.

As part of the covenant, he gives them laws. Note, however, that these laws are not to create a new relationship. They are, instead, an invitation to the elected or the chosen ones to remain in the relationship with Yahweh. "So you shall keep the commandments of the Lord your God, by walking in his ways and by fearing him... Take heed lest you forget the Lord your God, by not keeping his commandments and his ordinances and his statutes, which I command you this day... And if you forget the Lord your God and go after other gods and serve them and worship them, I solemnly warn you this day that you shall surely perish" (Dt. 8:6, 11, 15 and 19; see also Dt. 7:11). For the people, therefore, to retain and maintain the relationship and the freedom into which God has led them and to continue to be blessed (Dt. 7:13), he gives them the Ten Commandments.

God reminds them to be always aware of the liberative act of Yahweh and to keep and observe his words and, thus, to show the same kind of mercy to others: "You shall not pervert the justice due to the sojourner or to the fatherless, or take a widow's garment in pledge; but you shall remember that you were a slave in Egypt and the Lord your God redeemed you from there; therefore I command you to do this... You shall remember that you were a slave in the land of Egypt; therefore, I command you to do that" (Dt. 24:17-22). Again, in Exodus, we read: "You shall not oppress a stranger; you know the heart of a stranger, for you were

strangers in the land of Egypt" (Ex. 23:9). God gives laws and expects the observance of them so that they live and inherit the land promised to them. "You shall appoint judges and officers in all your towns which the Lord your God gives you, according to your tribes; and they shall judge the people with righteous judgment. You shall not pervert justice; you shall not show partiality; and you shall not take a bribe, for a bribe blinds the eyes of the wise and subverts the cause of the righteous. Justice, and only justice, you shall follow, that you may live and inherit the land which the Lord your God gives you" (Dt. 16:18-20). God does not constrain them, but gives freedom of choice of good or bad: "... I have set before you life and death, blessings and curse; therefore, choose life, that you and your descendants may live, loving the Lord your God, obeying his voice, and cleaving to him; for that means life to you and length of days, that you may dwell in the land which the Lord swore to your fathers, to Abraham, to Isaac, and to Jacob, to give them" (Dt. 30:19).

Through these commandments Yahweh helps them not to go blind in discharging justice. Thus, these laws function as a motivating force that enhances their lives and relationship with Yahweh and encourages them to give others, especially the downtrodden and suppressed, their due. Through these statutes and ordinances, which constitute positive directions and suggestions for action, Yahweh protects them from being under the yoke anymore. For, he is at the same time God of mercy and steadfast love; he is at the same time a jealous God (Dt. 6:15) who turns against the iniquity of those who hate him (Dt. 5:9-10; see also Ps. 33:5). St. Paul would say: "For Freedom Christ has set us free; stand fast, therefore, and do not submit again to a yoke of slavery" (Gal. 5:1).

When we come to the New Testament we understand that the very advent of Jesus was to liberate people from all sorts of bondage, spiritual as well as social/political. Before he began his public ministry Jesus, moved by the Spirit, declared, quoting from the Book of Isaiah, thus: "The spirit of the Lord is upon me, because he has anointed me to preach good news to the poor. He has sent me to proclaim release to the captives and recovering of sight to the blind, to set at liberty those who are oppressed, to proclaim the acceptable year of the Lord" (Lk. 4:18-19). His continued preaching and teaching reflect the realization of the initial declaration. "Jesus came not to destroy the law but to fulfil it" (Mt. 5:17). There is the Old Testament prescription that no one should oppress others. "Whoever sacrifices to any god, save to the Lord only, shall be utterly destroyed.

'You shall not wrong a stranger or oppress him', for you were strangers in the land of Egypt. You shall not afflict any widow or orphan" (Ex. 22:20-22). Now when the leaders and the lawyers started to oppress the people Jesus appears to fulfil the law by reinterpreting it and giving it the original meaning. He reinterprets it and makes it suitable to the messianic times. Thus, in the hands of Jesus law becomes an instrument that liberates people from the clutches of legalists. He declared that Sabbath is not for Sabbath's sake but for man (Mk. 2:28). The very mission of Jesus was to liberate people from all bondages.

The liberative acts of Jesus extend to all sections of people. First and foremost, he invites the Pharisees, the scribes, etc., to liberate themselves from the bondage of ignorance or pretence. "Jesus points out that literal observance of law neglecting its spirit is detrimental to life; in other words, an exclusive insistence upon the literal sense of the law is far from being life enhancing."<sup>9</sup> When he saw a large crowd following him and as he realized that they were without food, he ordered the disciples to feed them (Mk. 6:30-44). His liberative words and deeds proceeded from the single law of love in its two dimensions, vertical and horizontal: "... You shall love the Lord your God with all your heart, and with all your soul, and with all your mind. This is the great and first commandment. And a second is like it, you shall love your neighbour as yourself. On these two commandments depend all the law and the prophets" (Mt. 22:37-40; Jn. 13:34). St. Paul also would reiterate it, saying, "For you were called to freedom, brethren; only do not use your freedom as an opportunity for the flesh, but through love be servants of one another. For the whole law is fulfilled in one word, 'you shall love your neighbour as yourself'" (Gal. 5:13-14).

#### 4. Marriage: Annulment Cases

In an attempt to see how the law can become oppressive or liberative, we shall explore certain specific issues in which law would defend, ensure, enforce, and protect the rights of individuals and societies.

The marriage nullity<sup>10</sup> cases and the procedures followed in the decision making provide the best examples to show that law exists in order

<sup>9</sup>Thunduparampil, "Life and Law," 36.

<sup>10</sup>Antony Pinheiro, *Marriage in Latin and Oriental Canon Law*, Kalamassery: Jyothir Dharma Publications, 2006, 215: "Nullity of marriage is a permanent relief obtained in the case of an invalid marriage... Obviously, there does not exist a marriage bond between the partners. Hence, a declaration of nullity would free them



to help and liberate people and not to constrain or enslave them. For, due to any of the grounds prescribed in the Codes, if a marriage breaks down, Church takes sufficient care to see to it that such parties with grievances are properly helped. Let us examine the present legislation and see how the Codes of Canon Law deal with marriage cases.

Marriage that leads to the family life is one of the most fundamental institutions as far as human society is concerned. As God himself has established it, Church considers it a divine institution and hence it is most sacred to the church. Moreover, Jesus Christ has elevated it to a sacrament.<sup>11</sup> Marriage in the Catholic Church is considered a divine institution, established and confirmed by God himself by his laws (Gen. 1:27-28; 2:18-24). It is a sacramental as well as permanent union between a man and a woman joined in wedlock. It is through the institution of marriage, be it in religious or civil form, a man and a woman start living together as husband and wife and, thus, begin to establish a family that is the nucleus of the human society.

Law establishes, protects, and safeguards marriage. In all cultured societies there are some legal structures that enable a man and a woman to live and move around in society as husband and wife enjoying the rights and obligations of spouses. Unless they have "this legal support and protection people will look at them with suspicion or even trouble them somehow, at least in the Indian context. Even among aboriginals there are some customs or long-standing practices that enable a man and woman to enjoy the freedom and dignity that are due to the status of married life. "In a pluralistic society, the public authority of the state can impose on the engaged [couple] a public ceremony through which they publicly profess their status as spouses. The state can furthermore make laws which regulate in a precise and correct manner the civil effects deriving from marriage, as well as rights and duties regarding the family."<sup>12</sup> So also in the Church, which greatly values the sacramentality of marriage, there are set norms and regulations that enable the married couples to enjoy the marital rights and obligations legitimately. The role of law in this context

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from marital rights and obligations and the parties would be free to enter a new marriage if he or she has no impediment or prohibition."

<sup>11</sup>CIC, c. 1055 §1 and c. 1134; CCEO, c. 776 §2; See also Pinheiro, *Marriage in Latin and Oriental Canon Law*, xv.

<sup>12</sup>Lawrence G. Wrenn, *Annulments*, Washington: Canon Law Society of America, 1996, 219.

is to ensure freedom and afford stability to the institution of marriage. By preventing many unwanted things law functions here as a liberative instrument.

Even though marriage is considered to be an irrevocable covenantal union or partnership based on personal consent between a man and a woman for “the whole of life” (CCEO, c. 776;<sup>13</sup> CIC, c. 1055), many marriages break down due to several insoluble reasons. At times, innocent young people suffer or even end their lives prematurely as a consequence of immature, imprudent, unsuitable, or incompatible marriage bonds. In the context of modern globalization and, especially in the Indian context, increased mobility either on account of study purposes or job-related matters, there take place many ‘hectic marriages’ which face difficulties and challenges later because of the lack of sufficient knowledge about the future life partner.

Here Church laws function as a means of liberation for the spouses or the candidates for marriage in two ways: 1) By facilitating the unmarried ones and 2) By helping the ‘victims’ of marriages. First by enacting norms, guidelines, or instructions that prevent the circumstances and situations leading to such incompatible unions, church laws come to the aid of matrimonial candidates. For example, the Codes prescribe that “before a marriage takes place, it must be established that nothing stands in the way of its valid and lawful celebration” (CIC, c. 1066 and CCEO, c. 785). Particular law of the Syro-Malabar Church, for example, requires that “those who have lived for more than one year outside the eparchy after reaching marriageable age, should produce a free state certificate” (Art. 163, §1). In the second paragraph of the same article, it is stipulated: “... he/she also shall make an affidavit regarding his or her ‘free state’ covering the period of his or her stay in other places.” Thus, the authorities want to make sure that an aspirant for marriage has no previous marital bonds, scandalous cohabitation, or clandestine living together and the like that would later threaten the marriage. The parish priest of the original parish may not be aware of the things that happen in the place of his/her current residence. Therefore, a letter of the parish priest of the candidate’s

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<sup>13</sup>*Codex Canonum Ecclesiarum Orientalium*, Auctoritate Ioannis Pauli PP. II promulgatus, AAS 82 (1990), 1033-1353; for the English version see, Canon Law Society of America, *Code of Canons of the Eastern Churches* (Latin English Edition, New Translation), Washington, DC: Canon Law Society of America, 2001.

present residence certifying the “free state” of the candidate will avoid so many confusions or difficulties and evil effects that might occur later.

Again, CIC, c. 1069 and CCEO, c. 786 bind all the faithful thus: “Before the celebration of a marriage, all the faithful are bound to reveal to the parish priest or the local ordinary such impediments as they may know about.” Particular law of the Syro-Malabar Church has concretized this common law stipulating as follows: “Banns are to be published on three Sundays or days of obligation during the sacred liturgy in the parish churches and if needed also in the filial churches of the parishes of the parties concerned...” (Part. Law, Art. 174). Ignorance regarding various aspects of marriage – biological, legal, sacramental – might also lead the candidates of marriage to unnecessary troubles and legal problems. Therefore, the Particular Law of the Syro-Malabar Church, for example, legislates thus: “Prior to betrothal the parties shall fill in the prenuptial enquiry form in front of their respective parish priests in order to make sure that they enter into marriage covenant with due preparations, knowledge and consent” (cc. 782-785; also see Part. Law, art. 160). According to the Law, “the local hierarchs shall see to it that in his eparchy marriage preparation courses are conducted and norms are set regarding the attendance at such courses” (Part. Law, art. 162, §2). These are a few of the precautionary measures that the Church provides lest anybody becomes a victim of illegal or invalid marriage bonds.

Secondly, the provisions of the law also aim at helping the married couples. What does the Church do in such cases? While the Church upholds the indissolubility and irrevocable nature of a sacramental marriage, she feels that on account of a marriage illegally or invalidly entered into, the life of either of the parties should not be damaged. The eparchial bishops constitute, therefore, marriage tribunals in all the eparchies, as far as possible, and prepare personnel to deal with broken marriage cases. Besides making provisions to prepare the couples well in advance of marriage (CCEO, c. 783; CIC, 1063, n.2), both the codes set apart a major portion of the code to come to the rescue of the injured party in a marriage bond, through legal provisions and procedures. Here, however, we should bear in mind that there is no concept of divorce in the Catholic Church.

Church, through her marriage tribunals, comes to the rescue of those who are already ‘victims of invalid or illegal marriage bonds’ with its norms and regulations that safeguard the right of different parties and mete

out justice to all. Of course, we come across with the question of divorce in the Mathew's Gospel (Mt. 19:3-9). The Pharisees ask Jesus: "Is it lawful to divorce one's wife for any cause?" Jesus' reply to the question reveals God's initial design regarding marriage and set aright a deviation caused due to the hard-heartedness of men. "For your hardness of heart Moses allowed you to divorce your wives, but from the beginning it was not so" (Mt. 19:8). Then, he reinterprets it or reforms placing it in the original spirit: "And I say to you: whoever divorces his wife, except for unchastity, and marries another, commits adultery" (v.9). "What, therefore, God has joined together, let not man put asunder" (v.6). Thus, he liberates them from their ignorance or presumptions. Jesus proves that he came not to abolish any law but to perfect or fulfil it (Mt. 5:17).

In spite of being a divine institution and a sacrament and despite having several legal safeguards, both in the ecclesiastical and civil realms,<sup>14</sup> several marriages break down due to "certain anomalies such as adultery, cruelty, desertion and virulent disease."<sup>15</sup> Especially in the modern world of globalization and migration, job opportunities and other circumstances are such that chances for the breakage of marriage are numerous. Canon law prescribes various other grounds such as impotency, lack of form, lack of due discretion, etc., which can lead up to the nullification of marriage.

What the marriage tribunals, however, do in this respect is to declare, after sufficient enquiry, study, and deliberation, those marriages which should not have taken place due to some impediments or grounds, null and void.<sup>16</sup> In effect, it means that such an apparently existing marriage bond, due to any one or more of the defects, has not sacramentally taken place and, subsequently, the party is free to find a life partner and establish a family. Thus, canon law functions as a liberative force in the case of married couples as well as candidates to marriage who, on account of any of the grounds prescribed in the code, suffer or might suffer unnecessarily. In such circumstances, "a relief by way of dissolution or nullity of

<sup>14</sup>William E. Pinto, *Law of Marriage and Matrimonial Realities for Christians in India*, Bangalore: Theological Publications in India, 2000, 48.

<sup>15</sup>Pinto, *Law of Marriage and Matrimonial Realities*, 48.

<sup>16</sup>Pinheiro, *Marriage in Latin and Oriental Canon Law*, 215: "A judicial declaration of nullity is the recognition made by an ecclesiastical tribunal in a judicial sentence which is ratified by another ecclesiastical tribunal of higher grade, that it has been proved with moral certitude that, when the marriage was contracted, a cause of nullity was present."

marriage was inevitable. What is contended is that the relief sought is not to punish the guilty party but to protect the innocent party."<sup>17</sup> Thus, with legal prescriptions Church comes to the aid of stressed couples and liberate them from the yoke of an unjust or unsuitable life partner and through ecclesiastical judicial judgment enables them to enter into a new marriage.

### 5. Freedom of Expression

Freedom of speech is a fundamental constitutional right as far as any citizen is concerned. It is not different in the ecclesial community also. Both the Codes of Canon Law of the Catholic Church legislate, thus, with regard to the freedom of expression: "Those who are engaged in the fields of sacred study have a just freedom to research matters in which they are experts and to express themselves prudently concerning them, with due allegiance to the *magisterium* of the Church". (CIC c. 218). Its corresponding canon in CCEO, c. 21 reads as follows: "Those who are engaged in the sacred sciences have a just freedom of inquiry and of expressing their opinion prudently on matters in which they possess expertise, while observing the submission due to the *magisterium* of the Church."

It is to be noted here that the Christian freedom is always a 'freed freedom'. Therefore, it is neither an absolute provision nor a license to do anything and everything according to one's own whims and fancies. That is why both the codes include the expression that it is "just freedom." While speaking about the laypersons and their rights, CCEO, c. 402 makes the following provision: "Lay persons have the right to have recognized that freedom in the affairs of the earthly city that belongs to all citizens. In exercising this freedom, however, they are to take care that their actions are imbued with the spirit of the gospel and are to take into account the doctrine set forth by the *magisterium* of the church; but they are to avoid proposing their own judgment as the doctrine of the church in questions which are open to various opinions."<sup>18</sup>

The question whether law is liberative or restrictive is relevant here. If we imbibe the true spirit of the legislator, we will have to say that it is both. Because while endorsing juridically and legally establishing the freedom of expression, it also at the same time stipulates that it is only a "just freedom." Why? We speak of the freedom of expression remaining

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<sup>17</sup>Pinto, *Law of Marriage and Matrimonial Realities*, 48.

<sup>18</sup>See also AA 6; LG 35 and 4.

within the framework of an organizational structure and a belief system. One has, therefore, to exercise the freedom responsibly. That is, those researchers have to observe *obsequium* or be submissive to the teachings of the *magisterium*. Therefore, it is a healthy restriction and not something negative and, at the same time, it is an empowering freedom aimed at the doctrinal progress and “edification of the community of faith and cooperation with the bishops resourcefully in the discharge of their teaching function” (CCEO, c. 606 §2). It is very well explained in the code: “It is for theologians, given their profound understanding of the mystery of salvation and their expertise in the sacred and related sciences as well as in current questions, to explain and defend the faith of the church and to pave the way for doctrinal progress, while faithfully submitting to the authentic *magisterium* of the Church and at the same time availing themselves of proper freedom” (CCEO, c. 606 §1). Through these positive legal support, strength, and promotion of research and expression, the people or subjects of these laws are encouraged to engage more freely in the affairs of the church and, thus, employ their “knowledge, competence and position” (see CCEO, c. 15 §3) for the growth and expansion of the church as well as the edification of the faithful. Such a kind of freedom and corresponding restrictive measures liberate the faithful, including the clergy and all those engaged in teaching and preaching ministry, from committing heresy and apostasy and liberate the Church from spreading wrong principles. Law also sanctions those who violate these norms (see CCEO, cc. 1436-1437).

### 6. Liberative Dimension of the Penal Laws in the Church

In comparison with the earlier laws of the Church the present body of canon laws (*corpus iuris canonici*), in general, has reduced the automatic punishments (*latae sententiae*) to the minimum. The concept of *latae sententiae* is, however, foreign to the Code of Canon Law for the Eastern Churches.

Whereas one of the guidelines given to the committee for the formulation of the Latin Code stipulates that the punishments “imposed by the law itself are to be reduced to the minimum,”<sup>19</sup> that which were given to the committee for the formation of the Eastern Code say that “all automatic [*latae sententiae* against *ferendae sententiae*] penalties should

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<sup>19</sup>*Communicationes* 1 (1969), 101.

be eliminated in the eastern code.<sup>20</sup> This shows the concern of the legislator to liberate people from rigid or even unjust application/imposition of law and its consequences in the concrete lives of the people. The guidelines stress the point that "the attempt should at least be made to envisage the possibility of introducing into the penalties also a positive element which would better correspond to their medicinal character – the character, that is, which is practically the only that the Christian East acknowledges in canonical punishments."<sup>21</sup> Greater emphasis is, thus, given to the canonical admonition prior to the imposition of a penalty. A canonical penalty should not be considered only in terms of a deprivation of a good, but in accord with Eastern tradition, the imposition of positive acts (penances) should also be considered. If a finger or another limb of the human body is cut and wounded we dress and redress it until it gets healed. So is the case with canonical penalties in the church, especially in the oriental spirit. Medicinal character is well reflected there. Instead of finishing one off with an automatic punishment, the eastern spirit tries to heal the person with an admonition or with positive acts of penances prior to punishment. Besides this, the code prescribes that the delict should be given time and opportunity to express or defend himself/herself before the judgment being passed on him. CCEO, c.1469 §3 states: "Before making any decision in the matter, the hierarch is to hear the accused..." With regard to the extra-judicial decree CCEO, c. 1486 §1 says: "The accused be notified of the accusation as well as the proofs and be given the opportunity of fully exercising the right of self-defence, unless the accused neglected to appear after being cited in accord with the norm of law."

CCEO, c. 24 stipulates: "The Christian faithful can legitimately vindicate and defend the rights which they have in the church in the competent ecclesiastical forum according to the norm of law." Thus, in the Eastern Code, the medicinal nature of the penal law is emphasized. It is also clear from the cases of marriage annulment process. The whole process is concentrated not on punishing the harming spouse, instead it is interested in liberating the injured party.

The same canon in the next paragraph prescribes that the accused always should get justice according to law and, then, recommends that the

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<sup>20</sup>*Nuntia*, 3 (1976), 24.

<sup>21</sup>*Nuntia*, 3 (1976), 24.

law should be applied with the principle of equity. That is, the mind of the legislator is not to destroy the accused, but to strengthen, liberate, and save him/her through these legal procedures or legal safeguards. CCEO, c. 24 §2: "Further, if they are summoned to a trial by the competent authority the Christian faithful also have the right to be judged according to the prescripts of the law, to be applied with equity." The mind of the legislator is that even when punished, the accused should be duly respected. "The members of the Commission sought not only to avoid anything that would contradict Vatican II, but to be most faithful to the mandates and spirit of the Council. Consequently, penal law should be restricted to the external forum, marked in a special way by Christian mercy, and a pastoral spirit so that every effort should be made so that sanctions would never harm those punished and penalties always respect the personal dignity and rights of those punished."<sup>22</sup>

Pope John Paul II places law in the proper context of protecting fundamental human rights:

In the vision of a church which protects the rights of the individual faithful, but likewise promotes and protects the common good as an indispensable condition for the integral development of the human and Christian person, she also positively includes penal discipline. Even the penalty that is threatened by ecclesiastical authority – although in reality it is simply a recognition of a situation in which the subject has put himself or herself – is seen as a means of fostering communion, that is, as a means of repairing those deficiencies in the individual good and the common good that have come to light in the anti-ecclesial, criminal, and scandalous behaviour of the members of the People of God.<sup>23</sup>

The law that punishes the errant members of the church "flow from its nature as a visible community or society, and the consequent necessity to recall sinners to their Christian duty and repentance; to protect the innocent faithful from bad example and behaviour disruptive of ecclesial communion; to promote the unity of faith; and to deter the weak from

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<sup>22</sup>*Communicationes*, 2 (1970), 101. See also William H. Woestman, *Ecclesiastical Sanctions and Penal Process*, Bangalore: Theological Publications in India, 200, 3.

<sup>23</sup>John Paul II, *Allocution to the Roman Rota*, Feb. 17, 1979 in AAS 71 (1971), 422-427. The translation is from Woestman, *Ecclesiastical Sanctions and Penal Process*, 5.



being led astray.”<sup>24</sup> The council of Trent in its 24<sup>th</sup> session states as follows regarding salvific and liberative nature of penal law through constraining norms: “The Apostle warns (1 Tim. 5:20) that public sinners should be openly rebuked. When, therefore, someone commits a crime publicly and in the view of many, by which others are offended and scandalized and disturbed, then without a doubt a fitting penance for the crime in question should be publicly imposed on such a person, that one who has incited others to evil by example, should recall them to an upright life by the evidence of the person’s penance.”<sup>25</sup> Thus, punishment in the church is aimed at bringing back the delict and, hence, the medicinal nature of the law is upheld.

### **7. Conclusion**

Laws, rules, norms, regulations, restrictions, control, limitation, boundary, and the like are words that majority of the human beings do not like. Generally speaking, they are considered to be negative concepts. In the foregoing pages we have been trying to see that laws and other similar words do have a restrictive, restraining dimension. However, compared to the beauty and values these laws stand for or support, promote, and protect, the restrictive aspect is having less weight. This could be well comprehended with the example of a road traffic junction where there is neither a signal light nor a traffic police to control the traffic. Laws, in the Church also, serve as a means or a specific instrument that liberates the people, and even institutions, from several enslaving situations and evils in two ways. Firstly, by stipulating conducive norms and regulations, positive directions, and suggestions that help the faithful to avoid the creation of unnecessary troubles to themselves and to others and, secondly, by enacting reliable procedural norms and legal sanctions of rather medicinal nature aimed at liberating and bringing back the errant.

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<sup>24</sup>Woestman, *Ecclesiastical Sanctions and Penal Process*, 7.

<sup>25</sup>Trent, Sess. 24, c. 8. See also Woestman, *Ecclesiastical Sanctions and Penal Process*, 8.