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Buddhism and Constitutionalism

A Comparison with the Canon Law

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18.1 INTRODUCTION

Readers of this volume may be wondering, as I myself have wondered, why a person with only the most rudimentary knowledge of Buddhism and only a smattering of knowledge about constitutionalism itself should be involved in a discussion devoted to both subjects. I have considered this question as a likely one among you, and I want to offer two possible justifications for my appearance.

One is Tom Ginsburg's invitation. An offer from him was something I hesitated to reject. Tom stands at the top of the field of comparative constitutionalism, and I figured: If *he* asked me, there must be a plausible reason. You can make your own decision on this. The other is my own interest in the character of religious law – not just Christian law but the law of other religions. Both this volume and my research involve the possible connection between the two. I thought – I still think – that organized religion may, by its inherent nature, be connected with constitutionalism. Both stand upon a conviction that there are certain fundamental rules and principles that must be respected. They stand outside our own volition, indeed our own full understanding, and they shape our law. Perhaps the easiest example from the perspective of Christianity is that of the Ten Commandments. Its commands are not subject to repeal or amendment, though our adherence to them will never be perfect and their exact reach may be controversial. They are "constitutional" in that sense. Containing no penalties for violation, they cannot be considered positive law, but they invite legislators to provide more definite enactments to secure their enforcement.

In contributing to this volume, I was motivated by a desire to discover whether another religion – Buddhism – shared this feature with Christianity. Does what I have described make an intellectual connection with what exists in the practice of Buddhism? For purposes of comparison, this short chapter contains four examples

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that show how the canon laws, which regulated life in Christian churches, were understood and treated in practice.

18.2 DEFINITIONS

I begin with two definitions. Canon law means the law of the medieval church. In its definitive form, it was the product of the twelfth to the thirteenth centuries, fashioned from decrees of church councils, papal rulings, biblical texts, the ancient laws of Rome, and the dictates of natural law. It lasted in its medieval form for a long time: in the Catholic church until the twentieth century, and in Protestant lands, in what might be called a secularized but still substantially similar form, until about the same time. It was part of the European *ius commune*, the general law of European lands that supplemented and directed the scope of local customary laws. Constitutionalism is a more contested term. If I may borrow from what I remember from a talk given by the dean who first invited me to come to the University of Chicago, Gerhard Casper, later president of Stanford University, it is not simply a set of laws that preempted other laws. He wrote: "Constitutionalism does not refer to having a constitution but to structured and substantive limitations on government" (Casper 1987, 16). He did not mean that only a democracy could have such constitutional limitations. As Tom Ginsburg has himself shown, even authoritarian regimes may leave room for institutions that check the exercise of despotic powers (2008). The significant question is not where we place any particular category of rights, but how close they are to being unlimited. Almost all the rights we hold are subject to limitations. They cannot be absolute, and it is more useful to examine what the limitations are than it is to attempt to place those rights into one box or the other. In what follows, I shall assume that the reader knows only slightly more about the medieval canon law than I do about Buddhist law.

18.3 FIRST: STATUS-BASED RIGHTS OF THE CLERGY, INCLUDING MONKS AND NUNS

A foundational principle of the canon law was that the clergy should be treated as a class and separately in law than were other men and women. Most famously, this principle was the basis for "benefit of clergy" in England, a privilege that allowed clerics accused of serious crimes to escape prosecution in the royal courts. Instead, they were to be remitted to the hands of their bishop, who would deal with them as he saw fit – no mean privilege in an age when the ordinary punishment for those found guilty of a felony was death at the gallows. This was only the most famous application of what the church itself considered a matter of right ordering in a world where clergy stood apart from the laity. The claim, canonists said, was one that no secular ruler had authority to reverse. The temporal law itself recognized this principle, as in Magna Carta's first clause – the English church shall be free. This

arrangement had consequences. It meant that physical attacks against a cleric were to be dealt with differently from similar attacks against the laity – an offender was to be tried in an ecclesiastical court and, if found guilty, required to undertake a journey to the papal court in Rome to seek absolution from the Roman pontiff. It also required special disposition of the property of clerics at their death, much like the situation of Buddhist monks.

Of course, it was also true that the clergy was bound by stricter rules in some respects. Requirements in their dress, limitations on the right to own property, and of course the burden of celibacy – the issue we learned about in the context of Korean Buddhism presented by Mark Nathan in this volume – were all regarded as consequences of this part of the canon law. I should add that some of these assertions were contested in specific situations – just as the reach of provisions in the US Constitution today sometimes become matters of dispute. Allowing claims to freehold land to escape secular jurisdiction simply because it came into the hands of an ecclesiastic seemed an abuse of the right ordering of society to most English common lawyers for instance, and they developed ways to prevent it. However, that there existed a basic and permanent difference between the spiritual and the temporal spheres of life those lawyers did not dispute, and this fundamental difference had in effect constitutional consequences.

18.4 SECOND: FREEDOM OF RELIGIOUS CHOICE

Surprising as it may seem to find any mention of freedom of choice in matters of religious faith in the law of the medieval church – the architect of the Inquisition – the canon law did in fact contain such a principle. No unwilling person was to be required to embrace Christianity. Jews were permitted to raise their children in the Jewish faith, even where the government of a land was in the hands of orthodox Christian bishops and magistrates. The same was true of other religions. This is, however, an example of a fundamental freedom that was reduced to a very small corner of human life as it was put into practice, and the medieval church cannot pretend to have been a champion of religious freedom. This is because the canon law also held that, although the choice to accept baptism or to refuse it was a real one, once baptism had been chosen freely, it was final. No freedom to renounce Christianity was available, and since in practice most baptisms were conducted while the person was an infant, in fact, this freedom of choice largely disappeared. It was akin to circumcision among the ancient Israelites; it could not be undone, and it obliged the circumcised to keep the Mosaic Laws. The constitutional freedom to choose one's religion, found in the texts of the medieval canon law, would thus have to wait to become fully effective – just as in the history of the common law, freedom of speech in English had to wait until it could be expanded from the privileged floor of the Houses of Parliament to the streets of London.

18.5 THIRD: A RIGHT TO REMAIN SILENT

Known commonly in modern legal parlance as the "privilege against self-incrimination," this constitutional principle was commonly stated by the legal maxim *Nemo tenetur prodere seipsum*: No one is obliged to proceed against himself. Included in Amendment V to the US Constitution (1791), the principle is also found in several of the canonical texts as understood in the Middle Ages. It was buttressed also by the principle, stated in the same basic texts, that *De occultis non judicat ecclesia*: The church does not pass judgment on matters that are hidden. The proper place for these private matters was the private forum of confession to God, not the public forum of a court of law. As Panormitanus, the greatest of the late medieval canonists, stated in this argument, buttressing it with citations from the Bible and the *Decretum*, "It seems that no one is required to answer an interrogation or an incriminating charge, because *Nemo tenetur prodere seipsum*" (Panormitanus 1615). Like the concept of religious freedom, however, this constitutional right turned out in practice to mean less than it does today. This happened because public fame was accepted as raising a legitimate presumption of a person's guilt, requiring him to swear a compurgatory oath of his innocence if he wished to squelch the rumor's effect. In other words, he could not be required to incriminate himself, but he could be required to rebut public fame against him if it was held by good and substantial members of the community. Parallels to this situation may be seen today – most recently in the reputation of "inappropriate behavior" that has been fastened on many men in respect of women they admired. Had this been 1250, in the absence of definitive proof of their offenses, they might have been obliged to undergo canonical purgation, and I think it is fair to say that this would be an inroad on the presumption of innocence and the privilege against self-incrimination.

18.6 FOURTH: WELFARE RIGHTS

Article 25 of the Universal Declaration of Human Rights declares that "Everyone has the right to a standard of living adequate for the health and well-being of his family." It may be surprising to discover that the medieval canon law contained a similar, though not identical, provision. However, it was based not upon noble aspirations, but rather upon dictates canon lawyers found in the law of nature. Before society was organized, their argument ran, all things on Earth had been held in common. So it was in the Garden of Eden. Private property depended upon a general agreement to forgo common ownership in favor of individual incentives to make productive use of what they possessed. It would reward effort and protect against thievery. However, that agreement did not extend to times of extreme want. When those times arrived and social organization fell apart, the poor could take from the wealthy without scruple. In a sense, they were simply taking what was already theirs – held in common perhaps – because they were entitled to it under the agreement made at

the time. It followed also that governments had the ability to organize efforts in this direction to avoid the chaos and public disquiet that would accompany a regime of pure self-help. This point may also be amusing. Of course, the idea that there had actually once been a "world parliament" that agreed to this system requires a stretch of the imagination. William Blackstone, the great eighteenth-century English lawyer, described it as "too wild" to be believed (Blackstone 1979). But he did not reject the conclusions that lawyers had always drawn from it. Undoubtedly more limited in scope than what is now found in the Universal Declaration, it has been claimed that it stands as a worthy ancestor of today's aspirations.

18.7 CONCLUSION

There is a good deal more that could be said on this subject. More examples could be provided, more rights and limitations expanded upon. My hope, however, is that there may be some parallels in Buddhist thinking that relate to what I have described. I picked my four subjects because I thought there might be, and there are, indications in the chapters from this volume to encourage my hopes on this score. Clerical privileges, for instance, might be just such an area which Buddhist thought held to be off limits from meddling and change by secular authorities. Berthe Jansen's very helpful chapter on monastic constitutional law certainly encourages this approach. Perhaps another example would be Martin Mills' discussion of Songtsen Gampo's royal law based on the Buddhist ten virtues, or Iselin Frydenlund's chapter on events in Myanmar. Seemingly, it also resembles what D. Christian Lammerts wrote about the *dhammasattha* law of precolonial Southeast Asia and his wonderful example of the exchange of a bunch of bananas for a coconut filled with gold. Richard W. Whitecross' treatment of constitutionalism in Bhutan encouraged the same thought, as did Krishantha Fedricks' intriguing introduction to televangelist Buddhist monks. On the other hand, some of the contributions seem to me to suggest the opposite – that the real problem has been simply the treatment of Buddhists by avowedly secular governments rather than the place of constitutional ideas within Buddhism itself. Levi McLaughlin's considerations on the impact of the 1951 Religious Juridical Persons Law on Japanese Buddhists is an example. This chapter and a few others have addressed the treatment of Buddhism under current law, not constitutionalism itself as part of religious law. Valuable and interesting as they are in themselves, they have suggested to me the absence of Buddhism as a likely source of constitutional principles. If that is what we must conclude the evidence shows, I will be wiser, but also sadder.

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