The "Lex Ecclesiae Fundamentalis"

a missed chance or a chanceless chance

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SUMMARY

A failure in the Church is the basis from this book, because the "Lex Ecclesiae Fundamentalis" (further mentioned as LEF) has, despite sixteen years effort, still not appeared. Even though between 1965-1981 seven versions of the LEF were drafted not one of them has had any powerful support. The main Question in this investigation is what ecclesiastical and canon law arguments were the reason for the LEF not to be published. The investigation has focused on two areas, namely Fundamental law and the Church. The first reading investigated the primary source Communications and the 'Archive of Monsignor Willy Onclin' from Leuven. This archive was until recently not available for use in an investigation of the LEF. From these primary sources it appeared that in discussions of the members of the 'special study group of the LEF' (further mentioned as Coetus); at the Bishops Synods and at the World Episcopacy there where different understandings of what is meant by Fundamental Law. Also over the meaning of 'Church' there was some disagreement because different Church Models were present. This first reading resulted in the conclusion that because what was meant by Fundamental Law was not clear and there was no agreement on which Church Model the LEF failed.

To enlighten this, the main point of the questions from the Coetus members concerning theological and canon law about the LEF are placed together (Chapter II). Then the opinions of theological and canonical authors have been looked at (Chapter III). These two chapters served as reproduction of the common problems in discussions about the LEF.

After this four Church Models and the concept of constitutionalism are historically characterised in order to analyse the remarks made by the Coetus members, authors and bishops in which Church Models and constitutional conceptions played a part (Chapter V an VI). In the description of constitutionalism, state law has been used.

Chapter VI also pays attention to the divine law that played a big part in the LEF discussions. Finally we will considered whether the LEF has been a missed chance or a chanceless missen (Chapter VII).
Out of the study of the work by the Coetus and many notandae some main points were formed in Chapter II.

First of all the opportunity of the LEF appeared to be doubted, because the LEF would brake new theological developments in ecclesiastical life. In this idea that the LEF clarifies the ecclesiastical and theological developments, a joining finds place between ecclesiastical law and theology. Secondly there was a disagreement about the usage of language in the LEF. Supporters believed the text was often too theological; for that very reason the opponents believed the text was too juridical. Thirdly, the Divine law played a major part in the LEF discussions.

Most of the opponents feared that an admission of the Divine law would define the theology too closely. Although the supporters admit a precise delimitation between the Devin law and ecclesiastical law is difficult, they consider that an admission of these could be possible and meaningful.

A fourth item was the status of the LEF. Especially the fact that the LEF had to become the highest ecclesiastical law exhorted questions. This highest juridical status strengthened the idea that ecclesiastical life (and theology) would be to closely defined by the LEF. Furthermore the LEF was regularly compared to a civil constitution.

From the way this was handled by the authors it appeared, that especially the fourth scheme in 1970 had exhorted many reactions. These reactions are to be characterised by the following items.

Concerning the character of the LEF some thought the LEF had to be based on theology; others were supporters of the juridical character. For LEF the Coetus has chosen for a theological- legal character. Furthermore the discussions about Church Models play a part. People asked themselves which Church Model could serve best as basis for the LEF. The question here is, to what extend can ecclesiastical Church Models can be basis for a church constitution that controls the actual relations within the Church? All this finds a repercussion in the remarks about the usage of language in the LEF.

Some find the usage of language is too theological, the others find it too juridical. So a central question is: is it possible to separate theological and juridical usage of language?

At the same time the divine law, in contrast to purely the church law, plays a prominent part in the comments. No unambiguous idea prevails about this. Many people think that in the LEF not only divine law but also purely church law must be included. But also many people
admit that a strict separation between divine and church law provides a problem. However, a clear description of divine law is missing.

Finally there is indistinction about the concept "constitution". One calls the Gospel the constitution of the church; the other sees a constitution as a fundamental structure of the ecclesiastical organisation.

In the comments on the LEF/1976 and the LEF/1980 more items of the former reactions on the LEF/1970 return. This balance makes clear that the authors and the Coetus members do not differ in their comments. A distinction is however that the Coetus members are mainly positive about the possibility of a LEF and that the authors are mainly negative. Chapter III also makes clear that theologists strongly emphasise the Church Models and the Church as a mystery; canonists emphasise the juridical aspects of the churchly constitution. This makes theologists experience the Gospel as the Law and they see the LEF as a danger for the church, because they fear that the LEF could form the theological foundations of the Church. In this idea the concept "constitution" seems to be made improperly equal to "Gospel". Canonists understand the LEF especially as a juridical constitution for the Church that controls the fundamental structure of the Church.

So theologists and canonists had different expectations of the LEF. But they agreed in their opinion that the LEF schemes were not satisfactory.

Theologists found the Church Models not well developed; canonists found the juridical character badly defined.

Chapter IV explains the reasons for the historical descriptions of the Church Models, the constitutional concepts and the Divine law. An historical description enlightens the development of the meaning and the use of the Church concept and the constitutional concepts at the time of the LEF project. We have been chosen for the Church Models that appeared mostly in the LEF discussions. As there are: *societas perfecta*, mystical Body of Christ, People of God and *communio*. The description of the constitutional concepts was made starting from the constitutional concept of constitutionalism because an ecclesiastical constitutionalism seemed to be missing. These descriptions make it possible to see if the Church has a ecclesiastical constitutionalism of her own; and to analyse whether the LEF, in theory of law, can be called a constitution.
Thus in Chapter V the four Church Models mentioned are historically described and next the specific comments on LEF are discussed in which the Church Models are central. This led to the following conclusion.

The LEF wanted to arrange the practical standards of the order in the Church, later the Coetus decided that the LEF had to have a theological-legal character. Because of this more and more ecclesiastical concepts ended up in the LEF. These ecclesiastical concepts called up different reactions with theologians, canonists, bishops and cardinals. This was logical, because the ecclesiastical theory about the Church, especially through Vaticanum II, was broken open. The development of more Church Models was to realise a diversity in thinking about the Church. The *societas* model was out and has not been replaced by another Church Model as yet. However the People of God model had preference, a real agreement about Church Models was missing among theologists. Therefore their meaning for the churchly legal system was indistinct. Thus no Church Model could serve as guiding principle for the LEF. In this discussion a strong tendency ruled that theology stipulates the ecclesiastical law. This had a paralysing effect on the work. Theology became a given theme for the canon law, through which the canon law was made inferior to the theology. Thus time was not ready for the LEF because of the theological development. But when will it be right, theology always keeps moving, and time is never ready for a LEF. In short: the LEF was chanceless.

But why could a new *Codex* be enacted in 1983? Even then there was no comprehensive Church Model present, nor were all theological questions solved. The reason for this is probably the fact that the *Codex* is not an ecclesiastical constitution. This seems to be the main point, many were of opinion that an ecclesiastical constitution had to be more stable than normal ecclesiastical laws. An ecclesiastical constitution was rightly seen as to be higher and more fundamental in the Church than the other ecclesiastical laws. But the legal higher status of the ecclesiastical constitution had been theological interpreted in the sense that the ecclesiastical constitution had to situate correctly the Church Models and, as it seemed, no uncertainty about a Church Model was allowed to exist. This opinion connects theology and law in such a way that the concept 'constitution' means no longer a formal written legal sediment of a common structure, but more a fixing of the theology. This seems to be an improper idea of 'ecclesiastical constitution'.

After describing in Chapter VI constitutionalism, constitution, basic rights and civil rights with help of constitutional law, the specific remarks about the LEF, in which these concepts played a part, have been discussed. This led to the following conclusions.
A first conclusion is that the Church, at the time of the LEF project did not possess her own churchly constitutionalism. Pope Paul VI gave an impulse with the concept "constitutive", but this had not been comprehensive. Next to that some used constitutional elements from the civil right; others completely turned away this usage. In continuation of this, many turned away any analogy between the LEF and the civil constitution because the Church is different from the State because of her supernatural nature. Others on the other hand confirm their arguments by pointing at the analogy. Through the lack of her own constitutional (or constitutive) concept and the frequent denial of every analogy with the civil right, the ideas lying behind stay unclear.

Next to that agreement the LEF had to regulate the fundamental rights and an adequate legal protection of the religious. Herewith many missed a ground right that protects to avoid possible abuse of power by the churchly authority. This vision corresponds to the civil constitutional right. A point of discussion was how far ground rights can restrict the institutions of divine recognised institute. The contra arguments especially refer to a theological framework.

Also prevails the question about the existence of invariably divine right of the Church. But the (legal) formulation of this divine right varies during time. In short, the contents of the divine right is unchangeable, but its design in churchly legislation varies during the centuries. However, the LEF discussions about the divine right was strongly approached from the theological perspective. Through this stayed an open concept to be useful for the LEF. This being theological also plays a role with the fact that the LEF became the highest law in the Church. This is why many mean that the LEF would only break down divine right, because the divine right is the highest law in the Church. The LEF however will than be standardised to the divine right. From this the misconception arises that the highest law in the Church means: highest for everything in the Church. But a churchly official constitution is the highest position of law for a community. The LEF has no higher value above dogma and spirituality. There has been forgotten that law controls relations and not theology.

The theological idea about constitution and the highest status of the LEF worked paralysing and lost sight of the limited meaning of an official constitution, namely 'highest' in the legal system. In short, the theological and canonical conversations were too closely interwoven at this point, what led to indistinction. The base for this interweaving came into being in 1967 in the intention that the LEF had to have a theological legal character. Based on this theology the legal question started to dominate what led to the fact that not one framework served as a clear reference. And this made the LEF project very vulnerable. Too many concepts
('fundamental', 'divine right', 'constitution', 'highest' and 'fundamental rights') stayed open concepts, what led to indistinction about the nature, method and contents of the LEF.

Lastly chapter VII summarises the main conclusions.

Many concepts had a too open character at the time of the LEF project. This was also caused by the fact that a characteristic juridical concept of churchly constitutional law was missing. The idea of "constitutional law" of Paul VI directed more to theologians than to canonists, because furthermore an analogous use with civil constitutional law was turned away by many, a theological approach of the concepts started to dominate in the LEF discussions. This led to confusion in the LEF debate. The theological approach did not put the LEF in a sheer juridical perspective of an officially written constitution with the highest status for the priority laws in the Church.

Through this a fear had been created that the LEF would establish the entire life and especially the development in theology. This fear had been stimulated by the interweaving of more church models in the LEF. However this use of church models was confusing, because many are not crystallised yet.

In short, at the time people started too fast and too enthusiastically with a scheme for a constitutional law for the Church without answering fundamental questions about necessary concepts, this led to great confusion about these concepts and a lot of interweaving between canon law and theology. Through this people lost sight of the limited meaning of the LEF as law document as well of the fact that church law does not record theology. This confusion has never been solved successfully in the course of years. In this way the LEF was chanceless during its time. The future will show whether it has been merely a missed chance.

Finally: is a churchly constitution sensible and useful in today’s Church? The answer is a heartfelt 'yes'. The existence of legal relations within the Church between men in power and the ordinary religious persons who participate and work in the Church, make an official churchly constitution useful. The higher legal status of an official church constitution creates a more clear framework for the rights of the Christian religious and the fundamental structure of the Church in the legal system than in the Church Book of Law.

In addition to this a new attempt at a church constitution is useful for a necessary reconsideration of the fundamental laws. The steadily development of the theme human rights in the Church makes this necessary, by an official church constitution in which functional
church basic rights are recorded, the Church also makes clear to the society that she takes human rights and the rights of the believer seriously.

It is also very challenging for canonists to typify the issue of limitation of power within the *communio* model in a formal church constitution.

Finally a proposition for a definition for a functional church constitution:
"church constitutional law is the regulation of church power by law in such a way that possibilities for Christian *communio* are created which are otherwise excluded, so that a religious balance can be possible, whereby in co-operation with the church official bodies the freedom of the human and Christian person is being respected ".

The being 'otherwise excluded' has to be understood in the sense that no limitation by 'church power' can mean that initiatives of the religious can be made impossible.

The words 'freedom of the human and Christian person' makes clear the necessity of an admission of church basic rights. The words 'being respected' demand a certain 'rule of law'.

And finally the 'religious balance' can be worked out in a certain way of separation of powers with a joined 'checks and balances'. Because the church constitution is the basic basis in the Church it is necessary that it is the highest church law. Herewith the nullification of other church laws is a possibility.

translated by L. Malherbe