# Bishops Against the Pope

The Motu Proprio "Ecclesia Dei" and the Extension of the Indult

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The Pope's clear intent in issuing "Ecclesia Dei" was to make the old Mass <freely> available to anyone who preferred it, argues a noted canonist

In order to be able to better highlight the range of the motu proprio <Ecclesia Dei> and the possible legal impact of its verbal expressions, we must take a step backwards and consider the first document in the lengthy and sad saga of the liturgical revolution: the Constitution <Missale Romanum> of Pope Paul VI.

At the eve of Vatican II there existed a strong anti-legal feeling in various parts of the Church, a feeling which gained momentum during the Council. This reaction was understandable because the law, like all good things, can be overdone and it had been definitely overdone in the forty-five years that preceded Vatican II. The reaction, of course, went to the opposite extreme and, above all, lasted far too long, creating injustice and confusion-which always happens when the law is confused and ambiguous. This anti-legal attitude infected the Council and produced documents that often are good sermons, but not always clear and definite in their enactments.

This anti-legal attitude also affected laws which were promulgated after the Council, including <Missale Romanum>. This Constitution seems merely to propose a new form of the Mass, but it lacked clauses that would show the legislator's wish to be obeyed; nor did it seem to abolish anything, substituting clearly the new for the old.

Paul VI was what in the States is known as a "liberal," a diplomat, not a theologian, and certainly not a liturgist. He had a strong leaning for ecumenical relations with the Protestant world, which might be achieved more readily if the Catholic liturgy were a bit softened so as to make it less different from the Protestant one. He also had absolute trust in the council [<Consilium>] for the reform of the liturgy, for all practical purposes headed by Archbishop Bugnini.

I personally think that Paul VI realized that a revolution of the liturgy must not seem to be imposed directly and starkly like any other law: probably he did not wish to abolish the old Mass completely, but thought that it would slowly die out of its own accord. Add to what I have said that Paul VI was in sympathy with the antilegal movement, and the result is the ambiguous document which goes under the name of <Missale Romanum>.

<Missale Romanum> probably intended to abrogate-that is, abolish by total substitution-the bull <Quo Primum> of 1570 by St. Pius V, which codified and consolidated the immemorial and universal custom that had regulated the Roman liturgy through the centuries from the time of Gregory the Great at the end of the sixth century. <Quo Primum> had further reinforced (but not replaced) the immemorial and universal custom and had conferred upon the old Mass the privilege of absolute priority over all other forms of celebration of the Mass. To <Quo Primum> (after <Missale Romanum>) we can, in any case, apply Canon 21: <In dubio revocatio legis praexistentis non praesumitur, sed leges posteriores ad priores trahendae sunt et his, quantum fieri potest, conciliandae>, which for all practical purposes means that if the old Mass has lost its privileged position, it nevertheless continues to exist and the faithful have a right to it.

But what is worse (from the point of view of the liturgical revolutionaries) is that <Missale Romanum> forgot to explicitly abolish (as the law required) the immemorial and universal custom on which, before <Quo Primum> (and later together with it), rested the old Mass, which therefore continues to exist although it is perhaps no longer protected by a written law. This was noted by scholars, but even then no supplementary law was passed to abolish that custom. Some people have thought that this was so because, apart from the fact that Paul VI had probably not really wanted to abolish the old Mass outright, he was alarmed by the resistance to the changes due also to their brutal implementation.

**A Contradictory Indult**

You all know that the struggle for the old Mass was carried on until John Paul II heard the cries of woe coming from the People of God who had been deprived of their birthright, and on October 3, 1984 he promulgated the indult <Quattuor abhinc annos> in which he allowed bishops to grant the old, or Carolingian-Gregorian Mass (I do not like the term "Tridentine") to those faithful who would request it.

An indult is a measure by which somebody invested with authority in the Church can grant, in order to favor the salvation of souls (which is the purpose of canon law, before which all laws must bow), an exception to the law (derogation); it is akin to dispensation, but with a wider scope. An indult, therefore, presupposes the existence of a law which has to be relaxed, in our case a law which had forbidden or abolished the old Mass. As we have seen, such a law does not exist, and therefore an indult is a misnomer in our case, since the faithful, even today, have a right to the old Mass on the basis of the non-abolished immemorial custom. But to have recognized this would have been tantamount to officially denying the liturgical policy of Paul VI and indeed repudiating Montini himself, with incalculable consequences-a thing that no pope can do after so short a time, apart from the fact that the present Pope is officially committed to the new Mass. For this reason it was good and practical policy on the part of the faithful to accept the indult and work with It.

We will now have to examine the indult more closely, as the enactments of <Ecclesia Dei> are based on it. The key phrases of the 1984 indult underline, once more, that the Church exists for the salvation (or, better still, the sanctification) of souls and that nothing must impede or retard it, but that all pastors who are truly such must, like the Lord himself, love and indeed give their lives for their sheep. The indult must be linked, therefore, with Canon 83, pare. 1 of the new Code on the duties of bishops, and especially with Canon 387 which underlines the bishop's pastoral mission. Canon 387 says explicitly: "<Episcopus dioecesanus, cum memor sit se obligatione teneri exemplum sanctitatis praebendi in caritate, humilitate et vitae simplicitate, omni ope promovere studeat sanctitatem christifidelium secundum uniuscuiusque propriam vocationem.>" This work of direct sanctification, "in charity and humility," and which must take account of each of the faithful's particular vocation, is therefore the sole responsibility of the bishop, not of other bodies like

episcopal conferences, synods or councils. This special episcopal duty is underlined in the indult, which gives particular force to the enactments of Canon 387 and excludes all other prelates or bodies (except, of course, the Holy See) from its application.

It is obvious that the intent of the Holy Father, as expressed in the first part of the document, is flatly contradicted by the second part, obviously prepared by the bureaucrats of the Congregation of Divine Worship, which is a veritable orgy of restrictive rules. The document is obviously contradictory and ought to have called for a second clarifying document that never materialized, as one bishop after another, often intimidated by their episcopal conference or by their clergy, proceeded to interpret the therefore the wishes of the Congregation of Divine Worship.

**Three Key Principles of Canon Law**

We now come to the events of 1988. I will not dwell on these sad events that ended with the final break between Archbishop Lefebvre and the Holy See, and the excommunication of the French bishop for his unlawful consecrations (and for the crime of schism). Neither will I go into the tedious question whether Lefebvre really did or did not incur the penalty of excommunication, as the question is now academic and only marginally affects our subject.

The outcome of the Lefebvre affair was the motu proprio <Ecclesia Dei> in which the Pope gave new form to the 1984 indult. What prompted the Pope was firstly the hope that a widening of the terms of the indult might bring back some of the Lefebvrites, and secondly, perhaps, the knowledge of how little the bishops had implemented the 1984 indult. Before we examine the motu proprio <Ecclesia Dei>, let us explain three principles of canon law which will help to interpret the document.

The first notion concerns what we mean when we say that the law must always be interpreted according to the "mind of the legislator." This means that in canon law what the legislator wants is more important than what he seems to have said. As the great canonist Suarez says: "As concerns the intention or mind of the legislator, it must be considered that from it depends not only the substance but also the effectiveness of the law....The mind of the legislator is the soul of the law, so that as

in a living being the substance and workings of life depend above all from the soul, so in the case of the law it depends from the mind of the legislator." (<De Legibus>, L. III, c. XX, n. 1).

The second principle concerns the so-called <finis legis>, i.e. the purpose for which the law has been enacted. If, for example, the purpose of the law as an expression of the mind of the legislator is in danger of being defeated because of enactments badly worded or apparently in contrast with the aforesaid purpose, those enactments would have to be interpreted to serve what the legislator wishes to achieve.

The third principle that we must keep in mind is that it is immaterial in which form or fashion the legislator expresses himself as long as he makes it clearly known that he is acting as a legislator.

**Did <Ecclesia Dei> Grant a Privilege?**

Let us now examine the motu proprio <Ecclesia Dei> in its relevant clauses. It is undoubtedly, among other things, a legal document; it promulgates a law. The Pope says: "I wish to manifest my will," and then goes on to say: "by virtue of my Apostolic Authority I decree the following"; in the context of this law he legally sets up a department of the Roman Curia called the Commission <Ecclesia Dei> with powers and faculties of its own. The mind of the legislator and the purpose of the law are to pacify the Church after the Lefebvre affair and give ample and complete satisfaction to the wishes of those faithful "who feel attached to some previous liturgical and disciplinary forms of the Latin tradition." Eminent prelates and jurists, among them Cardinal Mayer, first president of the Commission <Ecclesia Dei>, have concluded that the Pope had conceded a "privilege" to those same faithful. Cardinal Mayer wrote two official letters on the subject: one to the chairman of the Ecclesia Dei Society of Australia, and one to the Judicial Vicar of the Vancouver Regional Tribunal. The same opinion, although surrounded by caveats, was expressed by Mgr. Re, deputy Vatican Secretary of State, in a letter of his to Dr. Eric de Saventhem, then President of the International Federation of Una Voce.

What is a "privilege" in canon law? The word "privilege" comes from the Latin <lex privata>, or "law or rule for private persons," as opposed to a general law or law for everybody. How does the Code define a privilege? Canon 76, pare. 1 states: "<Privilegium, seu gratia in favorem certarum personarum sive physicarum sive iuridicarum per peculiarem actum facta, concedi potest a legislatore necnon ab auctoritate exsecutiva cui legislator hanc potestatem concesserit.>" The "private law" or privilege is an instrument which the legislator uses to fulfill the spiritual needs of certain faithful who would be penalized by the indiscriminate application of the general law. It is a recognition by canon law that the law is an imperfect, albeit indispensable, instrument for the attainment of the public good. The State may ignore such individual or particular necessities, but the Church cannot, as her job is to save each individual soul.

The Code goes on to specify how a privilege must be interpreted in either of two ways: in a restrictive or in a broad and favorable way. Canon 77 so states: "<Privilegium interpretandum est ad normam can. 36, para 1; sed ea semper adhibenda est interpretatio, qua privilegio aucti aliquam revera gratiam consequantur.>" Canon 77, although it clearly says that no privilege can be emptied of all meaning and have no effect whatsoever, does refer, on the matter of interpretation, to Canon 36 pare. 1 which so states: "<Actus administrativus intellegendus est secundum propriam verborum significationem et communem loquendi usum; in dubio, qui ad lites referuntur aut ad poenas comminandas infligendasve attinent aut personae iura coarctant aut iura aliis quaesita laedunt aut adversantur legi in commodum privatorum, strictae subsunt interpretationi; ceteri omnes, latae.>"

The new Code therefore confines strict interpretation to cases that concern either criminal law or the rights of third parties where privileges are concerned. But certain canonists, probably still under the influence of the old legislation, maintain that such strict interpretation must somehow be extended to all privileges that constitute an exception to an existing law. They therefore make a distinction between privileges in the strict sense of the word as defined by Canon 76 (which are enacted in favor of individual bodies or persons, and very often are exceptions to existing laws), and privileges in the broad sense of the word, i.e. privileges which are the result of a law, or are part of a law.

This distinction is important because whereas privileges in the strict sense of the word are often exceptions from the observance of the law and must, like all exceptions, be interpreted strictly or restrictively, the special law and, even more so, a general law or law concerning the universal Church but containing exceptions in favor of certain people must be interpreted in a broad and favorable manner because they embody the general solicitude of the Church for the salvation of souls; they are part of a general policy, not particular favors accorded to this or I that party. Some canonists further maintain that only the special clauses contained in a general law must be interpreted in a broad and favorable way because they form part of a certain policy; they therefore consider a special law on the same plane as a particular privilege. But the great canonist Van Hove (<De Privilegiis>, n. 201) opposes this interpretation, because he says that a law is a law and, whether special or general, it has the same characteristics, must enjoy the same treatment and therefore must always (be it special or general) be interpreted in a wide and favorable way. I must here, though, register the opinion of the great canonist Reiffenstud (<Ius Canonicum>, I, I, tit. III, pare. V, n. 138, p. 139), who says that even a privilege granted as an exception from the law (a privilege in the strict sense of the word) is subject to a wide and generous application if it concerns "Divine worship." The reason is easy to understand: "Divine worship" is not only something we do for our pleasure but it is an essential obligation, directly connected with the salvation of souls.

I will now quote to you what Cardinal Mayer said to the Chairman of the Ecclesia Dei Society of Australia in a letter dated May 11, 1990. In this letter Cardinal Mayer criticizes the Congregation for Divine Worship for sabotaging the Pope's intentions, and then proceeds to explain the privilege granted by <Ecclesia Dei> while at the same time suggesting that the old Mass was never really abolished (!):

**1.** It should be noted that the somewhat pejorative language of <Quattuor abhinc annos> with regard to "the problem of priests and faithful holding to the so-called Tridentine Mass" was completely avoided in the Apostolic Letter <Ecclesia Dei>. In the latter document issued by the Supreme Pontiff himself reference is simply made to "those Catholic faithful who feel attached to some previous liturgical and disciplinary forms of the Latin tradition" (5, c) and "those who are attached to the Latin liturgical tradition" (6, c). It would seem unduly prejudicial to continue

referring to allusions in the 1962 Order of Mass in terms of its "lawfulness" (<auctoritas>) and "richness" (thesaurus cfr. 5, a) and qualified the desire both to celebrate and to assist at this Mass as a "legitimate aspiration" (<appetitio> cf. 5, c.). Hence a privilege in the canonical sense of the term was granted to the faithful by the Supreme Legislator of the Church (cf. C.I.C. #76. 1).

**2**. Hence insisting that only the "aspirations" of those who have difficulties in adjusting to the Missal promulgated by Pope Paul VI qualify as "rightful" and categorizing others as arising "from poor theology, self-interest, facile nostalgia, or some other aberration" seems considerably removed from the benevolent dispositions and pastoral considerations of our Holy Father in writing his Apostolic Letter of 2 duly 1988 in which he states that:

- respect must everywhere be shown for the feelings of all those who are attached to the Latin liturgical tradition by a wide and generous application of the directives already issued some time ago by the Apostolic See for the use of the Roman Missal according to the typical edition of 1962 (Ecclesia Dei 6, c.).

**3.** While it is clear that the new Ordo Missae remains normative for the entire Latin rite and there is no intention of changing the status of this Mass, this should not be construed as denying that there can be a "right" to the celebration of the Holy Sacrifice of the Mass according to the earlier Missal. Certainly, no one has the right to the acquisition of a privilege, but once a privilege is duly granted the subject indeed has the right to benefit from it (cf. C.I.C. #77). In Quattuor abhinc annos the celebration of the 1962 Order of Mass was presented as a privilege which might be requested from the competent authority (b). In Ecclesia Dei, however, the Roman Pontiff spoke of the 1962 Order of Mass in terms of its "lawfulness" (auctoritas) and "richness" (thesaurus cfr. 5, a) and qualified the desire both to celebrate and to assist at this Mass as a "legitimate aspiration" (appetitio cf. 5, c.). Hence a privilege in the canonical sense of the term was granted to the faithful by the Supreme Legislator of the Church (cf. C.I.C. #76. 1).

**4.** It is perhaps a moot point to argue that "the mind of the Holy Father is not to perpetuate the Tridentine Mass as an alternative liturgy but to accommodate those people who rightfully merit accommodation." It might equally be argued that the Holy Father's mind was not to abrogate the use of the earlier Roman Missal either.

The experience of this Pontifical Commission is that it is a relatively small proportion of the faithful who desire the use of the earlier Missal, but that where it is made available to those seeking it, it is an efficacious means to help them enter into the Eucharistic Sacrifice.

**The Pope's Intent**

What are our conclusions on the subject?

We must first of all realize that there was already from the beginning of the liturgical revolution a group of faithful who were by law exempted from saying the new Mass: infirm or aged priests (General Instruction <De Constitutione Apostolica "Missale Romanum" gradatim ad effectum deducenda>, October 20, 1969). This is a real case of a privilege accorded to a portion of the People of God through a general law of the Church. With the famous 1984 indult, bishops were also authorized to add other faithful to the already existing group of aged or infirm priests who had a right to the Mass. The motu proprio <Ecclesia Dei>, by establishing the right to the old Mass of the faithful who "felt bound" to "some previous liturgical and disciplinary forms of the Latin tradition" (and therefore not only the Mass), enlarged the group of those who had a right to the Mass by giving these faithful also the automatic right to belong to that group. This right, both to the old Mass, to the whole of the old liturgy (other Sacraments included), and to belong to the group of faithful who enjoy this privilege, is accentuated by <Ecclesia Dei>. It would here be too technical to analyze whether the 1984 indult and the motu proprio <Ecclesia Dei> are to be considered extensions of the general law embodied in the General Instruction of 1969, or a special species of legislation. As we have seen, whatever the nature of the measure (even a mere exemption of the law or privilege in the strict sense of the word), whenever it deals with "Divine worship" it must be given a wide and favorable application.

For this reason I maintain that when the motu proprio <Ecclesia Dei> enacts that the rules contained in the 1984 indult must be given a "wide and liberal application," this not only reflects the mind of the legislator but is inherent in the very nature of the special law which was enacted (or an extension of special clauses of a general law already enacted; cf. General Instruction of 1969). For this reason the motu proprio <Ecclesia Dei> has swept aside the conditions that limited the concessions

under the 1984 indult (and which contradicted the real mind of the legislator as manifested in the first part of the document), and therefore requests for celebrations of the old liturgy must be given the widest and most favorable fulfillment. Of course when we speak of rights in the Church (including therefore the right accorded by the motu proprio <Ecclesia Dei>) we must always keep in mind the second paragraph of Canon 223: "It pertains to ecclesiastical authorities, for the common good, to regulate the rights that belong to the faithful." We must also remember that the matter concerns the liturgy, and as the bishop, according to Canon 835, para. 1, is "the regulator, promoter and custodian of the liturgical life of the Church entrusted to his care," the bishop's involvement in these deliberations is always necessary. But this involvement must never end up in a denial, except in the case of extraordinary circumstances where the bishop's assent might involve serious damage to the welfare of the community, circumstances which must be thoroughly and convincingly demonstrated, as one would have to do if one had to suspend civil rights in a secular state.

**Bureaucratic Barriers**

On the basis of what I have told you, we have recently (after the usual farcical denials) started a case in Rome before the highest court in the Catholic Church, the Supreme Tribunal of the Apostolic Signatura. We petitioned the court that a privilege was involved and that the bishop was therefore obliged to grant the Mass. For practical reasons the plaintiffs, under Canon 1483, had appointed one of themselves as a proxy or agent, who engaged an attorney in Rome to defend the case. The case received a first admission by the Chancery of the Tribunal and no objections were raised because only the proxy and not all the plaintiffs (whose mandates were duly registered) had personally engaged the attorney. The case proceeded under the two-tier system of the Signatura-the prelates belonging to the inferior tier judging on the admissibility of the case, which, if admitted, is then judged by a panel of cardinals and archbishops.

Unfortunately the plaintiff who acted as proxy died and had to be replaced by another plaintiff who was duly registered, and no objections were raised by the Chancery. The Promoter of Justice (a kind of high-court state attorney) declared himself in favor of the admission of the case (a rare thing), when suddenly the inferior court decided that the case had become extinct with the death of the first

plaintiff-proxy. The court, in flagrant opposition to the law and after the event (as no objections had previously been raised), decided that proxies could not be admitted and the first plaintiff proxy was acting only in his own name and not in the name of the other plaintiffs, whose names were then cancelled from the case. As the case was rejected on this blatantly illegal procedural quibble, I feel even more sure that we are right in maintaining that the motu proprio <Ecclesia Dei> has consolidated, if not created, a privilege: somebody got cold feet and saw to it that the plaintiffs were thrown out on the next pretext available!

I must mention here that even those who during the preliminaries of the case did not agree with the privilege theory did, however, maintain that after the motu proprio <Ecclesia Dei> requests for the old Mass could not be thrown out just like that. In the words of one eminent jurist and high official: "This decree [<Ecclesia Dei>] certainly does not give the faithful any right to the Mass but most certainly imposes on diocesan bishops the duty to follow certain criteria in taking their decisions; if not through a definite procedure, at least with particular caution and concerns. Otherwise these words of the Roman Pontiff would be empty and without effect ("<verba illa...inania et vana essent>" ); or at least no reason or scope (<ratio>) could be given to the text and context of those Apostolic Letters." Whichever way you see it, from the motu proprio <Ecclesia Dei> onwards you just cannot be pushed aside with a shrug or insults!

What if the concerted efforts of Curia officials, episcopal conferences and priests' councils should prevent the Pope's intentions from having any effect? In that case remember that, even as Cardinal Mayer himself infers, the old Mass was never abolished, that the present Holy Father's intention is to give the faithful liturgical freedom. So never give up hope, and remember that the force of prayer can move mountains. If your intention is good and your love for the old liturgy is not tainted by selfishness (which includes resentment for an unjust treatment), but is motivated by the love of God and the honor of His Church, God, in His own good time, will grant you what you ask. . .

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