

## **DIMENSIONS OF LAW IN THE CHURCH**

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The author gave a series of lectures on Theology of Law at the Institute of Oriental Canon Law, Dharmaram Vidya Kshetram, Bangalore, in June-July 2011. The present article contains the text of the last lecture in a slightly revised form. The lectures were entitled as follows: 1) Theology of Law: Point of Departure, 2) Law in the Old Testament, 3) The Covenant: Biblical Foundation of Law, 4) Law in the New Testament, 5) Survival of the Old Testament Law in the Church, 6) *Ius Divinum*, 7) Dimensions of Law in the Church. This last lecture is a synthesis of the foregoing ones in a different key. It tries to identify the characteristics of law in the Church as situated at the cross-section of anthropology, Christology, pneumatology, ecclesiology, sociology and history. Law in the Church must be viewed as set on a value scale. Hence it is proper to speak of the hierarchy, of laws in the Church on the model of the hierarchy of truths, to which theologians should be attentive. Similarly, canonists must be attentive to the hierarchy of laws or the hierarchical dimension of laws in the Church.

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Theology of law developed as a new science in the Catholic Church only after the Second Vatican Council, whereas Protestants had started the theological reflection on law much before. Before the Council, Catholics used to follow a rather philosophical method conceiving the Church as a “perfect society” like the state and then trying to justify canon law as an essential requisite of such a society. The Council spoke of the Church as the people of God, the new messianic people which is “constituted and organized in this world as a society” (LG 8), but did not call the Church a perfect society. Christianity is indeed one of the world religions and the Church is a religious society like other religious societies; but in the eyes of faith, or in its own self-understanding, the Church is something unique. So, too, is law in the Church. To stress this uniqueness some called the Church a “supernatural society;” and qualified canon law as law by analogy in comparison with civil law (or state law). Thus it was stressed that canon law can have coercive power like state law on the one hand and yet be different from state law in its divine origin and in its finality, which ultimately is the salvation of souls. Since the philosophical concept of analogy refers to two terms that have connotations that are partly identical and partly different, some writers have stated that canon law is law by analogy. Some others, however, have doubted or denied the aptness or usefulness of this approach through analogy, which in any case remains philosophical.<sup>1</sup>

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<sup>1</sup>Eugenio Corecco and Remigius Sobanski have written much on theology of law and resorted to analogy. V. Rampollo, *El derecho y el mistero de la Iglesia* (dissert. Pontifical Gregorian University, Faculty of Canon Law, 1968), Rome 1972, esp. chapter 2, “Espressione analogica del mistero” (pp. 59-90). Among those who deny the aptness or usefulness of analogy in this context are the following. Carl Gerold Fürst, “Von Wesen des Kirchenrechts,” *Communio* 6 (1977) 496-506; Velasio de Paolis, “Ius: notio univoca o analoga?,” *Periodica* 69 (1980) 127-162; L. Müller, *Kirchenrecht—analoges Recht? Über den Rechtscharakter der Kirchlichen*

Pope Paul VI encouraged canonists to go beyond philosophy and develop a theology of law. In his address to the participants of the Second International Congress of Canon Law held in Milan (10-15 September 1973), whom he received in audience at the Vatican, the pope said:

The intimate relationship between canon law and theology is a question that is raised with urgency... Today we must necessarily have a theology of law, which will consider all that divine revelation says about the mystery of the Church...

If the law of the Church has its foundation in Jesus Christ, if it has the value of the sign of the internal action of the Spirit, it must express and promote the life of the Spirit, produce the fruits of the Spirit, be the instrument of grace and be the bond of unity in a manner distinct from and subordinate to that of the sacraments, which are of divine institution. Law defines the institutions, determines ... the juridical relations among the faithful ... by means of norms which are at times counsels, exhortations, indications of perfection, pastoral directives. To limit the law of the Church to a rigid order of injunctions would be to do violence to the Spirit, who guides us towards perfect charity in the unity of the Church. Therefore, your first concern will not be to fix a juridical order modelled simply on civil law, but to deepen the work of the Spirit, which must express itself in the law of the Church also.<sup>2</sup>

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*Rechtsordnung*, St. Ottilien: EOS Verlag, 1991; T. Galkowski, *Il 'quid ius' nella realtà umana e nella Chiesa*, Rome, Pontifical Gregorian University, 1996.

<sup>2</sup>*L'Osservatore Romano*, 17-18 September 1973, pp. 1-2 (my translation from the Italian).

Pope Paul VI stressed the need to adopt a theological approach to law considering the Church as a mystery in analogy with the mystery of Christ. He was virtually asking canonists not to be satisfied with philosophy of law, but to join hands with theologians and develop a “theology of law” in the wake of the Second Vatican Council, which regarded the Church as a mystery in analogy with Christ.

It is by no mean analogy that the Church is likened to the mystery of the incarnate Word. For just as the human nature, assumed by the divine Word as a living instrument of salvation and is united with him indissolubly, serves him, so also the social organism of the Church serves the Spirit of Christ, which vivifies it, for the growth of the body (cf. Eph 4:16). (LG 8).

Here the analogy is not between the Church and the State, but between the mystery of the Church and the mystery of the incarnate Word. And it throws light on the nature of the law of the Church. Canon law is no mere *ius humanum* (human law) like the law of the State, nor is it simply *ius divinum*, (divine law), although it is invested with a unique property and dignity inasmuch as the Church is the body of Christ and the organ of the Holy Spirit. Just as Christ, who has both a human nature and a divine nature, is not man analogously, but is true God and true man, so the law of the Church called canon law, which contains both *ius humanum* and *ius divinum* is not law analogously. The Church is a true society, a human religious society, animated by the Holy Spirit. The Church is *societas sui generis*, but *vera societas*, not a society in an analogous sense. In short, while the concern to stress the uniqueness of the Church and of its law is to be appreciated, it is not by adopting the philosophical concept of analogy that a theology of law can be constructed.

Although a distinction is possible between law *in* the Church and law *of* the Church, writers do not maintain it consistently, nor shall we try to do so here. Law of the Church refers to law which has the Church for legislator and therefore originates from the legislative power of the Church; whereas law *in* the Church has a vaster range comprising also law whose legislator is God or Jesus Christ, the founder of the Church. In other words, law in the Church includes both *ius divinum* and *ius humanum*. This cannot be said of civil law or the law of the state or political community, although it too exists according to the will of God, which is operative through natural law. Philosophically, the state is a natural society, the Church is not. Nor can the Church be called simply a supernatural society.

There are certain characteristics or properties that are specific and unique to the law in the Church, while some others are common to other societies whether religious or civil. These characteristics or properties may be called the dimensions of law in the Church and may be spelled out under the following seven heads: anthropological, Christological, pneumatological, ecclesiological, sociological, historical and hierarchical. The term dimension as used here recalls a passage of St Paul, who speaks of “the breadth and length, the height and depth” of the love of Christ (Eph 1:18). The term dimension is only implicit here, but the concept is surely present. We shall now consider all these seven dimensions of law one after another; but they should be taken together to determine the specific nature of law in the Church, a law which is unique and is distinct not only from the law of the state but of any religious society, although some of these dimensions are common to these also.

### **1. Anthropological Dimension**

Contemporary theology is particularly concerned with the problems of man (that is, men and women *inclusively*) of today, man conscious of his identity, jealous of his rights, caught up in

a network of relations both personal and functional, and intent on progress. Theology today is attentive to this “man” and speaks with a pronounced anthropological accent.

By anthropology in general we mean the science of man and his works. It is divided into physical, cultural, philosophical and theological anthropology. We shall be dealing with this last with reference to the law in the Church. To distinguish and underscore what is specific to theological anthropology a word may need to be said about the other three branches of anthropology.

*Physical anthropology* studies man as a biological organism, and is particularly interested in its evolutionary history. It is a physical science along with biology and physiology.

*Cultural anthropology* studies man in the various cultures, which are diversified mostly by his creativity: language, literature, religions, beliefs, arts, behaviour, achievements, and history. It is a social science.

*Philosophical anthropology* reflects on human existence, human destiny, the place of man in the cosmos; it asks about the “ultimate causes” of the human phenomenon (matter-spirit, body-soul, God, nil, absurd...) and assesses human existence (humanism, personalism, existentialism, theism, atheism, materialism, idealism, etc.).<sup>3</sup> It is a branch of philosophy.

*Theological anthropology* is the reflection on man in the light of revelation, integrating, however, the conclusions of the other three branches of anthropology, physical, cultural and philosophical. Theological anthropology does not follow or identify itself with the humanistic anthropocentrism

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<sup>3</sup>Jean Mouroux, *Sens chrétienne de l'homme*, Paris, 1947; Battista Mondin, *Antropologica filosofica* (Subsidia Urbaniana 6), Rome: Pontificia Università Urbaniana, 1983.

characteristic of the Renaissance, but it is allied both to theocentric humanism and personalism, propounded and represented, for example, by Jacques Maritain. Theological anthropology is a theological science.<sup>4</sup> Man is not the centre of being (which is God), nor of creation in general (which includes incorporeal and invisible beings). Man is, however, the centre of the visible creation. Humanistic anthropocentrism is a seductive extreme of both philosophical and theological anthropology, which is avoided in "Christian anthropocentrism."<sup>5</sup>

According to theological anthropology, with which we are dealing here and which was already much developed by the Greek fathers like Gregory of Nyssa, man is created in the image of God to be lord of the whole universe. Man is called to become similar to the only begotten divine Son of God, perfect image of the invisible God, and thus to reach the fullness of human and divine communion in the mystical body of Christ. This call and destiny of man arouses great interest in theology today, which is noted for its anthropological spirit, a feature that needs to be reflected also in theology of law. René Latourelle has explained the matter as follows by setting twentieth century theology in its historical context.

In the XVI century, theology was marked by humanism; in the XVIII century theology was influenced by rationalism and in the XIX century by scientism. We can say that the theology of the XX century is developing under the sign of intersubjectivity...

From this standpoint medieval theology and the theology of the XX century exhibit very different faces. In the

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<sup>4</sup>Luis F. Ladaria, *Antropologia teologica* (Analecta Gregoriana 233), Rome, 1995.

<sup>5</sup>J. B. Metz, *Christliche Anthropozentrik*, München 1962.

Middle Ages, in order to answer the questions raised by sacred Scripture and the writings of the fathers of the Church, it was normal to give an explanation of the logical type. In the XX century theology turns in the first place to history and the historical context. The Middle Ages elaborated in the main a theology of mysteries in themselves, whereas today, without despising mysteries in themselves, theology is much more attentive to the aspect of the economy of revelation, that is to say, the realization of the plan of God in history and its functional aspect, that is to say, revelation *for us* and for our salvation.<sup>6</sup>

What is said here of the XX century is still applicable to the decades following it. What does the gospel bring to us today, to the man of today? This is the question that interests contemporary theology. In this regard contemporary theology resembles very much the theology of the patristic period, which was developed in response to the problems and concerns of the people of those days. Medieval theology with its speculative tendency was interested rather in itself as a system. Today theology tries once again to be close to the joys and hopes of the man of today but also to his doubts and questionings.

Finding itself in this historical context, theology of law must be attentive to the anthropological dimension of law in the Church. As much indeed had been said long ago by Jesus of Nazareth in simpler words understood by his audience: "The Sabbath was made for man, not man for the Sabbath" (Mk 2: 27). All laws, all canons, are for man, for the good of man. Indeed, according to Jesus, the Son of Man, even a divine law about the Sabbath, a commandment of the Decalogue, which is

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<sup>6</sup>René Latourelle, *Teologia scienza della salvezza*, Assisi 1970, p. 115.

the heart of the Thora, is in function of the good of man. Law is not an end in itself, but is subordinate to man as a person, who is of inestimable and inviolable value. "You were bought at a great price; do not make yourselves slaves of men" (1 Cor 7: 23), St. Paul told the Jewish Christians of Corinth who were prone to be impressed by the absolutist claims made for the Mosaic law of circumcision. Theological anthropology affirms freedom, "that freedom which our contemporaries appreciate so much and ardently seek, indeed rightly so," as the Second Vatican Council has noted (GS 29).

"The Sabbath was ordained for man and not man for the Sabbath." This axiom relativises not only the law of the Sabbath but all law and legal institutions. It articulates their essential scope, the good of man. This was expressed by Christians in the traditional motto "*salus animarum suprema lex esto*" (the salvation of souls is to be the supreme law), which has been inserted in the new Latin code: "... *prae oculis habita salute animarum, quae in Ecclesia suprema semper lex esse debet*" (CIC-1983, can 1752). However, this adage does not sound very happy today for the following reasons. First, "*anima*" expresses in contemporary understanding only a component of the human being (soul), not the whole human being as was understood instead in the Bible and in the medieval usage. The law of the Church aims at the good of the whole man, not only of his soul, reductively, but the man redeemed by Christ in body and soul. Secondly, with the use of the plural *animarum* the focus on the value of man considered as an individual person is shifted to the collectivity. Thirdly, the motto "*salus animarum suprema lex esto*" is modelled on the original Roman law axiom, "*salus reipublicae suprema lex esto*," which was a directive issued by the Roman senate to the consuls in times of national crisis or emergency, not a principle of law governing ordinary administration. This association of ideas can be a historical irritant. Fourthly, in the Roman axiom

the communitarian aspect was in the forefront, for which concern was expressed for the safety or good of the nation, which encompassed the individual. Its exact parallel would be “*Salus Ecclesiae suprema lex esto,*” which would suggest a situation of crisis in the Church, about which those in authority are being put on the alert, with a shift of focus from the individual to the community.

There is a false supernaturalism that is to be avoided. While seeking to save the soul, the body is not to be neglected. Christianity bespeaks of a humanism under the sign of the cross. Hence the law of the Church must have the greatest respect for man, for all that is truly human, for “whatever is true, whatever is honourable, whatever is just, whatever is pure, whatever is lovely, whatever is gracious” (Phil 4: 8).

Theological anthropology does not overlook the drama of sinful man, of the rebel alienated from divine-human communion in the Church. This involves at the juridical level unpleasant consequences that are inevitable realistically, like the constraint of the delinquent envisaged in penal law. But even this must be and can be integrated in the axiom about the good of man and the common good of the Church.

With such an emphasis laid on the anthropological dimension canon law will no longer need to defend itself with uneasy, incessant apologetics. Law in the Church will be seen as the defence of the freedom of all and the guarantee of human and personal values. The motto “not man for law, but law for man” is to make clear that law in the Church is primarily personal and personalising, and only secondarily a clause in a code in function of legal justice. From this point of view one may consider, for example, the priority of personal jurisdiction over territorial jurisdiction. Jurisdiction in the Church is primarily personal, while territorial jurisdiction is ultimately personal jurisdiction using territory as a criterion to determine the

persons over which power is exercised. Another example would be the assessment of civil marriage contracted by Catholics, which canon law does not recognize as valid sacramental marriage. This should not mean that such civil marriage is only legalised concubinage. Inasmuch as civil marriage can contain personal values of love and fidelity as well as the juridical contents of the matrimonial pact it is matter that is apt to be sanated canonically *in radice*. One may even go further and ask whether civil marriage can be regarded as sacramental in certain rare cases, even if it is refused canonical protection. Further, in the same anthropological perspective, may be considered the case of conjugal separation. The juridical treatment of the two parties cannot be the same if one is responsible for the separation, while the other is the victim, even if not rarely the “innocent” party concurs unconsciously in the infidelity of the other party and contributes to the final separation. Consider the following two cases. 1) Jack is fascinated by his young secretary, abandons his wife and children and elopes with her and marries her; 2) Johny is abandoned by his frivolous wife and seeks in a new marriage relationship the care of his little children. Humanly there is a difference between these two cases of Jack and Johny. But both are second marriages and equally invalid before the canon law of the Catholic Church, although some particular canonical traditions (e.g. the East Syriac) differentiate between them with attention paid to persons in their life situation. These are implicitly attended to traditionally in the application of the principle of *oikonomia* in the Orthodox tradition.

The anthropological dimension of law is attentive to respect for man, the masterpiece of creation and the boast of the Redeemer. The new man in Christ preserves all that is truly human and is the heir of all that is true, just and worthy of praise. Ultimately, there is no radical opposition between the

two ancient axioms: “God the measure of all things” (Plato), and “Man the measure of all things” (Protagoras), because in the perspective of Christian anthropology “Man is the glory of God” (Ireneus).

## 2. Christological Dimension

“Man is the measure of all things since God became man,” annotates Karl Barth.<sup>7</sup> Without Christology anthropology is lame and blind since Jesus Christ is the Way, the Truth and the Life. Judeo-Christian revelation is centred on Christ, the focal point of the history of salvation. With his immanence and transcendence Christ dominates creation (Col 1: 15-16). The lot and destiny of man we know from the life, death and resurrection of Christ, the firstborn of creation, head of humanity and the bearer of the new covenant in his person.

As the Word (*logos*) of the Father, he is the full articulation of God’s commandment, of his law (*nomos*). Even as the Ten Commandments are the ten words of the Father instituting the Mosaic covenant, Jesus Christ in his word and in his person is the new covenant and the new law. “The end (goal: *telos*) of the Law is Christ” (Rom 10:4), revealed by the Father who proclaims “This is my Son, the Beloved; with him I am well pleased; listen to him” (Mt 17:5). And the words which the Son gave to his disciples are the words which the Father gave to him (Jn 17:8). The new covenant sanctioned in the blood of the Son of God subsists in him. Risen from the dead and become Lord of life he has all power in heaven and on earth (Mt 28:18); from him is derived as from the head (Col 1:18) the sacred power (*sacra potestas*) of the Church. Christ sends his Church on a mission, which is to accomplish (“complete”) his own mission. But he is always with the Church (Mt 28:19,20)

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<sup>7</sup>Karl Barth, *Christengemeinde und Bürgergemeinde*, Zollikon-Zürich 1946, p. 36.

directing it with his Spirit and governing it personally,<sup>8</sup> not from far through legates and vicars, although the apostles and bishops can rightly be so called. Those who hear the persons sent by Christ hear him (Lk 10:16).

Christ is present in the proclamation of the word and in the liturgy of the sacraments, which is the summit and source of the life and activity of the Church (Vat II, SC 9). Christ is specially present in the liturgy, in the person of the minister of the word and of the sacraments. But this does not justify the attempt of those who see in the sacraments the theological foundation of law in the Church and overlook the pastoral power of the Church. This power is a participation in the power of Christ, who shepherds his sheep and as head of the body regulates and governs it. Christ is present in the shepherds he has set over his flock (Jn 21:16-17); he is present in the Church binding or loosing in heaven what the Church binds or looses on earth (Mt 18:18). Christ is the head of the Church his body, the fullness of him who realizes himself in the cosmos (Eph 1:23). Hence, Christology precedes ecclesiology and is basic to a Christian anthropology.<sup>9</sup>

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<sup>8</sup>Note that it is Christ who chooses Matthias in the place of the traitor Judas ("the one whom you have chosen," Acts 1: 24). According to Vatican II, "Bishops govern the Church entrusted to them as vicars and legates of Christ" (LG 27; CCEO can. 178). In Roman law, *vicarius* is "one who acts in another's place as his substitute" (Adolph Berger, *Encyclopedic Dictionary of Roman Law*, art. "vicarius," p. 763), a definition which does not properly apply to bishops, although an analogous or metaphorical use of the term is possible. Pope John Paul II preferred the term "successor of Peter" to "vicar of Christ."

<sup>9</sup>International Theological Commission, "Teologia, cristologia, antropologia," (1982), *Enchiridion Vaticanum* 8, 354-399; Juan Alfaro, *Cristologia e antropologia*, Assis, 1973; John Zizioulas, "Cristologia, pneumatologia e istituzioni ecclesiastiche," *Cristianesimo nella storia* 2 (1981) 11-128.

The theology of law developed in the twentieth century by Protestants is particularly attentive to the Christological dimension of law, sometimes excessively so. Johannes Heckel maintains that even the secular state is subject to Christ's lordship and it can be said *extra Christum nullum ius*. Erik Wolf bases his theology of law on Christology and views *ius divinum* as resting on the "brotherly lordship" (*bruderschaftliche Herrschaft*) of Christ. Catholic writers generally view Christ as the founder of the Church and its lawgiver, but beyond that they rarely dwell in a comparable manner on the Christological dimension of law.<sup>10</sup>

The Church is in the service of Christ as it exercises authority; and therefore attention is to be paid to Christ's style of governing. Christ invites to his kingdom ("Come and follow me"), respecting fully human freedom. Religious freedom is to be respected not only by the state in politics but also in the life and law of the Church inasmuch as grace does not suppress nature but perfects it. Theology of law has to conciliate and harmonise the style of invitation to the kingdom of Christ (*grace*) with the coercibility proper to penal law (*nature*) in society. On the one hand law in the Church is the law of the children of God in the house of the Father; on the other hand it is the law applicable to these children, who though freed from sin by the Son, are still subject in varying degrees to the slavery of the fallen nature ("the flesh"). The penal law of the Church is situated in this dialectic between nature and grace, which is germane to Christian anthropology.

The risen Christ declares: "All authority in heaven and earth is given to me" (Mt 28:18), but he does not tell his Apostles "and I am giving all this authority to you." Instead he gives the Church its mission to go and teach all nations. Christ is the

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<sup>10</sup>H. Heimerl, "Aspecto cristológico del derecho canónico," *Ius Canonicum* 6 (1966) 25-51.

*pantokrator*, who commands his Church, his servant/slave, — not queen or empress, as is implied instead in the imperial claims of Pope Gregory VII (1073-1085) in his *Dictatus papae* (1075).<sup>11</sup> The sovereignty of Christ implied in Mt 28:18 is to be understood with reference to the Christological dictum that the Father has “given him power over all flesh in order that he might give eternal life to all” (Jn 17: 2) who believe in him. The law of the Church partakes of this saving power of Christ in the sacramental economy of the life of the Church, without however any claim for that law to be a kind of “eighth sacrament” of the Church.

In the light of Christ the *pantokrator* the law of the Church should appear as the law of a servant Church, not the diktat of a triumphant sovereign seated “on the throne to judge the twelve tribes of Israel” (Lk 22:30), which is an eschatological perspective, not a canonical legitimation of the judicial power of the Church, as this verse is sometimes interpreted by canonists. Whether the Church issues sacred canons through councils or promulgates codes through pontiffs it is doing so in the service of Christ the King. Here while a comparison with the legislative activity of the state will be superficial, a unilateral emphasis on the theandric character of the Church will be partial and deviant in its consequences.<sup>12</sup>

The analogy with the Word incarnate has its limits which do not let us “christify” the law of the Church. In Christ the human nature is, by virtue of the hypostatic union, an

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<sup>11</sup>Klaus Schatz, *Papal Primacy: From Its Origins to the Present*, Collegeville: The Liturgical Press, 1996: that the pope can use imperial insignia, that he can depose emperors, that all kings should kiss his feet (p. 186).

<sup>12</sup>Charles Journet, “Il carattere teandrico della Chiesa fonte di tensione permanente,” *La Chiesa del Vaticano II*, Florence 1965, pp. 351-362; A. Anton, “Estrura teàndrica de la Iglesia,” *Estudios Eclesiasticos* 42 (1967) 39 ss.

*instrumentum conjunctum* of the Word and all the acts of Christ are theandric. The same cannot be said of the Church, which in its members knows sin; its social organs and juridical institutions are subject to the “flesh” and can resist the Spirit. Hence, the reserve expressed in canon 17 of the Council of Sardica (343-344), “*Obediant honesta praecipienti episcopo* (Obey bishops who command what is legitimate).”<sup>13</sup> This conciliar reserve echoes St. Peter who told the Jewish high priest who imposed silence on the Apostles: “We must obey God rather than men” (Acts 5:29). The Gospel texts “Those who hear you, hear me” (Lk 10:16) and “Whatever you bind on earth shall be bound in heaven” (Mt 18:19) are no guarantee against the infidelity of churchmen and the injustice of legal provisions. Jesus has warned against disloyal and wicked servants of the Church (Mt 24: 45-51; Lk 12:41-48). Obedience in the Church does not dispense from the need to use discernment. The ancient monastic directive of blind obedience to the spiritual father-superior can be misleading if taken out of context and generalised.

From the above mentioned analogy between the two natures of Christ and of the Church the Orthodox theologian Afanasiev has drawn conclusions which are somewhat different from ours.<sup>14</sup> He writes as follows.

Her [the Church’s] dual nature ... is similar to the dual nature of Christ. The relationship of the empirical and spiritual natures is determined by the Chalcedonian formula: undivided, inseparable, unchanging and unmingled. The invisible, spiritual being of the Church is manifested through her empirical nature. Therefore, the

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<sup>13</sup>Pope Pius XII cites this canon in his *motu proprio Cleri sanctitati* (1957).

<sup>14</sup>N. Afanasiev, “The Canons of the Church: Changeable or Unchangeable?” *St. Vladimir’s Seminary Quarterly* 11 (1967) 54-68.

division of the Church into visible and invisible, such as is characteristic of Protestantism, is incorrect in that it destroys the Church's empirical reality. The Church is one, just as Christ is one, being visible and visible at the same time... To divide the Church into the visible and the invisible is ecclesiastical Nestorianism... (pp. 57-58).

The oblivion of the empirical nature is the other pole in the doctrine on the Church, ecclesiastical Monophysitism (p. 60). The dual nature of the Church defined in Chalcedon is opposed to both ecclesiastical Nestorianism and ecclesiastical Monophysitism. In accordance with this the divine-human source of canonical decrees is affirmed by Tradition. If it is necessary to speak about law in the Church, then we should not speak of divine and human laws as separate entities divorced from one another, but we should speak of a single divine-human law. The will of the Church (her divine-human will) manifests itself through the canonical decrees in order that her historical forms of existence embody her essence (p. 61).

*Jus humanum* only regulates empirical organisms (p. 61)... *Jus humanum* does not exist in the Church; all decisions are divinely inspired ("they are all enlightened by one and the same Spirit"), and they must remain indestructible and unshakeable (p. 56).

Afanasiev is rightly concerned to maintain a clear distinction between church canon (*kanon*) and state law (*nomos*). He writes: "No matter how we may define law, canons in no way belong to the field of law" (p. 60). The Greek word *nomos* can, however, signify not only state law as distinct from church law (canon) but the Mosaic law and sacred scripture in general. By maintaining that in the Church "all decisions are divinely

inspired” and that “they must remain indestructible and unshakeable” Afanasiev seems to adopt ecclesiological Monophysitism, which he himself condemned while losing sight of the distinction between faith and church order. To hold that the Church cannot unmake any canon she has made is to contradict the historical fact that later councils have changed canons enacted by previous councils. For example, the Council in Trullo changed the canon about the convocation of metropolitan synods twice a year into annual convocation. This is a matter of mere order, not a matter of faith, and therefore changeable.

### 3. The Pneumatological Dimension

The Christian East preceded the West in the historical development of the theology of the Holy Spirit, called pneumatology.<sup>15</sup> The West, however, developed it rapidly since the second half of the twentieth century. The Orthodox traditionally insist much on pneumatology exploiting the rich patristic heritage, which is represented by the masterpiece on the Holy Spirit written by Saint Basil of Caesarea. On the structure of the Church St Basil wrote:

And the organization of the Church? Is it not evident without the possibility of contradiction that this is the work of the Spirit? It is he who has given to the Church, according to St Paul, “first of all apostles, secondly prophets, thirdly teachers; then come miracles, then the

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<sup>15</sup>Yves Congar, *Je crois en l'Esprit Saint*, 3 vols., Paris, 1979-1980; José Saraiva Martins, ed., *Credo in Spiritum Sanctum* (Atti del Congresso internazionale di pneumatologia, Roma, 22-26 marzo 1982, Vatican City, 1983. See esp. Ignace de la Potterie, “L'Esprit Saint et l'Église dans le Nouveau Testament, vol. II, pp. 791-808; Rudolph Schnackenberg, “Charisma und Institution in den Schriften des Neuen Testaments,” pp. 809-827; Jean-Marie Tillard, “L'Esprit Saint dans la reflexion théologique contemporaine, pp. 905-919.

gift of healing, that of helping, of governing, speaking in diverse languages" (1 Cor 12:28). It is by following the diversity of the gifts of the Spirit that this order is organized.<sup>16</sup>

According to Basil the Great the Holy Spirit is at work in the emergence of the structures of the Church. We can see this in the case of Paul and Barnabas, who were sent on their mission after a charismatic intervention of the Holy Spirit in the Church of Antioch: "The Holy Spirit said, 'Set apart for me Barnabas and Saul for the work to which I have called them.' Then after fasting and praying they laid their hands on them and sent them off." (Acts 13:2-3). Similarly at Ephesus it is the Holy Spirit that appoints the *episcopoi* or overseers (Acts 20:28). And Timothy likewise received the "gift of God" through the imposition of hands by the elders together with Paul (1 Tm 4:14; 2 Tm 1:6). The Holy Spirit grants his diverse gifts like teaching and healing to each one with sovereign freedom: "the wind/spirit blows where it chooses" (Jn 3:8). But these gifts are granted for the common good (1 Cor 12:7, 11) in the main. Among these gifts is also that of governance, so that the New Testament model of Church governance is neither "charismatic anarchism," as certain enthusiasts of the charismatic movement envisage following Rudolph Sohm,<sup>17</sup> nor a juridicism which suppresses the spirit so as to deserve to be called "pneumatomachy" with allusion to those Christians of antiquity who did not give the Holy Spirit his due.

The fundamental role of the Holy Spirit is likewise exalted by another ancient Christian writer, Narsai of Nisibis, who is one of the poet Fathers of the East Syriac Church of the fifth

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<sup>16</sup>Basile le grand, *Sur le Saint Esprit*, trans. B. Pruche, Sources Chrétiennes 17, Paris 1968, p. 387; PG 32, 141A.

<sup>17</sup>Rudolph Sohm, *Wesen und Ursprung des Katholizismus*, Leipzig 1912, p. 54.

century. Using the imagery of the Church as a ship, he exalts the role of the priests as “the helmsmen of the Spirit.”

In the ship of the Church he (the priest) steers and gives,  
With rudders of the Spirit he steers the reasonable ships,  
And he makes straight their course

To the harbour of life that is hidden in the height.<sup>18</sup>

This imagery of the ship and rudder was widely used in the ancient East to refer to the course of the Church through history, represented also with another similar image, the pilgrim. With “rudders of the Spirit” attention is drawn to the invisible helmsman, the Holy Spirit. “Rudder” is *hudra* in Syriac, and *pedalion* in Greek, while *kormčaja kniga* in Russian refers to the “navigator’s map” or “chart.” These images allude to and develop the Pauline concept of the function of direction or governance (“gubernationes”: 1 Cor 12:28) in the Church. This is the gift or charism of governance (*donum regiminis*<sup>19</sup>). The Second Vatican Council teaches: “the Holy Spirit endows the Church and directs it with several hierarchic and charismatic gifts” (LG 4). Here the distinction is not clear whether it is implied that there are hierarchic gifts given by the Holy Spirit to the members of the hierarchy (and only to them) that are not charismatic; if so, what are they?

The Spirit “blows” where it (he/she) wills” (Jn 3:8) in a pregnant sense bestowing gifts freely. It is for the hierarchical Church to regulate them (but not quench them) according to reason but chiefly with the above mentioned charism of governance.<sup>20</sup> Bishops were expected to give proof of being able to take care of God’s Church by first having managed well

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<sup>18</sup>R. H. Connolly, ed. trans., *Liturgical Homilies of Narsai*, Cambridge 1909; homily XXXII, p. 65.

<sup>19</sup>M. Zerwick, *Analysis philologica NT graeci*, Rome 1966, p. 382.

<sup>20</sup>G. Hasenhüttl, *Charisma, Ordnungsprinzip der Kirche*, Fribourg 1969.

their own household (1 Tm 3:5). Bishops have the pastoral duty to discern spirits, but this discernment of spirits itself is a charism, which cannot be institutionalised.<sup>21</sup> For charisms are not always within human control and can be directed also to the ministers of the Church. An example is the prophecy of Agabus regarding St Paul's arrest (Acts 21:10ss). So is also the message of St. Catherine of Siena to the popes of Avignon to return to Rome. The hierarchy is also subject to such charisms. According to the ancient saying, "non omina nimirum eidem dii dedere" (the gods have not given all their favours to one and the same person). However, the Church cannot so rely on charisms as to dispense with law and order as would the medieval *illuminati* and *fraticelli*. Charisms should be subject to ecclesiastical authority (1 Cor 14:37). This mutual subjection cannot be regulated by law. The fact that the Church is not mistress of charisms and yet must regulate them is a paradox. Philosophically, the principle of order is not charism but reason. And in the Church "all things should be done decently and in order" (1 Cor 14:39). Basically, as in any society, the principle of order in the Church is reason, which must however recognize the singular role of charisms in the life of the Church, which is not only a society but a mystery.

The traditional link between ministerial priesthood and the charism of priestly celibacy in the Latin Church as well as in a few Eastern Catholic Churches may be considered in this connection. These two are not necessarily linked to each other by the Holy Spirit. This is clear from the NT and from the Church of the first centuries as well as from the experience of several Eastern Churches, both Catholic and Orthodox. For the call to ministry celibacy and marriage were indifferent in the early Church, which is not so in the later Latin Church discipline. Ecclesiastical authority may decide that only those

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<sup>21</sup>K. Rahner, *The Dynamic Element in the Church/ Das Dynamische in der Kirche* (Quaestiones Disputatae 5), Basel: Herder, 1958, p. 65.

who have the charism of celibacy will be admitted to the ministerial priesthood; but it cannot be determined that only those gifted with the charism of celibacy will be called to the ministerial priesthood, a link not borne out by the evidence of tradition in the early Church nor by the experience of many Eastern Churches. Hence it has been asked if it is a case of “extinguishing the spirit” to link canonically ministerial priesthood and clerical celibacy in some Eastern Churches and in the Latin Church.<sup>22</sup>

Not only is the Holy Spirit active in the Church but other spirits, powers and forces as well (2 Tm 2:26). It would be ingenuous to believe that all conciliar decisions are inspired by the Holy Spirit. This would be to underestimate the human element in the Church like the shady manoeuvres of Cyril of Alexandria at the Council of Ephesus, which make it difficult to suppose that the winning faction has always the support of the Holy Spirit. St. Gregory Nazianzen was so victimized by ecclesiastical politics and embittered as to say that he expected no good to come out of any assembly of churchmen! Owing to “the hardness of heart” the practice of repudiating one’s wife got established in the Old Testament and became a law of Moses (Mt 19:8). It cannot be excluded that hardness of heart likewise plays a decisive role in the legislative activity of the Church. The style of church legislation followed by the Apostles (Acts 15:28) is an ideal: “*Visum est Spiritui Sancto et nobis* (lit. It has seemed good to the Holy Spirit and to us). This is a juridical formula meaning: We have decided following the Holy Spirit (who had descended equally on the uncircumcised gentile converts and the circumcised Jewish converts, showing thus that circumcision made no difference). This privileged method of legislation is not always at hand. The Church has

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<sup>22</sup>Basilio Petrà, “Married Priesthood: Some Theological ‘Resonances’,” *Logos: A Journal of Eastern Christian Studies* 50/3-4 (2009) 459-479. Petrà has dealt with this subject in several publications.

then to discern the “signs of the times” or rely on reason. The reception itself of conciliar legislation and decisions by the Church is an act of discernment on the part of the ecclesial body, and this discernment is an element or criterion of the ecumenicity of a council.<sup>23</sup>

In the civil society it is for the human reason to determine the common good, the attainment of which is the aim of the state. In the Church, which is a faith community, human reason occupies a place subordinate to faith. It is by obeying and by being guided by the Holy Spirit that reason realises its full potential in the Church. This does not exclude the experience of “the dark night of the senses” and “the dark night of the spirit” (to use the language of the mystical theology of St. John of the Cross), when, for example, the Christian faithful are not convinced of what “seemed good to the Holy Spirit” and to the ecclesiastical hierarchy, even after the latter has given clarification, as St. Peter did after admitting Cornelius into the faith community (Acts 10:7). Just as in spiritual life a person who insists on clarity and certainty and refuses to be guided by a learned spiritual guide experienced in the discernment of spirits, is in danger of going astray in the dark night, so also in the Church a juridical life guided solely by human reason may not rise above mediocrity even if it escaped the danger of going astray, misled by the evil spirit (2 Tim 2:26).<sup>24</sup> Neither *sola scriptura* nor *sola ratio* is a valid axiom in the juridical life of the Church.

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<sup>23</sup>Yves Congar, “La ‘réception’ comme réalité ecclésiologique,” *Rev. Sc. Phil. et Théol.* 56 (1972) 369-403.

<sup>24</sup>The invocation in the Lord’s Prayer, “And lead us not into temptation (*et ne nos inducas in tentationem*)” gets its full meaning in the context (Dt 13:3) of God *testing* his people by allowing “omens or portents” foretold by false prophets to take place: “God is testing you to know whether you indeed love the Lord your God with all your heart and soul.”

In short, law in the Church must in principle or *de jure* be law according to the Spirit, law of the Spirit; but in practice or *de facto* it can happen that some canon or norm has no reference to the Spirit at all (*praeter Spiritum*), or that it is even contrary to the Spirit (*contra Spiritum*), if it has been enacted by a hardened heart or in resistance to the Holy Spirit. Hence the need not only to examine it in the light of reason but to discern it with the help of the gift of the Holy Spirit.

#### 4. The Ecclesiological Dimension

The Church is a mystery in analogy with the mystery of Christ, as the Second Vatican Council (LG 8) teaches. "It is by no mean analogy that the Church is likened to the mystery of the incarnate Word. For just as the human nature, assumed by the divine Word as a living instrument of salvation and is united with him indissolubly, serves him, so also the social organism of the Church serves the Spirit of Christ, which vivifies it, for the growth of the body (cf. Eph 4:16)." Canon law belongs to the social organism of the Church. As an instrument of the Spirit of Christ for the good and growth of this organism it has a salvific value; it is not a tool of slavery as Sohm saw it.

According to a preconiliar conception, canon law is the product of the power of jurisdiction (*potestas iurisdictionis*) of the ecclesiastical hierarchy, which is a threefold power: legislative, executive and judicial. With the council it became apparent that this approach is insufficient inasmuch as in the conciliar ecclesiology the hierarchy is collocated in the people of God, not above it.<sup>25</sup> The sacred power of the hierarchy is not derived from or delegated by the people of God nor does the hierarchy supply the foundation of law in the Church. Neither

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<sup>25</sup>International Theological Commission, "Temi scelti di ecclesiologia," (7 ottobre 1985) *Enchiridion Vaticanum* 9, 1672-1765; Joseph Hoffman, "Statut et pratique du droit dans l'Église: réflexion d'un théologien," *Revue de Droit Canonique* 27 1/2 (1977) 5-37.

does the hierarchy pre-exist the people, nor does the people pre-exist the hierarchy. Nevertheless, just as the People of God is dealt with in *Lumen gentium* prior to the hierarchy, it is proper that the rights and duties of the people of God be dealt with in the first title of the Eastern Code. This does not imply that the Church is a democracy, which is not to hold that the Church is a monarchy either. Neither of these designations applies to the Church. Being a mystery, the Church is a unique society.

As the body of Christ (the mystical body) the Church is a mystery, but as the people of God it is a society. There is no dichotomy or opposition between these two, which constitute a single unique reality, which is at the same time visible and invisible, as the Second Vatican Council teaches with implicit reference to Martin Luther (LG 8). To conceive the Church as visible only or as invisible only is a false dichotomy, which has unfortunately presided over Catholic-Protestant polemics. This has been recognized by the leading Lutheran theologian of the twentieth century, Karl Barth, who abandoned Luther's basic ecclesiological dichotomy, the doctrine of the two Churches: the true Church which is spiritual and invisible, and the sham Church governed by canon law, a human creation. Since the radically negative theology of law of certain Protestant writers like Rudolph Sohm is based on Luther's dichotomy, the negative conclusions they draw regarding law in the Church are devoid of ecclesiological justification.

The scope of law in the Church *as society* is the common good of the Church, that is, to create conditions of ecclesial communion and life as Church, so that all can realize fully their Christian vocation. This communitarian aspect risks being obscured in the traditional formula which speaks of *bonum animarum* (good of souls) in this context. Inasmuch as "souls" suggest an individualistic approach, due reference to the community risks being missed or obscured. The *bonum*

*commune ecclesiale* comprehends besides the salvation and sanctification of souls also the good of the community. Unlike the sacraments, which have automatic efficacy imparting grace *ex opere operato*, according to the Scholastic formula, law does not have like automatic efficacy to bring about the salvation and sanctification of souls. It only creates the conditions that are necessary so that each one may singly or in union with others posit freely, and without impediment, those acts that lead to salvation. The formula “*bonum commune ecclesiale*” both specifies the scope of the law in the Church and distinguishes it from the law of the state or civil law. In this sense we may refer here to St. Thomas Aquinas: “*omnis lex ad bonum commune ordinatur*” (*STh* I-II, 90, 2).

As regards the relationship between the sacraments and law in the Church, according to the Second Vatican Council, the Church itself may be regarded as a sacrament, “that is, the sign and instrument of close union with God and of the unity of the whole human race: *signum et instrumentum intimae cum Deo unionis totiusque generis humani unitatis* (LG 1)”. In this *generic* sense law in the Church can be regarded as sacramental, that is to say, it participates in the role and mission of the Church to be “the sign and instrument of close union with God and of the unity of the whole human race.” In so far as the (seven) sacraments of the Church also have the same role, law in the Church is related to them without, however, becoming a sacrament along with these in the *specific* sense of the term sacrament. Certain writers have tried to posit the theological foundation of law on the sacramentality of the Church by stressing the salvific role of law in the Church.<sup>26</sup> One may indeed speak of its sacramental character inasmuch as

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<sup>26</sup>Zanchini di Castiglione, *La Chiesa come ordinamento sacramentale*, Milano 1971; D. Llamazares Fernandez, “Sacramentalidad y juridicidad: *Lex Ecclesiae*,” in *Estudios en honor del Dr. M. Caberos de Anta* (Bibliotheca Salamanticensis I, I), Salamanca 1972, pp. 235-266.

salvation in Christ is sacramental. This is, however, to hold on to the generic sense of the term, not to establish the theological foundation of law. In the history of salvation it is the covenant that is presented as the theological foundation of law. It may be noted, moreover, as has been recognized by leading theologians like Karl Rahner, the exact meaning of "sacramentum" in the conciliar phrase is not very clear.<sup>27</sup> Surely the Church is not the "eighth sacrament," nor is every act of the Church sacramentally efficacious. The attempt to locate the theological foundation of law on sacramentality did not convince Yves Congar either, who stated that the radical question posed by Rudolph Sohm about the relationship of law and the Church is still haunting us.<sup>28</sup>

From the conciliar teaching that the universal Church subsists in particular Churches it follows as a consequence that law in the Church must also be conceived as corresponding to this distinction: universal law or common law of the entire Church and particular law that is not common to the entire Church (CCEO can. 1493). Particular law can have subdivisions corresponding to the extension of the portion of the particular Church. Those who are baptized are normally incorporated through baptism in the universal Church and at the same time in a Particular Church or Church *sui iuris*, but in exceptional cases the latter incorporation may be wanting and may be postponed, as in the rare case foreseen in the Latin code of baptism administered by one who is not a baptized person (CIC can. 861 § 2), and therefore does not belong to a Church *sui iuris*. In this case the baptized person is incorporated in the universal Church and may be said to await incorporation in a Particular Church or Church *sui iuris*.

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<sup>27</sup>Karl Rahner, "Was ist ein Sakrament?," *Schriften zur Theologie X*, Einsiedeln 1972, pp. 377-379 at p. 384.

<sup>28</sup>Yves Congar, "Rudolph Sohm nous interroge encore," *Rev. Sc. Ph. Th.* 57 (1973) 263-294, at 294.

There are different degrees of communion with the Church, which can be full or partial. To be in full communion one must be in the state of grace or (“have the Spirit of Christ”), be united with the Church through the profession of faith, reception of the sacraments, submission to ecclesiastical authority and the observance of the laws of the Church order. Some believers are “fully incorporated in the society of the Church” (LG 14) whereas others are only partially incorporated. While CIC can. 205 and CCEO can. 8 enunciate the minimum requirements to be in communion with the Catholic Church canonically, ecclesial communion admits of degrees ranging between the fully practising Catholics and the nominal Catholics. Sociologically or in the census they are all counted as Catholics, but their participation in the life of the Church may vary.<sup>29</sup> In the matter of sacramental life the variation can be considerable, between the daily Eucharist of some fervent Catholics and the annual confession and communion at the paschal time by many “good” Catholics, while still others may neglect even this minimum for long, even throughout life. Further some may deny or doubt certain truths of faith like the existence of angels or of hell or the infallibility of the pope. Some may neglect to participate in parish life, refuse to contribute to the needs of the Church, fail to aid the needy and thus sin against charity, the first commandment. The religion of some in the secularised world of today may come alive only at or after death, for the “last” rites or church burial. The concept of partial communion applies not only to those who belong to the other Churches and ecclesial communities but also within the Catholic Church. This consideration is a bridge to the following sociological dimension of law in the Church.

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<sup>29</sup>E. Pin, “Les modes d’appartenance à l’Église et leur évolution,” in Hervé Carrier and E. Pin, *Essai de sociologie religieuse*, Paris 1967.

## 5. The Sociological Dimension

In an attempt to find the justification of law in the Church canonists used to have recourse to the axiom of philosophy of law *ubi societas ibi ius* (where there is society there is law). This was not a theological approach but a philosophical approach, which failed to satisfy those who did not regard the canons of the Church as law (*nomos*) or the Church as a society (cf. “the invisible Church” of the Protestant Reformers).

The Second Vatican Council teaches that the Church of Christ is indeed a society but a unique one. The Church is not a society like the family or the state, both of which have their origin as an exigency of human nature and are based on natural law (GS 74). Just as Jesus Christ is a man, but a unique man being both God and man united in one person in the hypostatic union, so also is the Church, the mystical body of Christ, “which is constituted in this world and organized as a society” (LG 8). “It is the will of God to save human beings not as individuals with no link among them. God wanted to constitute them as a people ... a messianic people with Christ as head ... and having for law the new commandment to love as Christ himself has loved us” (LG 9). This messianic people is the new People of God with whom Jesus Christ has sealed the new covenant. The Church is not a society like the family or the state, which have their origin as an exigency of nature but from a pact, the matrimonial pact or the “social contract” (Rousseau, properly understood), respectively. The Church is a unique society theologically, although sociologically it is classified as one among several religious bodies or societies; it used to be regarded philosophically as a “perfect society” like the state,

which is understood and accepted only in certain restricted circles or horizon.<sup>30</sup>

As a society the Church and its laws have been conditioned and shaped by socio-cultural factors. Like Jesus of Nazareth, who was a Palestinian Jew of the first century,<sup>31</sup> so were also the apostles he chose, trained and sent empowered with the Holy Spirit. As the Church spread through the Roman Empire and got established in it, Roman law supplied the model for church government. Thus diocese, province, metropolitan, pontiff, council, etc. are terms that justify the axiom "Ecclesia vivit sub iure romano" (The Church lives under Roman law). The sociological dimension of law permits one to ask (the purely hypothetical question) whether the shape of the structures of the Church and its law would have been different if the initial development of the Church had taken place in a different cultural world other than Palestine and the Roman Empire, say in China or in India. As the Word of God became incarnate in a culture, so also the Church of Christ becomes incarnate in particular cultures, often modifying them, and becomes Particular Churches.

Contrary to certain hurried cultural analyses,<sup>32</sup> society today exists on different strata of civilization and culture in spite of clear trends towards the unification of civilizations. Expressions like the secular city, technological culture, spatial era, electronic age, etc. correspond only to a part of reality. The vibrant "secular city" of Harvey Cox ignores the adamant

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<sup>30</sup>Roger Mehl, "Ecclesiologie et sociologie," *Revue Théologique de Louvain* 3 (1972) 385-401; Gérard Defois, "Révélation et société," *Recherches de Sciences Religieuses* 63 / n. 4 (1975) 457-503; S. Lenner, "La Chiesa, il Regno di Cristo e il diritto," *Civiltà Cattolica* 133 (1982) III 27-42; Henri Desroche, *Sociologies Religieuses*, Paris: Press Universitaire de France, 1968.

<sup>31</sup>John P. Meier, *A Marginal Jew: Rethinking the Historical Jesus* (New York: Doubleday), 3 vols., 1991-2001.

<sup>32</sup>For example, Alvin Toffler, *Future Shock*, New York, 1970.

sacral society of traditional religions. With the digital age coexists the iron age, beside the industrial society survives the agricultural society, even as slums rot in the shadow of skyscrapers. Consider the bushmen, the primitives and the aboriginals identified by the anthropologists. The homo sapiens makes laws forgetting his neighbour, the homo faber. How to give due consideration to this wide spectrum of society in which coexist sections with values of various epochs and civilizations? The sociological dimension of law can counsel a juridical pluralism which can have far reaching consequences.

For example, let us consider marriage, which for Christians is monogamy. In the Old Testament, during the patriarchal period and under the monarchy, polygamy and concubinage were normal and legal. Abraham had a wife (Sarah) and a concubine (Hagar), Jacob had two wives (Lea and Rachel), David had seven. Solomon, who took many wives, is not blamed for his polygamy but for promoting the cult of foreign divinities with his vast harem. By the time of Jesus and the Apostles, however, monogamy had established itself gradually in society through social change, not by prophetic intervention or any legal enactment. Monogamy thus became a law of *ius divinum* for the new People of God, so to say, sociologically. But even today in many countries in Africa (Camerun, Guinea, Kenia, Mali, Senegal and Uganda, etc) polygamy is widely practised.<sup>33</sup> Some of these countries would like to modernise and introduce the law of monogamy, while others or some sections hold on to the values of traditional religions. Theology can invoke inculturation, and law can stand by customary law. How is one to assess this case from the standpoint of theology of law?

Here is another case. A certain Abraham or Jacob or David presents himself for baptism with all his wives, concubines and

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<sup>33</sup>Joseph Prader, *Il matrimonio nel mondo*, 2 ed., Padua, 1986, pp. 33-35.

children. What is the Christian missionary to do? The answer of the two codes of the Catholic Church is clear and identical: “unam ex illis, ceteris dimissis, retinere potest (keep one of them and send away the rest)” (CIC can. 1148 § 1; CCEO can. 859 § 1). But is this canonical norm also divine law (*ius divinum*) applicable to Abraham, Jacob or David? In the divine *oikonomia*, their *kairos* may not coincide with the *chronos* of the missionary.

In another case, a monogamous Christian, who is a tribal chief and daily communicant, takes the widow of his deceased childless brother for his second wife (cf. Mt 22:24) and is admired by the parishioners for his charity shown to a helpless widow. Should the missionary, who knows canon law, refuse him communion? His colleague, who is a theologian, speaks of divine pedagogy or *oikonomia*, by which God patiently waits for society to change from being polygamous to monogamous while letting Abraham, Jacob and David sit at the messianic table in the kingdom of God with their wives and concubines. The theologian says, while different civilizations of different peoples coexist in time, the messianic age may yet have to dawn effectively for some of them.

Culture is a sociological factor that enters into the definition of rite along with liturgy, theology, spirituality and law (CCEO can. 28 § 1), by which Particular Churches are mostly distinguished as Churches *sui iuris*. Other factors that can determine the identity of the Particular Churches can be nationality or ethnicity but also history (see below). These factors serve to determine the identity of a particular community as a Church *sui iuris*.

In this context may be considered the debate regarding the ordination of women to the ministerial priesthood, which continues to engage the attention of many, especially feminists. In 1988 the question was declared definitively closed by Pope John Paul II, who taught that this option is not available to the

Church by the will of its founder, who chose only men to be his Apostles, but no woman, not even the singular woman, Mary his mother. Though closed thus by the supreme church authority, the question is still being debated. Several Protestant ecclesial communities have opted to ordain women even as bishops, a question on which the Anglican Communion has split. Those who favour the option or regard the question still open argue that it was sociological factors that conditioned the option of Jesus and the Apostles. Neither women nor slaves could legally be witnesses. The mission Jesus gave to his Apostles was to bear witness to him (Acts 1:8, 22), a role which women could not fulfil then (cf. Mk 16: 11; Jn 4: 22). Not even Mary his mother could bear witness as a woman, so she could not be chosen or "ordained." Christ sent his Apostles "to preach the gospel, not to baptize" (1 Cor 1:17) much less to celebrate Mass. But once the Church got established it came to be believed that priests are ordained primarily to celebrate Mass. So it is argued by the proponents of women's ordination that where and when the socio-legal disability of women to bear witness has been overcome, their "inability" to receive sacred ordination (CIC can. 1024; CCEO can. 754) is also to be deemed to have ceased.

In the light of the sociological dimension of law it is easier to understand (which is not the same as to justify) the historical phenomenon of the latinization or byzantinization of certain Eastern Churches in their law, liturgy, theology and spirituality. A dominant culture invades, percolates and assimilates a subaltern or subsidiary culture. This social process is at times violent imposition, but at times free reception, at times a mixture of the two. Hence a discourse on latinization must distinguish between forced imposition and free assimilation and reception. And the change can be for the worse or otherwise, gain or loss, or a mixed blessing. In principle, free donation and reception belong under ecclesial

communion (*koinonia*), which is an ecclesiological phenomenon and exigency. For example, the Churches in Armenia and in the Persian Empire synodically received several canons enacted by synods in the Roman Empire. Isobokht (ca 800), “arguably the best jurist of the Chaldean Church,”<sup>34</sup> codified the law of this Church by drawing on Roman law, Syro-Roman law, Hebrew law, Persian law and Islamic law. Reception has been practised in the Church very widely and it corresponds to “the profound exigency of ecclesial communion,” as Yves Congar says. It prevents the complete isolation of an ecclesial body while letting it to make its own “a determination which it did not give to itself.”<sup>35</sup> This has happened in the reception of the decisions of the first ecumenical councils by Churches which did not take part in them. As regards the Particular Churches, the juridical source of one is per se available to the others as a literary source, which, if found suitable, can be freely made into law by an act of legislation.

The principle of subsidiarity is a basic rule of social organization, whereby what can be done by lower social organs or societies is left to them to do and is not reserved to higher instances or authority. This principle is applicable also in the Church “notwithstanding its hierarchical structure” (Pope Pius XI), although it may not be applicable in the same way as in the state. Certain writers have questioned this applicability in their concern to safeguard the divine element in the Church. This concern, however, is misplaced when it leads to losing sight of the human element — a monophysite or miophysite temptation. As in Christ, true man and true God, the Church preserves, in spite of the divine element in it, its authentic human nature with its social and juridic exigencies.

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<sup>34</sup>Jean Dauvillier, “Le droit chaldéen,” *Dictionnaire de Droit Canonique* III, col 340.

<sup>35</sup>Yves Congar, “La ‘réception’ comme réalité ecclésiologique,” *Rev. Sc. Phil. et Théol.* 56 (1972) 369-403, at p. 370.

Thus for example, the appointment of bishops, which can be done properly and indeed is being done within a Patriarchal Church, is not to be reserved to a higher authority. Formerly the election of bishops was done also in a Metropolitan Church, even in the Latin Church.

Election is the hallmark of democracy with the majority winning and the minority losing. Although this is generally so in ecclesiastical elections also, an exception is possible because the Church is not a democracy. The traditional canonical concept of "*sanior pars*" (healthier part), refers to the minority that was in the right, but lost to the majority that was in the wrong. In a democracy the majority always wins by force of numbers, regardless of any *sanior pars*: quantity scores over quality. This is both the strength and the weakness of democracy, not seldom torn by civil wars. In the Church, which is not a democracy, a different solution is possible. For example, in the late Middle Ages in the election of bishops by cathedral chapters, the lost side deeming itself the *sanior pars*, used to appeal to the pope, who would then intervene appointing his nominee, often different from the rival contestants who were usually members of the powerful nobility. This was possible precisely because the Church is not a democracy.

However, support for the *sanior pars* can be problematic. An example is Pope Paul VI's support of the minority view against the majority in the commission he set up to study the morality of the regulation of birth. He promulgated the minority view as ecclesiastical magisterium in his encyclical *Humanae vitae* (1968). But this victory of the *sanior pars* became problematic as regards credibility, as was seen in the sequel to *Humanae vitae*, which became sociologically a *quaestio disputata* while some favoured papal authority on the one hand but others supported the majority principle. In a prevalently sociological outlook, marked by the verdicts of the democratic process of

the opinion poll, credibility is at risk where Church authority does not have the support of the majority, irrespective of the question of truth or justice as long as there is no clear answer to the question whether the *sanior pars* has also the support of truth or of the Holy Spirit.

## 6. The Historical Dimension

Judaism and Christianity are historical religions unlike “traditional religions.” Jesus, the founder of Christianity, was born during the reign of Emperor Augustus in a province of the Roman Empire (Lk 2:1-2) and died “under Pontius Pilate (Creed). Just as knowledge of Jesus as a historical person is necessary for ecclesiology, so too it is in the light of church history that we can understand theology of law. Church history is the ‘biography’ of the Church, of which canon law is a chapter.<sup>36</sup>

From history we know that the law of Israel was not a static deposit consigned by God to Moses, but the product of history and the fruit of new social experiences. Thus several provisions of the Covenant Code regarding cultivation, property and care of animals, which are found in the Book of Exodus, reflect the situation after the Israelites settled down in the land of Palestine. Similarly, under the new covenant the law of the Church has both grown and changed since the apostolic times down the centuries, in varying historical contexts. The history of canon law underscores the importance of the historical dimension of law in the Church.

A few examples will bear this out. Ecclesiastical offices and power structures have changed with history. From the Christian replica of the Jewish system of local government by

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<sup>36</sup>Gabriel Le Bras and Jean Gaudemet, eds., *Histoire de droit et des institutions de l'Église en Occident*, Paris, 1955s; Willibald M. Plöchl, *Geschichte des Kirchenrechts*, 2<sup>nd</sup> ed., Vienna-Munich 1960.

elders evolved the system of Single Bishop (“monarchic episcopate”) heading a local Church. The election of bishops by the people of the local Church became progressively restricted to the bishops, with the exclusion at first of the laity and later also of the clergy: this was no calculated clericalization of the Church, as certain “democratic” rhetoric would have it, but chiefly a measure to protect the Church from the invasion of politics. In the West, the process went still further till bishops came to be nominated by the pope as a rule. This was not strictly a process of centralisation but rather a papal response to requests to intervene in local elections which were marred by the vested interests of ambitious clerics or were exploited or brought to a stalemate by rich nobility, power-hungry kings and Christian emperors. The pope intervened at first in response to requests, then in response to local needs even without request, albeit not always in a wholly disinterested manner nor without profit to its own claims to universal primacy.<sup>37</sup> Rome imitated the imperial style, “*imitatio imperii*.”

The combination of spiritual power and temporal power in the pope as head of the Papal States had its origins in historical factors. It gave the papacy the appearance of a worldly institution, but it was not without a silver lining. For all its attendant evils, it prevented the papacy from ending up as a Western replica of the patriarchate of Constantinople, where patriarchs were often made or unmade by the emperors. The autonomy the papacy came to enjoy is in large measure the historical legacy of the sovereignty of the former papal states, which survived in the Vatican City, recognized by Italy as a sovereign state and subsequently in international law. This sovereignty enhanced papal primacy, which was asserted and recognized progressively across centuries. The growth of the papacy towards the primacy of universal jurisdiction is the

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<sup>37</sup>Klaus Schatz, *Papal Primacy: From Its Origins to the Present*, Collegeville: The Liturgical Press, 1996, pp. 95-100.

most conspicuous example of the influence of the historical dimension of law in the Catholic Church. According to Catholic dogma papal primacy is of *ius divinum* for having been “instituted by Jesus Christ,” but without the knowledge of the history of the papacy, “the papacy itself cannot be understood.”<sup>38</sup> For since the twelfth century the papal office set to imitate the Roman imperial model in church government.

The Catholic Church is not a monolith but is a communion of Particular Churches called canonically Churches *sui iuris*. History enters into the definition of rite, which is the facial expression of a Particular Church or Church *sui iuris*. “Rite is the liturgical, theological, spiritual and disciplinary heritage of a people, a heritage which is differentiated by culture and the vicissitudes of their history and which is expressed in the particular faith style of each Church *sui iuris*” (CCEO ca. 28 § 1). A well-known example is the emergence of the Slav rite in the first millennium in the Constantinopolitan or Byzantine tradition. Several other rites emerged later in the second millennium from the vicissitudes of history. From a recent civil war in Ethiopia emerged Eritrea as a new state with the first stirrings for the emergence of a new Church *sui iuris*, perhaps eventually also of a new rite.

The historical phenomena of large scale migrations of peoples caused by wars, political and economic insecurity, the attraction of better prospects of life and work, etc. , have created a new life situation (*Sitz im Leben*) for several Churches *sui iuris*. For adequate pastoral care of their Christian faithful the Second Vatican Council approved multiple jurisdiction in the same territory, revoking the former norm of “one city one bishop.” Formerly, a second bishop in the same city spelled rivalry, schism or heresy. It was “monstrous like a body having two heads,” according to the Fourth Lateran

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<sup>38</sup>Klaus Schatz, *Papal Primacy*, pp. ix, 175-183.

Council (1215). In the changed historical conditions of a mobile society, especially in cities with ten million or more people often with immigrant Christian faithful of several ritually different Churches, pastoral care often requires or favours the system of multiple jurisdiction. In the experience of the Catholic Church worldwide since the Second Vatican Council this has been found on the whole positive. Thus the conciliar directive to erect, where useful or necessary, ritually distinct parishes and eparchies/dioceses in the same territory has relativised the principle of territorial jurisdiction, which once had suited a relatively static society but turned out to be inadequate for the modern mobile society.

Finally, the historical dimension of law in the Church is also apparent in the fact that custom can make or unmake law in the Church (CIC can. 28; CCEO can. 1509). The Church is always in need of reform (“*Ecclesia semper reformanda*”) in its human elements. Whereas the Council of Trent had been a council of Counter-Reform, the Second Vatican Council was a council of profound inner reform, especially in the liturgy of the (Latin) Church and in the roots of canon law. CIC-1983 replaced CIC-1917 in less than six decades after its promulgation; in 1991 CCEO replaced and completed CICO in just over three decades. Both these new codes were again modified in part by Pope John Paul II in 1998; and in 2009 CIC-1983 was reformed in parts once again by Pope Benedict XVI, who noted in particular the negative historical experience of the norm about “formally leaving the Church.” Both these codes will need even more radical reform if ecumenism is to make headway towards the unity of the divided Churches.

## **7. The Hierarchical Dimension**

The term hierarchy is regularly used in canon law with reference to those who hold power in the Church, and it has the particular sense of ecclesiastical hierarchy. But this term

can be used also in a general sense to denote the state of being “unequal” or “graded.” Thus the Second Vatican Council asks theologians to be attentive to “the hierarchy of truths,” meaning that not all truths of faith are of equal importance but that there is gradation or scale of truths which should be kept in mind (GS 62). Similarly, there is a hierarchy of laws in the Church; they are not of equal importance. Canonists in particular must be attentive to the hierarchy of norms in the legislation of the Catholic Church.

The question of the hierarchy of laws is not new. It was raised long ago in another form in the question asked about the first/greatest commandment in the Old Testament. According to the rabbis the Torah contained 613 laws, of which 365 were prescriptive (Do’s) and 248 prohibitive (Don’t’s). Were they all to be regarded as of equal importance as laws of God? Or was there a gradation? This concern about the hierarchy of laws lay behind the question put to Jesus about the “greatest commandment” (Mt 22: 36). His answer implies a gradation as he speaks of the love of God as the first commandment and love of neighbour as the second, “on which depend all the law and the prophets” (Mt 22:37-40). Further, the idea of the hierarchy of laws is implicit in the reproach Jesus moved against the scribes and Pharisees who tithed “mint, dill, and cumin, but neglected the weightier matters of the law: justice, mercy and faith” (Mt 23:23). In canon law, too, there is a similar scale or hierarchy of laws. Norms concerning the preservation of faith, the practice of charity, the celebration of the Eucharist and of reconciliation are to be deemed to have greater weight than prescriptions concerning tariffs, seniority, transfer of parish priests, and the like.

The post-conciliar project *Lex Ecclesiae Fundamentalis* contained the idea of the hierarchy of laws, although not the term. Some compared this project to the constitutional law of modern states. Some others questioned this comparison, still others

doubted the utility of this distinct piece of legislation. Finally the project was dropped. But it has left behind the sense of the hierarchy of canons as its legacy. It was mostly from the draft of *Lex Ecclesiae Fundamentalis* that the canons on the rights and duties of the Christian faithful in both the codes were taken (CIC cann. 204-223; CCEO cann. 7-26). These canons are of greater importance than many others in the two codes, like the canons on the Associations of the Christian Faithful (CIC cann. 298-329; CCEO cann. 573-583). They may be said to be fundamental, “though not fundamental in a formally juridical sense.”<sup>39</sup>

The term “supreme law” in can. 1752 of CIC implies likewise a hierarchy of laws contained in this code. The same should apply also to the canons of CCEO, although this code does not have a parallel canon. Among the laws of the state, too, there is a hierarchy of laws, which reason can establish. However, the finality of the laws of the state is the common good, a value which does not stand comparison with the transcendent value of the salvation of souls.

The Second Vatican Council asked theologians to be attentive to the hierarchy of truths because not all the truths of faith are linked equally with the central mysteries of the Christian faith. This conciliar directive may be regarded as directed also to canonists to be attentive to the hierarchy of laws or canons in the Church. An illustration may be had in the imagery of the solar system, in which planets vary not only in size but also in the distance from the sun. Similarly the truths of faith and the laws of the Church are closely or distantly linked to their centre

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<sup>39</sup>Giorgio Feliciani, “The Rights and Obligations of the Christian Faithful,” in George Nedungatt, ed., *A Guide to the Eastern Code* (Kanonika 10), (Rome: PIO), 2002, pp. 81-97, at p. 2; Rosalio José Castillo Lara, “Some General Reflections on the Rights and Duties of the Christian Faithful,” *Studia Canonica* 20 (1986) 7-32, at p. 15.

and ultimate end, the mystery of Christ and the salvation of souls.

Although careful codification may avoid conflicts of laws or of canons in their formulation, conflicts can arise in their application. When it occurs, the principle of the hierarchy of laws can indicate a way to find a practical solution.

### **Conclusion**

Law in the Church must be in harmony with a synthesis of the multiple dimensions of law: anthropological, Christological, pneumatological, ecclesiological, sociological, historical and hierarchical. They do not justify the motto “semper idem” (always the same) except insofar as it insists on maintaining identity in change. The aphorism of the Roman law “odiosa omnis mutatio legis” (any change of law is to be discouraged) counsels prudence in changing laws, not their immobility or immutability, which would be contrary to the historical and sociological dimensions of law, but even more profoundly opposed to the pneumatological dimension inasmuch as the Spirit is the principle of newness and renewal. This is presupposed in the motto “Ecclesia semper reformanda” (the Church is always in need of reform) while it emphasizes the condition of the Pilgrim Church facing ever new situations and challenges. Thus, if properly understood, these two mottoes can be seen to be complementary, not contradictory.

The Catholic style is to introduce reforms in continuity with tradition, while break with tradition is the hallmark of the Protestant style. A protest that claims to stand by the authority of Scripture alone (*sola Scriptura*) can generate protest with centrifugal forces spinning out ever new protests. Between the Protestant extreme on the left and the Orthodox extreme of legal immobility on the right is the Catholic centre, which

espouses the principle “*Ecclesia semper reformanda*” (the Church is always in need of reform).

This stance holds together in due tension all the seven dimensions of law. Conceptually, however, the Christological dimension may be said to resume at a profound level all the others. Jesus Christ is Emmanuel, God with us and for us. “Jesus Christ is the same yesterday and today and for ever” (Heb 13:8). And the Second Vatican Council affirms, “With the incarnation the Son of God united himself in some way (*quodammodo*) with every human being” (GS 22). In this concept of the “total Christ” are summed up the anthropological and social dimensions. Since the Holy Spirit is the spirit of Christ and the Church is his body, the pneumatological and the ecclesiological dimensions also subsist in Christ, in whom “everything subsists” (Col 1:17). Hence the formula of Johannes Heckel “*extra Christum nullum ius*” (outside Christ no Law) is valid if given its plenary sense as a Christological synthesis, but clarity is better achieved by articulating all the seven dimensions of law.