PATRONATO REAL AND RECURSO DE FUERZA

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THE historical relationship between the Roman Catholic Church and the Spanish colonial government of the Philippines is usually referred to as a union of church and state. Union ordinarily implies harmony; yet it is curious to note that during the three centuries of its existence this particular union was characterized by an almost continuous series of conflicts between the elements that composed it. Even if we limit ourselves to the period before 1700, a period of not much more than a century, we find that at least two prelates suffered banishment at the hands of the governor and *audiencia,* namely, Archbishop Guerrero in 1636 and Archbishop Pardo in 1683; that the very first bishop of Manila, Fray Domingo de Salazar, was forced by violent differences with Governor Dasmariñas to return to Spain in 1591; and that on at least three occasions—in 1611, 1634, and 1698—the religious orders in the Philippines resigned all their parishes and missions in protest against certain measures of the colonial government. These major crises lasted anywhere from two to ten years; nor were the periods of relative harmony that intervened entirely free from minor conflicts. It would seem, then, that union of church and state, at least in the Philippines for this particular period, led to anything but unity. Why this should be is a problem that presents many points of interest for the legal historian. It is hoped that this discussion may serve as an introduction to that problem.

One fact must be stressed at the very outset, and that is that the problem must be approached historically. It is usual to prejudge regimes to which the label "union of church and state" has been applied according to abstract *a priori* principles. This procedure is not, however, particularly relevant; for such unions are the result of concrete and sharply contrasted historical contexts, and hence cannot be properly understood without reference to these contexts. This is especially true of the unique arrangement between the Catholic Church and the Spanish Crown known as the *patronato real de las Indias.*

The extensive body of rights and privileges possessed or claimed by the Crown over the Church in the Spanish colonies was based on a number of extraordinary papal grants, which had been motivated by the anxiety of the Holy See to ensure the evangelization of the New World. Thus, the bull "Inter caetera" of Alexander VI (May 4, 1493) vested in the Spanish sovereigns the right and duty of sending missionaries to the lands newly discovered by Columbus; the bull "Eximiae devotionis" of the same pontiff (November 16, 1501) conceded the titles of the New World to the Spanish government provided it assumed responsibility for the material needs of the Church there; the bull "Universalis ecclesiae" of Julius II (July 28, 1508) granted to the Spanish crown the right of presentation to the more important ecclesiastical benefices in the Indies; and the bull "Exponi nobis" of Adrian VI (May 9, 1522) authorized the Spanish crown to regulate the number and qualifications of missionaries sent to the New World.[1]

Other papal pronouncements too numerous to mention extended these concessions and some of them expressly stated that the privileges granted were irrevocable.[2] These two features—the unprecedented amplitude of the powers granted and their irrevocability—enabled and encouraged the Spanish crown and its jurists to infer from the original grants all sorts of derivative rights and pri-

[1] The texts of these documents may be conveniently consulted in *Colección de bulas, breves y otros documentos relativos á la iglesia de America y Filipinas,* F. J. Hernáez, S.J., ed. (2 v., Brussels, 1879), I, 12-14, 20-21, 24-25, 382-384.

[2] E.g., the bull of Paul V (July 20, 1609), renewing the erection of the Diocese of Arequipa, Hernáez, *Bulas,* II, 178-180.

vileges, many of which went beyond the original intent of the grantor.

Ever since Ferdinand and Isabella adopted the policy of employing *letrados,* that is, graduates from the law faculties of the Spanish universities, in preference to the less pliable and more turbulent nobility, the bureaucracy of the Spanish empire was preponderantly a bureaucracy of lawyers. It was at the hands of these patient, industrious and thoroughly loyal functionaries that the original papal grants of the *patronato* slowly grew by interpretation and accretion into an all-embracing royal control over ecclesiastical affairs. This tendency on the part of jurists to attribute to the royal power an ever-increasing measure of ecclesiastical authority—technically known as regalism—found its most authoritative expression in the classic commentary on the Laws of the Indies, *De Indiarum jure,* of Juan de Solórzano Pereira.

What, according to Solórzano, was the nature of the *patronato* granted by the Holy See to the Spanish crown? More than merely a patronage, it was, in effect if not in name, an apostolic delegation. By it the Successor of the Apostles invested the kings of Spain with the apostolic function *par excellence,* that of preaching and conversion.[3] This is clear, he says, from the tenor of the papal grants, especially that of Alexander VI, which imposed on the Catholic Sovereigns and their successors the duty of sending missionaries to the New World. For, clearly, every obligation to perform anything necessarily carries with it the right to demand and to command whatever is necessary to its performance. Hence the apostolic duty imposed on the Spanish crown must imply some measure at least of apostolic authority. In other words, it is of the very essence of the *patronato* that it endows the Spanish king not only with duties but with rights, and that these rights constitute a certain amount of ecclesiastical and even spiritual jurisdiction.[4]

"Some measure"; "a certain amount"; precisely what

3 "Et respectu ecclesiarum vel conventuum Indiarum longe magis sine difficultate procedit dicta Regis nostri facultas, cum in his Indiis habeat universalem patronatum tot juribus et praeeminentiis munitum ut eum reddent in his partibus veluti legatum aut saltem delegatum Summi Pontificis" (*De Indiarum jure,* II [Madrid, 1639], iii, 23, 39). Cf. II, iii, 27, 58.

4 *Ibid.,* II, iii, 2, 34-37.

measure and what amount? What, in Solórzano's opinion, was the *extent* of the *patronato?* There were certain ecclesiastical matters and functions which he explicitly excluded from the competence of the Crown. Papal approval was needed for the erection of churches, the delimitation of dioceses, the appointment of bishops.[5] In the latter case, of course, only the sacrament of orders conferred full episcopal authority, and in the sacramental sphere the King, a layman, obviously had no competence. But outside these explicitly mentioned cases, says Solórzano, "our sovereigns...in those regions (i.e., the Indies) represent the Pope in many things."

They could for instance, authorize their episcopal nominees to administer dioceses even before confirmation of the appointment was received from Rome; provide for vacant benefices; assign religious to parishes even without the consent of the bishops. The King's commission sufficed for the exercise of the ordinary faculties of preaching and hearing confessions by missionaries sent to evangelize new territory. The royal tribunals had competence in cases involving clerics, and the King had the right and duty of watching over the conduct of priests and religious, of supervising the visitation of religious orders, and of recalling to Spain religious in the Indies whose behavior was found to be unsatisfactory.[7]

In addition to these specific powers, Solórzano lays down a general principle which makes possible the indefinite extension of royal jurisdiction in ecclesiastical affairs; always understanding, of course, outside the sacramental order. This important principle is that royal *cédulas* or decrees which legislate concerning ecclesiastical affairs in the Indies have "a certain force even in spiritual matters in virtue of the apostolic delegation."[8] If we consider the infinite variety of questions pertaining to the discipline, organization and activity of the Church in the Indies which royal *cédulas* authoritatively discuss and decide, we shall find little difficulty in agreeing with the judgment that for Solórzano the eccelsiastical authority

5 *Ibid.,* II, iii, 20, 7-8; 5, 14-15; 4, 28 ff.

6 *Ibid.,* II, iii, 4, 51.

7 *Ibid.,* II, iii, 4, 51; 15, 17; 16, 13; 18, 27; 27, 58; 2, 42-44; 26, 8; 26, 28-30; 2, 50.

8 *Ibid.,* II, i, 21, 27.

inherent in the *patronato* was, if not strictly universal, "universable," that is, capable of being extended to any case regarding which the King or his representatives might choose to legislate. [9]

This, then, is the nature and extent of the *patronato real de las Indias* as conceived by the foremost exponent of Spanish regalism. It was an apostolic delegation irrevocably vested in the Spanish Crown which, while it could not touch the strictly sacramental order and was not explicitly universal, was nevertheless capable of being indefinitely extended.

It would be difficult to imagine more ample powers; yet the regalists were able to formulate another principle on the basis of which the jurisdiction of the Crown over the Church could be further extended. This is a principle based, like that of apostolic delegation, on the necessary relation between an obligation and the corresponding right. The supreme duty of a ruler is to maintain the tranquillity of the realm; to that supreme duty must therefore correspond a right equally sovereign: that of employing all the necessary means to fulfil it. Apply this principle to ecclesiastical affairs, and you have the juridical basis of the *recurso de fuerza.*

The *recurso de fuerza* was the right of the King, through his councils and tribunals, to intervene in the operation of ordinary ecclesiastical jurisdiction and even to suspend that operation whenever, upon the appeal (*recurso*) of a subject, lay or ecclesiastical, the Church authorities are deemed to do violence (*hacer fuerza*) to the rights of the said subject or to the peace of the realm. [10]

Regalist writers specify three principal occasions when the *recurso de fuerza* may be legitimately invoked. The first is when papal bulls or other ordinances of the Holy See are found by the royal council to be derogatory to the *patronato real* or contrary to the laws and usages of the realm. In that case the royal government may retain such ordinances and forbid their promulgation in the Empire. The second is when an ecclesiastical judge at-

[9] Leo Cullum, S.J., *Antonio Lelio's Criticism of the Regalism of Juan Solórzano Pereira* (unpublished doctoral dissertation, Rome, Gregorian University, 1936), pp. 37-38.

[10] *De Indiarum jure,* II, iii, 27, 42-44.

tempts to take cognizance of a purely secular litigation between laymen. In this case a royal tribunal may, by the issuance of the so-called *auto de legos,* estop this usurpation of civil jurisdiction. The third is when the ecclesiastical authority disallows legitimate appeal to a higher ecclesiastical tribunal than its own. In this case the royal tribunal has the right to suspend the judicial process started by the eccelsiastical authority and to examine the documents of that process in order to determine whether or not the appeal should be allowed. A right must have a sanction to protect it; hence the sovereign or his tribunals may impose the proper penalties on ecclesiastics who contravene or resist the *recurso de fuerza,* the maximum penalty being banishment and sequestration of temporalities (*extrañeza y temporalidades*). [11]

It should be noted that this prerogative of the *recurso* is claimed for the secular ruler as such, that is, as supreme authority in the temporal order, and not in virtue of any apostolic delegation. The regalists are most insistent on this point; for on it they base their contention that the *recurso* does not in any way involve a usurpation of ecclesiastical jurisdiction. For an ecclesiastical judge who violates the rights of the king's faithful subjects is no longer acting as a judge or even as a churchman but is purely and simply an oppressor. By his unjust act he renounces the immunities of his office and reduces himself to the condition of a private citizen, in which condition he falls under the full jurisdiction of the secular prince. [12] Similarly, in suspending the ecclesiastical process and calling in its records for examination, the royal tribunal does not intend to judge the case itself, but merely proposes to determine whether or not the eccelesiastical court is exceeding its jurisdiction or unreasonably denying to the appellant that recourse to a higher ecclesiastical tribunal which is provided for in canon law itself.

Upon these two principles, then, the one of positive law, namely, the apostolic delegation which was held to

[11] Cf. Francisco Salgado de Somoza, *Tractatus de regis protectione* (Lyons, 1759), p. 6; Pedro Frasso, *De regio patronatu* (2 v., Madrid, 1677), I, 304; Diego de Covarrubias y Leiva, *Opera omnia* (2 v., Lyons, 1606), I, 116.

[12] Covarrubias, *Opera,* I, 115; Salgado, *De regis protectione,* p. 33.

be implied in the papal grants, the other of natural law, namely, the right of the ruler to safeguard the rights of his subjects and the peace of the realm, the Spanish regalists raised the formidable structure of the *patronato*, from whose awful height the Most Catholic King governed well-nigh every phase of the Church's activity with an authority only a little short of absolute. By the second half of the XVIII century the *patronato* had grown to such proportions that the King could consider even *ecclesiastical* judges as receiving their authority from him; and when the Audiencia of Puerto Rico admitted a *recurso* to restrain an appeal in an ecclesiastical case to a superior ecclesiastical judge, the King reprimanded it in the following terms:

> It has caused surprise that you should have permitted such a *recurso*. You should have in mind, as did that prelate (i.e., the ecclesiastical judge) what is decreed in the laws, and that he acted in this case by no means in his own right but with my delegated authority, in virtue of the exalted position which I occupy through the bull of Alexander VI as Vicar and Delegate of the Apostolic See; on the strength of which it belongs to My royal power to intervene in all that concerns the spiritual government of the Indies, to such an extent that the Holy See has empowered Me to act for it not only in the economic sphere with reference to the property and appurtenances of the Church, but also in the administrative and judicial sphere, with the sole exception of the power of orders, which seculars are incapable of receiving. [13]

What was the attitude of the Roman Curia towards these regalists claims? Five years after the appearance of the first volume of Solórzano's work, the Sacred Congregation of Propaganda held a session in which

> the intent of the said bull of Alexander VI [i.e., "Inter caetera"] came up for discussion, and the opinion of the Fathers (i.e., the cardinals who composed the Congregation] was that by it only temporal favors were granted to the Catholic Sovereigns, for what is said in it about missions convey no authority to the said Sovereigns, as the word *debeatis* ["you ought"] employed in the bull clearly proves. From this correct interpretation of the said bull it follows that the aforementioned Sovereigns are not, in virtue of the said bull, patrons of [all] the churches in the Indies but only of those which they have actually endowed at their own expense; nor are they apostolic legates or delegates, as is erroneously inferred from the same bull . . . [14]

[13] Quoted by Matías Gómez Zamora, O.P., *Regio patronato español e indiano* (Madrid, 1897), pp. 330-331.

When the second volume of Solórzano's *De Indiarum jure* appeared in 1639, the Sacred Congregation of the Index caused it to be examined by one of its consultors, Antonio Lelio, who had spent some years in Spain in the papal service. His adverse report to the Congregation apparently met with approval, for it was published in 1641 and Solórzano's second volume was placed on the Index the following year. In Lelio's *observationes*, therefore, we have an official Roman opinion on the official Spanish concept of church-state relations as embodied in *De Indiarum jure*. [15]

Lelio begins by denying that the papal grants contained any communication to the Spanish Crown of an apostolic delegation, understood in the sense of spiritual or ecclesiastical jurisdiction, and he proves this by an examination of the documents themselves. He argues, for instance, that the tenor of the papal declaration whereby the tithes of the Indies were conceded to the Spanish Crown excludes the idea of an apostolic delegation. The tithes were granted on condition that the Crown provide sufficient endowments for the churches in the Indies, and the bishops are to be the judges of the sufficiency of the endowment. [16] If ecclesiastical jurisdiction in any proper sense had been delegated to the Spanish sovereigns, why is the judgment as to the sufficiency of the endowments left not to them but to the bishops? [17]

Lelio then proceeds to confront Solórzano's arguments in favor of the *recurso de fuerza* with a host of canons and papal ordinances condemning the practice as a violation of the rights of the Church. [18] Foremost among these

[14] *Acta* of the Congregation, X, 22, no. 64, in Rafael Gómez Hoyos, *Las leyes de Indias* (Medellín, 1945), p. 56.
[15] Cullum, *Lelio*, p. 4.
[16] Cf. Alexander VI, "Eximiae devotionis" (November 16, 1501), Hernáez, *Bulas*, I, 21.
[17] Antonio Lelio, *Observationes ad tractatum de Indiarum jure* (Rome, 1641), p. 8.

pronouncements was the bull "In coena Domini", which placed under the ban of excommunication and anathema all who "call to themselves and away from our judges and commissaries suits regarding spiritual matters or related to matters spiritual . . . and presume as judges to take cognizance of them"; and all magistrates, judges notaries, clerks, executors and sub-executors who intervene in any manner whatever in capital cases against ecclesiastical persons, prosecuting them, banishing them, arresting them, or pronouncing sentence upon them without the special, specific and express permission of this Holy Apostolic See". [19]

Since Solórzano and the regalists derived the juridical basis of the *recurso de fuerza* from the natural law, Lelio meets them on this ground also. He admits that it is legitimate to meet violence with violence, and hence that the royal tribunals are perfectly justified, in cases of urgent necessity, to use physical force on churchmen who by force are endangering the safety of the realm. But such cases almost never happen. There is usually enough time and opportunity to permit the Church itself to rectify, in accordance with its own laws and rules of procedure, what its subordinate officials may determine unjustly. Moreover, no matter how impartial, unselfish and respectful the *recurso de fuerza* is made out to be by the regalist writers, it turns out to be far different in actual practice. Its ordinary effect is to immobilize the ecclesiastical tribunals while extending royal protection not to the poor and oppressed, but to the rich and powerful who are able to pay for long court actions and "square" the judges in charge of the case. [20]

Thus Lelio finds two principal elements in Solórzano's work which merit condemnation by the Congregation of the Index: first, the method by which the apostolic delegation is deduced from the papal documents, that is, by interpreting them independently of the Holy See and

[18] *Ibid.*, pp. 36 ff.

[19] Urban VIII, "Pastoralis Romani pontificis" (April 1, 1627), *Bullarum diplomatum et privilegiorum . . . taurinensis editio* (25 v., Turin, 1857-1867), XIII, 533-535. The bull derives its name, "In coena Domini," from the custom of publishing it every year on Holy Thursday. It was revised from time to time, the recension closest to our particular period being that of Urban VIII quoted above.

[20] Lelio, *Observationes,* pp. 42, 52.

even against its express declarations; second, the doctrine of the *recurso de fuerza* as proposed, whereby the Crown is represented as possessing a sovereign right to interfere in the exercise of ecclesiastical jurisdiction, the Crown itself and its ministers being the only judges as to when and how that right may be exercised. [21]

There were, understandably, few critics of Spanish regalism within the limits of the Spanish Empire; but these few were outspoken and resolute. The distinguished Franciscan canonist, Fray Manoel Rodrigues, took a firm stand against the *recurso de fuerza,* although he held the theory of apostolic delegation. Another Franciscan, Fray Domingo Lossada, took issue with his colleague as to the extent of that delegation, saying that precisely because it was a *delegation,* it could not contain more than what the one delegating meant it to contain or the one delegated was able to receive. The Jesuit Father Diego de Avendaño, after clearly stating the arguments for and against the *recurso de fuerza,* concluded that the arguments against it are well-nigh irresistible ("urgentissima"), but that, because of the weight of extrinsic authority in its favor, its practice could be approved—always, however, sparingly, moderately, with fear and trembling ("parce, moderate, cum timore"). [22]

Nor did the Philippines lack its anti-regalists. The first bishop of Manila, Fray Domingo de Salazar, a Dominican, consistently and vigorously opposed all attempts on the part of the civil authorities to impose limits on his jurisdiction, and even sketched out a theory which would reconcile the curialist principle of ecclesiastical liberty with the regalist principle of apostolic delegation. [23] But the most vigorous and versatile opponent of regalism in this part of the world was undoubtedly that other Dominican occupant of the See of Manila, Fray Felipe Pardo, who for ten years, from 1680 to 1689, fought what he

[21] *Ibid.,* pp. 78, 52.

[22] Manoel Rodrigues, O.F.M., *Explicación de la bulla de la santa Cruzada* (2 v., Salamanca, 1599), I, 119; cf. Gómez Hoyos, *Leyes de Indias,* pp. 36-37. Domingo Lossada, O.F.M., *Compendio cronológico de los privilegios regulares de Indias* (Madrid, 1737), p. 39. Diego de Avendaño, S.J., *Thesaurus indicus* (2 v., Antwerp, 1668), I, iv, 9; cf. I, ii, 7.

[23] Cf. H. de la Costa, S.J., "Church and State in the Philippines During the Administration of Bishop Salazar," *Hispanic American Historical Review,* XXX (Durham, N.C., 1950), 314-335.

considered to be a usurpation of ecclesiastical jurisdiction by the Audiencia step by step, yielding in nothing though it cost him imprisonment and exile.

The details of this controversy are full of interest for the legal no less than the ecclesiastical historian, but it would take too long to rehearse them here.[24] Enough has been said, however, to suggest that one of the main causes of friction between Church and State in the Philippines, as elsewhere in the Spanish Empire, was the control over ecclesiastical affairs which the Crown and its jurists gradually built up on the papal grant of the *patronato*. It is permissible to doubt whether the theory of apostolic delegation allowed a clear delimitation between the spiritual and the temporal orders. Had the Philippines been closer to Madrid, it is possible that the acute legal minds in the Council of the Indies could have resolved the Pardo controversy in such a way as to safeguard the essential rights of prelate and patron, of Church and State. As it was, the distance of the colony from the center of government served to emphasize the fact that the distinction between these two jurisdictions in the regalist theory of apostolic delegation was too delicate to survive the often rough and ready practice of colonial administrators.

The regalists, on the other hand, could claim that theirs was the more realistic approach to a concrete situation. It is quite clear that under normal conditions the ecclesiastical hierarchy should have full control of all religious affairs within their territorial jurisdiction. But was it equally clear that missionary work in the Indies in the XVII century was being carried on under normal conditions? Only one thing seemed to be obvious, namely, that the Church was absolutely dependent upon the State for protection and financial support. This being the case, could it not be argued that the Crown's essential contribution to missionary activity gave it some say in the conduct of that activity?

The curialist reply to this was to grant the contention, but to deny that it justified the large—in their opinion excessive—measure of control claimed and actually exercised by the Crown and its officials. So the debate went on, almost continuously throughout the XVII century and intermittently thereafter. The recurrent crises in the debate were undoubtedly harmful to the work of both Church and State, often dislocating and sometimes paralyzing both religious effort and civil rule. But the concentration of our attention on these crises should not blind us to the magnificent results which the cooperation between Church and State under the regime of the *patronato* achieved. These results endure to this day, both in Latin America and the Philippines.

Three general reflections are suggested by this discussion. The first is that it is in the highest degree misleading to give to the term "union of church and state" a constant and universal significance. There is, properly speaking, no union of church and state but only *unions*, that is, widely different arrangements between these two societies which are the result of unique historical situations and which cannot be understood apart from them. Hence, any constructive criticism of a regime of union of church and state must begin by specifying which type of union is meant. The second is that the particular type of union which has come within the range of our national experience was not, as we are sometimes led to believe, planned, executed and maintained by the Catholic Church, but was largely the creation of the Spanish monarchy, acting beyond, often against, the intentions of the Holy See, and in the face of resolute opposition from intelligent and saintly churchmen. The third is that the resulting juridical arrangement exercised a continuous and decisive influence on our legal history for over three hundred years, and hence deserves to be studied more extensively than hitherto by those learned in the law.

[24] The present writer deals with this controversy in an unpublished doctoral dissertation, *Jurisdictional Conflicts in the Philippines During the XVI and XVII Centuries* (Cambridge, Harvard University, 1951), ch. iv-viii.