

Pope Francis and the Death Penalty: A Conditional Advance of Justice in the Law of Nations

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IN A DOCTRINAL clarification apropos for the feast day of Alphonsus Liguori, patron of moral theologians, the Congregation for the Doctrine of the Faith [CDF] has modified §2267 of the *Catechism of the Catholic Church* on the death penalty at the direction of Pope Francis. Where the 1997 version left open, at least in theory, recourse to the supreme temporal punishment, Pope Francis has judged that the death penalty is “inadmissible because it is an attack on the inviolability and dignity of the person,” quoting the Holy Father’s own address of October 13, 2017.¹ These changes build upon prior remarks by popes John Paul II and Benedict XVI calling for the worldwide abolition of the death penalty.²

Primo sono, the rescript vindicates the position of E. Christian Brugger, who has extended the New Natural Law school’s emphasis on the impermissibility of directly intending any death to the

¹ www.press.vatican.va/content/salastampa/it/bollettino/pubblico/2018/08/02/0556/01209.html. Of course, the 1997 *Catechism of the Catholic Church* [CCC] quotes John Paul II’s *Evangelium Vitae* (1995) in judging the actual use of the death penalty in certain cases as “very rare, if not practically non-existent” (*EV* §56, quoted in *CCC* §2267).

² For a few examples, see Cardinal Ladaria’s “Letter to the Bishops” accompanying the rescript, [press.vatican.va/content/salastampa/it/bollettino/pubblico/2018/08/02/0556/01210.html](http://www.press.vatican.va/content/salastampa/it/bollettino/pubblico/2018/08/02/0556/01210.html).

question of state executions.³ Brugger's position is that the Catholic Church can and should teach that the death penalty is intrinsically evil as an instance of intentional killing. The rescript would also seem a loss for Edward Feser and Joseph Bessette, who have advocated for a return to the traditional Catholic position not only that the death penalty is necessary for prevention and deterrence but also that it is a proportional retributive punishment for certain heinous crimes.⁴ So bright a luminary as the late Cardinal Dulles cautioned that a change in the Church's position on the death penalty would be a reversal of doctrine that would portend the loss of the Magisterium's credibility and any principled basis for development in moral doctrine.⁵ For Dulles, even to say that retribution is no longer an acceptable purpose of punishment would be a partial reversal.⁶ For his part, Brugger has agreed that the traditional authoritative position of the Church militates against the new position. Accordingly, he has laid much stress on prior teaching being non-definitive for that reason.⁷

Two other interpretive options are available. First, it is possible that Francis and his two predecessors have simply made a mistake

³ E. Christian Brugger, *Capital Punishment and the Roman Catholic Moral Tradition* (Notre Dame, IN: University of Notre Dame Press, 2003), cited here. The second edition was issued with a new preface in 2014.

⁴ Edward Feser and Joseph M. Bessette, *By Man Shall His Blood Be Shed: A Catholic Defense of Capital Punishment* (San Francisco: Ignatius, 2017).

⁵ Avery Dulles, "Catholic Teaching on the Death Penalty: Has It Changed?" in *Religion and the Death Penalty: A Call for Reckoning*, ed. Erik C. Owens, John D. Carlson, and Eric P. Elshtain (Grand Rapids, MI: Eerdmans, 2004), 23–30. See also Dulles, "Catholicism and Capital Punishment," *First Things*, April 2001, www.firstthings.com/article/2001/04/catholicism-capital-punishment.

⁶ Dulles, "Catholic Teaching on the Death Penalty," 27–28. Here Dulles also cites approvingly Steven Long's position that the public order of society should include reference to "the somber efficacy of transcendent moral sanctions in social life" ("*Evangelium Vitae*, St. Thomas Aquinas, and the Death Penalty," *The Thomist* 63 [1999]: 519).

⁷ Brugger, *Capital Punishment*, 59–138. See also Brugger's two chapters in *Where Justice and Mercy Meet: Catholic Opposition to the Death Penalty*, ed. Vicki Schieber, Trudy D. Conway, and David Matzko McCarthy (Collegeville, MN: Liturgical Press, 2013), 113–36. For this same reason, Brugger has advocated for a type of doctrinal development that he calls "filtering and reformulating," based on his interpretation of the Congregation for the Doctrine of the Faith's [CDF] *Donum Veritatis* (1990) §24, a development that makes it "*possible* that a definitive teaching contradicting one or more of the propositions of the traditional teaching could be proposed by the magisterium" (*Capital Punishment*, 161).

or, at best, spoken imprecisely.⁸ The rescript modifying the *Catechism* and the CDF letter accompanying it are instances of the pope's ordinary Magisterium, which is not definitive.⁹ The hermeneutical criterion of doubt and replacement used by some moral theologians to argue against purportedly non-definitive doctrines of integralism and sexual ethics surely would cut here, as well. If prior teaching was non-definitive, why is this teaching definitive? It is not clear by any means that a teaching coming later in time makes it more authoritative, any more than a cancer is healthy because someone suffers it in adulthood rather than in infancy.¹⁰ Besides, the CDF is not claiming heterogeneous development and Catholics owe religious submission of mind and will even to non-definitive doctrine, either to doctrines *qua* true or to prudential judgments *qua* safe or sure.¹¹

⁸ "When it comes to the question of interventions in the prudential order, it could happen that some Magisterial documents might not be free from all deficiencies" (CDF, *Donum Veritatis*, §24). In illustrating the norms for interpreting papal teaching, John C. Ford and Gerald Kelly give the case of whether the apparently absolute pronouncements of Pius XI and Pius XII proscribing castration also banned penal castration. Subsequent clarifications by the Holy Office answered negatively, which shows that "words alone do not always give us the sense, the true meaning, of a papal pronouncement" (*Contemporary Moral Theology*, vol. 1, *Questions in Fundamental Moral Theology* [Westminster, MD: Newman Press, 1962], 31).

⁹ Avery Dulles, *Magisterium: Teacher and Guardian of the Faith* (Naples, FL: Sapientia, 2007), 53.

¹⁰ Compare St. Vincent of Lerins on the unchanging nature of doctrine and also on the development of doctrine in *Commonitorium*, esp. chs. 2 and 23.

¹¹ On ordinary magisterium and religious submission of intellect and will, see: the Second Vatican Council, *Lumen Gentium* (1964) §25; CDF, *Donum Veritatis*, §§23–24; and CDF, "Doctrinal Commentary on the Profession of Faith" (1998), §10. On the question of whether non-definitive teaching is protected generally by the Holy Spirit as "safe" or "sure" only, or as "true" for doctrine and "safe" or "sure" for prudential and disciplinary matters, compare (supporting the former position) Charles Journet, *L'Église du Verbe incarné: Essai de théologie spéculative*, vol. 1, *La hiérarchie apostolique*, 2nd ed. (Paris: Desclée de Brouwer, 1955), 435–88, and (supporting the latter position) Joachim Salaverri's treatise *De ecclesia* in *Sacrae theologiae summa*, vol. 1, 4th ed. (Madrid: Biblioteca de Autores Cristianos, 1958), 762. Here I differ from Dulles in categorizing prudential judgments as non-definitive doctrine and not as merely disciplinary acts, which require only external obedience (*Magisterium*, 94). While this question deserves further exploration, the fact that the CDF has regarded both doctrine and prudential judgments as falling under the third paragraph of the *Professio Fidei* supports my position against Dulles: "A proposition contrary to these doctrines can be qualified as *erroneous* or, in the case

A better interpretive approach, in my mind, draws from the nuanced way in which the CDF's prefect, Cardinal Ladaria, calls attention to the historical circumstances that make the Church's judgment appropriate. In his explanatory letter to the bishops of the Catholic Church, Ladaria notes that Francis's judgment "is not in contradiction with the prior teachings of the Magisterium." How? By appeal to the social circumstances of the prior teaching: "These teachings, in fact, can be explained in the light of the primary responsibility of the public authority to protect the common good in a social context in which the penal sanctions were understood differently, and had developed in an environment in which it was more difficult to guarantee that the criminal could not repeat his crime."¹² The prior teaching in question was that the death penalty was a permissible way of safeguarding the common good.

Were the death penalty itself intrinsically evil, it must never be used no matter what the circumstances. Yet we see here that the death penalty is permissible in one age and impermissible in another precisely because of a change in circumstances. This obviously rules out Brugger's position, which holds that the death penalty is intrinsically evil and that the Church has only lately attained that insight. Rather, what Ladaria says is that modern social conditions allow for better means to be used in punishing criminals, achieving both an effective safeguarding of the common good and also a testimony to the inherent dignity of the worst criminals as made in the image of God. As Benedict XVI said, the abolition of the death penalty would be "substantive progress made in conforming penal law both to the human dignity of prisoners and the effective maintenance of public order."¹³ According to Ladaria, "the political and social situation of the past made the death penalty an acceptable means for the protection of the common good."¹⁴ Under new conditions,

of teachings of the prudential order, as rash or dangerous and therefore *tuto doceri non potest*" ("Doctrinal Commentary," §10). The *Professio Fidei* demands "religious submission of will and intellect" for such doctrines.

¹² Ladaria/CDF, "Letter to the Bishops," §8. Presumably, this includes both the past permissibility of the death penalty and the primacy of retribution among the purposes of punishment.

¹³ Benedict XVI, General Audience of November 30, 2011, quoted in Ladaria/CDF, "Letter to the Bishops," §5. The appeal to both human dignity and changed conditions is also a feature of the development in the Church's teaching on religious liberty in *Dignitatis Humanae* (1963).

¹⁴ Ladaria/CDF, "Letter to the Bishops," §2.

including not only an increased awareness of human dignity but also “more efficacious detention systems,” use of the death penalty today “becomes unnecessary” for the common good.¹⁵ This new prudential judgment activates a deeper participation in the “mercy and patience of the Lord” in dealing even with our most grievous and intimate enemies.¹⁶

Finally, given that this new teaching on the death penalty depends on circumstances, it can only be non-definitive. Rather, the inadmissibility of the death penalty is not an absolute judgment, but one conditional on a certain state of civilization obtaining in which it is no longer necessary for safe-guarding public order. So long as the social conditions referred to in the CDF clarification obtain, the judgment that the death penalty must not be used also obtains. In other words, the Church’s judgment is simply becoming surer, from John Paul II to Benedict XVI to Francis, that there are practically no modern circumstances that allow for recourse to the death penalty, thereby calling for abolition. This does not imply that the state has no power to put to death, but that modern circumstances being what they are, there is moral need not to exercise this power.

My own research has uncovered a concept within the Thomist tradition that describes such conditional advancements in justice capable of recognition by the Church. The concept is the “law of nations” (*ius gentium*), which is a kind of medium level of law consisting of universal customs existing between the unchanging, universal precepts of the natural law and the mutable, particular laws of this or that political community.¹⁷ Precisely because of its placement in between the immutable and the local, the *ius gentium* is a set of universal, adaptable means toward attaining the unchang-

¹⁵ Ladaria/CDF, “Letter to the Bishops,” §§2, 7.

¹⁶ Ladaria/CDF, “Letter to the Bishops,” §9.

¹⁷ The primary expositors of this concept belong to the sixteenth-century School of Salamanca: Francisco de Vitoria, *Comentarios a la secunda secundae de Santo Tomás*, ed. Vicente Beltrán de Heredia, 6 vols. (Salamanca, ES: Biblioteca de Teólogos Españoles, 1932–1952), II-II, q. 57, a. 3 (3:12–17); II-II, q. 66, a. 2, nos. 4–5 (3:325–26); Domingo de Soto, *De iustitia et iure, libri decem* (Salamanca, ES: 1553) I, q. 5, a. 4 (44–46), III, q. 1, a. 3 (196–98), and IV, q. 2, a. 2 (288–91); Domingo Báñez, *Decisiones de iure et iustitia* (Venice: 1595) II-II, q. 57, a. 3 (13a); Luis Molina, *De iustitia et iure opera omnia* (Venice: 1593–1611) I, d. 5 (13); Francisco Suárez, *De legibus ac Deo legislatore* II, ch. 17, nos. 19, 20; VII, ch. 4, nos. 3–5. The concept is given a different meaning by the neo-Thomists of the twentieth century, though sometimes they arrive at conclusions very similar to the Salamancans on particular questions.

ing ends of the natural law. If better means or a different set of social conditions arises, the *ius gentium* is capable of change, often in tandem with the leaven of the Gospel in the world. We may apply this concept to the Church's current teaching on the death penalty and religious liberty, in which the language of human dignity occurs right alongside appeal to circumstantial changes in society. One classic institution of the law of nations was the enslavement of the vanquished in a just war, a "means" that preserved their lives while still reducing the threat of future unjust aggression and serving as retribution for the unjust aggression. Yet, as early modern Thomistic expositors of the law of nations noted, this "means" was not so natural that it could not be outlawed in Christendom, replaced by the practice of ransoming prisoners of war rather than reducing them to perpetual slavery.¹⁸

There are two main interpretations of this concept in the Thomistic tradition: that *ius gentium* consists either in universal customs added to the natural law by the human race as "morally necessary" for keeping the ends of the natural law (the Salamancan school of Francisco de Vitoria, Domingo de Soto, Melchior Cano, Domingo Báñez, and also later Jesuits); or in conditional deductions from natural law principles about what is strictly just in this or that set of "civilizational conditions" (later, Maritain-inspired neo-Thomists such as Yves Simon and M.-M. Labourdette). The former emphasizes the positive aspect of the law of nations; the latter, at least in Maritain, emphasizes the cognitive aspect—namely, that changes in conditions allow us to realize something true that we missed in earlier sets of social conditions.¹⁹ In either case, a change in circumstances makes possible a change in the practical judgment regarding certain means to a natural law end. In the case of the death penalty, a change in circumstances renders the state's use of its power over the life of those guilty of grave crimes a less effective means of fostering the common

¹⁸ E.g., Vitoria, *De iure belli*, q. 3, aa. 3 and 5; Vitoria, *Comentarios*, II-II, q. 57, a. 3, no. 5 (3:16–17); Domingo de Soto, *De dominio*, no. 25; Báñez, *Decisiones de iure et iustitia*, q. 57, a. 3 (13b); Molina, *De iustitia et iure*, I, d. 5; Suárez, *De legibus*, II, ch. 20, no. 8, and VII, ch. 4, no. 6.

¹⁹ It is quite possible that Pope Francis thinks of this question of the death penalty less in terms of conditions enabling a change in custom than in terms of conditions enabling a deduction from natural law "in light of the Gospel" that was not morally possible in prior ages. This line is perhaps more difficult to reconcile, as Dulles feared, with the credibility of the Magisterium and the traditional teaching.

good, all things considered. Naturally, such a change would leave untouched the state's possession of the power itself.

The fascinating thing about institutions included with the *ius gentium* is that, while mutable in themselves, their universal scope can make them existentially indistinguishable from the precepts of the natural law to the common person in any given age. We can call this category "universal existential evil," in contrast to the "intrinsically evil." In other words, that certain types of slavery were permissible then under certain titles would "feel" as natural as our abhorrence of slavery now. The "inadmissibility" of the death penalty ought to be understood in the same way and is perhaps the reason why some "feel" this teaching to be a reversal of the very doctrinal principles on which the old teaching was based. Just as Salamancan theologians such as Báñez and Soto appealed to the influence of the Church in changing the practice of enslavement,²⁰ so Francis now appeals to "the light of the Gospel" in changing the practice on the death penalty. What may be a permissible response to evil under certain conditions can become an impermissible response to evil under other conditions, especially if greater goods can be obtained or greater evils avoided. All this still regards what is extrinsically evil, under the aspect of what and how circumstances can make something extrinsically evil. Yet the very universality of the "law of nations" renders such extrinsic evils "universal existential evils" that would be hard for even educated people in this or that age to distinguish from the natural law itself. For this reason, the law of nations may also be called an "evolving natural law," distinct from the unchanging natural law, yet universal and therefore not reducible to civil law. Again, the development of the law of nations occurs in tandem with the Gospel acting as leaven in a world where evil and good are admixed. In this light, the Church can identify, suggest, and even command better means for attaining the unchanging end of our nature: eternal union with the Most Holy Trinity. Hence, the Church can demand that a certain means acceptable at one time no longer be used at another.

Accordingly, any new prudential judgment of the Church in such matters should correlate with an advancement in changeable means to unchangeable ends. This "law of nations" interpretation is simply that, in new circumstances, new means are possible that were not practicable, desirable, or even cognizable in the concrete circum-

²⁰ Báñez, *Decisiones de iure et iustitia*, q. 57, a. 3 (13b); Soto, *De iustitia et iure*, IV, q. 2, a. 2 (290b).

stances of prior ages.²¹ Since these are better means, they should replace, by means of a new universal custom, what was permissible before but no longer best or even adequate. So, an abolition of the death penalty can replace its practicable availability in earlier times without entailing that the Church has taught moral error for her entire history until 2018. Needless to say, I find the long testimony of Scripture, the Fathers, and the Magisterium answers affirmatively and definitively the question of whether the state possesses the power to put to death.²²

In my view, therefore, Francis's judgment is within the competency of the Magisterium, even as it is also a contingent and non-definitive doctrine.²³ The "law of nations" concept involves universal customs that are proximate to the natural law, and thereby existentially of great authority, since these customs will transcend particular, civil laws. Many important questions remain, of course. What of less developed countries, in which the conditions invoked do not exist to a sufficient degree that the death penalty can be removed from the legal code? What of prisoners capable of doing damage to public order or to the lives of other prisoners or guards while in a modern prison? These are questions that may require that theologians clarify more precisely the Church's prudential judgment. Even Ladaria's letter to the bishops accompanying the rescript implies that Francis's judgment is an ideal toward which nations should move, rather than a definition of an intrinsic evil that must never be done in whatever

²¹ For an application of this idea to the Church's teaching on religious liberty at Vatican II, see Basile Valuet, *La liberté religieuse et la tradition catholique: Un cas de développement doctrinal homogène dans le Magistère authentique*, 6 vols., 3rd ed. (Le Barroux, FR: Abbaye Sainte-Madeleine, 2011), 2:749–96.

²² On this point, see Feser and Bessette, *By Man Shall His Blood Be Shed*, 97–211. A common theme of the tradition is also that the Church has begged for clemency and time for reform on behalf of those condemned to death.

²³ Again, I concede the possibility that Francis and his predecessors are wrong in this judgment. One can find other examples of prudential judgments from popes that turned out to be wrong. Journet notes the judgment of Gregory XVI that Polish Catholics should submit to Tzar Nicholas I, despite his persecution of the Polish Church (*L'Église du Verbe incarné*, 481n1). This prudential decision was so bad that Gregory XVI himself publicly regretted it. Perhaps this was simply a disciplinary order, not a prudential judgment. All the same, the Church's judgment against the use of the death penalty has received only growing endorsement and increasingly universal application from several consecutive popes, so the case requires much more care before identifying it as a singular failure of judgment directed to a particular region.

conditions. He says that the Church, “in respectful dialogue with civil authorities, [encourages] the creation of conditions that allow for the elimination of the death penalty where it is still in effect.”²⁴ This implies that Francis’s prudential judgment does not obviate attention to concrete local conditions, even as it communicates a firm goal toward which civil authorities must now strive with all responsible effort. In any case, these questions should not hinder one from seeing that Francis is within his office to make such a prudential judgment and to enshrine that judgment in the *Catechism* as existentially binding in the way I have claimed.

All this stands even if one were to find fault with the argumentation used by Pope Francis in arriving at a more absolute position on the use of the death penalty, as the Church allows theologians to do.²⁵ For example, is Francis implying that retribution is not a legitimate purpose of punishment where the *Catechism* now appeals to “a new understanding . . . of the significance of penal sanctions imposed by the state”?²⁶ Perhaps all Francis means to do is distinguish retribution’s legitimacy in itself from the necessity of a proportional retribution when other social goods are in question. In other words, the argument would be that it is not necessary to pursue a proportionality unto death when other social goods are at stake in the use of the death penalty (e.g., renouncing all violence in a “culture of death” that may in fact be a tyrannical form of democracy, gaining time for the criminal’s repentance and reform, rectifying inconsistencies in the justice system such as uncertain convictions, and limiting the financial costs of death row). Another possibility is to remember that history contains much evil mixed with even what prior Catholic tradition held were legitimate uses of the death penalty. There certainly have been social settings in which the death penalty has

²⁴ Ladaria/CDF, “Letter to the Bishops,” §9.

²⁵ Another part of the Holy Father’s argumentation that deserves further criticism is his point that life sentences are a “hidden death penalty.” Were Pope Francis to mean that life sentences should be abolished too, this would seem to undermine part of the rationale for the development of the abolition of the death penalty: that prison systems are developed enough to protect the common good from the most dangerous criminals without killing them.

²⁶ “Novus insuper sanctionis poenalis sensus, quoad Statum attinet, magis in dies percipitur” (CCC §2267). To say that retribution is not a legitimate purpose in punishment would not only contradict the *Catechism* itself (see §2266), but also the *Compendium*, the *Roman Catechism*, and a number of other papal allocutions, let alone the traditional teaching of theologians.

been inflicted vengefully. There also have been societies where the temporal authorities employed cruel forms of the death penalty for real crimes against the moral order or ordered the death penalty for false crimes, such as confessing Jesus Christ to be Lord and Savior. To be sure, there remain today settings in which the concrete application of the death penalty reinforces a deformed pursuit of the common good. One thinks of many Muslim countries in which the death penalty is administered for the false crime of conversion to the Catholic faith from Islam.

Pope Francis's move is another step in Catholic social doctrine in the direction of limiting and constraining state authority in response to the totalitarianisms of the nineteenth and twentieth centuries, both in the West and elsewhere. Will there be any state authority left once the Church calls for functional abolition of that power that, in prior ages, was the basis for proving that the state's origin transcended the mere will of men? Perhaps one can situate the advance in a different frame: that the Gospel's light has shown a way of tolerating evil in the midst of society for the sake of highlighting Christ's mercy and willingness to abjure violence for the sake of our salvation in this age. Society should therefore renounce even legitimate violence when it is no longer necessary, in order to better highlight the dignity of all human life, as John Paul II urged in *Evangelium Vitae*, further constraining traditional teachings on the death penalty and war to only the purpose of necessary defense.²⁷ N·V

²⁷ An earlier version of this commentary appeared on the *Catholic Moral Theology* blog as "Death Penalty Development: A Conditional Advance of Justice," August 3, 2018 (catholicmoraltheology.com/death-penalty-development-a-conditional-advance-of-justice/).