



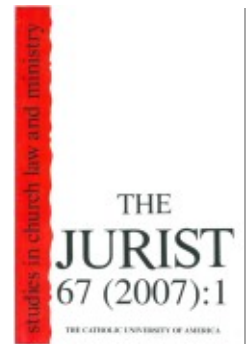
PROJECT MUSE®

---

Law for Life *Sacrae Discipline Leges* : Forty Years After The Council

Ladislav Orsy S.J.

The Jurist: Studies in Church Law and Ministry, Volume 67, Number 1, 2007, pp. 15-38 (Article)



Published by The Catholic University of America Press

DOI: <https://doi.org/10.1353/jur.2007.0043>

➔ For additional information about this article

<https://muse.jhu.edu/article/610255/summary>

LAW FOR LIFE  
*SACRAE DISCIPLINAE LEGES:*  
FORTY YEARS AFTER THE COUNCIL

LADISLAS ORSY, S.J.\*

*Let me sing for my beloved a love song concerning his vineyard:  
My beloved had a vineyard on a very fertile hill.  
He dug it and cleared it of stones, and planted it with choice vines;  
He built a watchtower in the midst of it,  
And hewed out wine vat in it;  
And he expected it to yield grapes. . . .  
What more was there to do for my vineyard . . . (Is 5: 1–2, 4).*

*Introduction*

To begin an exposition on the state of canon law with a poetic passage from the prophet Isaiah is unusual. But the allegory of the vineyard offers a good introduction into the inner core of my study. Yahweh built a vineyard and he created a protective enclosure for it, so that the life hidden in the vine may unfold and bring fruit. Isaiah sees a neat distinction between the external provisions (the clearing of the soil and the building of the tower) and the internal wealth (the vines bursting with life).

All that constitutes the supporting structures of the vineyard—the walls, the beds, the paths, the watch tower—they all are meant to provide protection for the vines so that they may grow and produce an abundant harvest of grapes. They are necessary but not life giving. Life is in the plants, and only there.

It is also so in the Church. Structures and organizations are needed to provide an environment for life to unfold and expand. But life is in the people—only there and nowhere else.

Concerning the Church, every allegory, of course, is an approximation of a reality that is too mysterious to be expressed in our limited concepts and images. Nonetheless, the allegory of the vineyard, when judiciously applied, is a good way of representing the relationship between law and life in God's own domain, which is the Church.

\* Professor of Law, Georgetown University Law Center, Washington, DC.—This article is a revised and enlarged version of the author's keynote address at the meeting of the Canon Law Society of America, on October 3, 2005 in Tampa, FL. He thanks the Society for their gracious permission.

### *The Theme*

The more precise description of the subject matter of my discourse is in the subtitle: *Sacrae disciplinae leges: Forty Years after the Council*.<sup>1</sup> It indicates a comparative study. The terms to be compared are, on the one side, the *corpus* of canon law as it is contained in the *Code of Canon Law* promulgated in 1983 and on the other side, the event and the “determinations” of Vatican Council II and their consequences. A broad topic—by any measure. Teams of experts, even if they were locked up for years in an ivory tower, could hardly do justice to it. But there is no need to be discouraged: within this broad field, I can focus on a few selected ideas and facts, probe them for a better understanding, and then form a few reasonable conclusions that need not be final but good enough to make some progress in the intelligence of our Church and in the appreciation of our laws.

My task is then to inquire as to how far our structures and laws measure up to the vision of the council? Or inquire as to how far the council and canon law form a unity—in integrated harmony.

In the search for the answer (or answers), I shall proceed in four steps:

*The first part* of my exposition could be called “due disclosure.” In it, I wish to clarify some key concepts and expressions that will regularly occur throughout my exposition. My intention, however, is not to give standard definitions—which otherwise I do not fail to respect—but to account for my own understanding of certain theological realities and legal institutions.

*The second part* will be a historical presentation of the state of the Church and of the canon law before the council.

*The third part* will focus on the event of the council; it will be a provisional image since the significance of the council is still unfolding.

*The fourth part* will assess the state of the Church and of canon law after the council; it will be a report on a present reality in which we all are involved.

*The conclusion* will be no more than an expression of hope: good ideas have a resilience that no human power can take away.

<sup>1</sup> *SACRAE DISCIPLINAE LEGES*: Apostolic Constitution by John Paul II, January 25, 1983; it introduced the revised *Code of Canon Law*.

*Part One: Key Concepts: Clues to Understanding.*

Before letting this small lexicon unfold, let me insist that I am offering only partial descriptions of rich—divine and human—realities of which we do not have a comprehensive perception.

*Church*

*Who are the church?* The church is the people of God, all of them, full of life-giving energy that wants to expand.<sup>2</sup> This energy leads them to fresh insights about their faith and gives them strength for evangelical deeds. They are the recipients of God's gifts that are distributed directly to individual people according to God's good pleasure. They all enjoy a fundamental equality flowing from the sacraments: baptism has made them God's children; confirmation has made them one in the Spirit; and the Eucharist has made them one in the risen body of Christ. According to the testimony of Vatican Councils I and II, they *together* are the keepers of the sacred memory of the Christ event, and they *together* have the wisdom to build the Church.<sup>3</sup>

*At this point a couple of cautionary remarks are in order:*<sup>4</sup>

*First, no one can be fully integrated into the Church unless he or she has living faith, firm hope, and active charity. To be a healthy organ in the body and to function well, a baptismal certificate or registration in a parish is not enough; sacramental life is essential.*

*Second, we should be careful in using the term "laity," an expression that came into usage somewhere in the third or fourth century. There is no sacrament or sacramental in the Church that would confer on someone the "lay status." All are simply the people of God. Now, some are invited to become servant-leaders of the community, but they, too, remain primarily "people"—as*

<sup>2</sup> Grace given by the sacraments, especially by the sacraments of initiation, should never be thought of as a mere static gift ("the person is sanctified") but as energy that *opportune et importune* presses and carries the person toward action—the speaking of the good news and the building of God's Kingdom. There is in a nutshell the "theology of the people." We need parish councils because there must be an outlet for the divine energy welling up in the parishioners.

<sup>3</sup> For Vatican I see Denzinger-Schönmetzer (DS) 3074, in particular the clause that states that the whole church is endowed with infallibility; for Vatican II see *Lumen gentium* 12.

<sup>4</sup> Paragraphs in the main text that are printed in italics are *obiter dicta*. They concern mostly practical matters—relevant for the doctrinal issues under consideration.

*the others are. There is not, there cannot be, an adequate distinction in the Church between laity and clergy. To begin with, there are the people, and then—among the people—some are sacramentally called to be servant-leaders. The rest, however are not transformed into a distinct class. The improper and uncritical use of the term “laity” has led to the less than sound theology that claims that the exclusive vocation of the laity is “to sanctify the world”—and then to leave the care of the Church to the clergy. All who are people of God are called to build the Church and sanctify the world. Not one of the letters of St. Paul (who was much concerned about “building the Church”) is addressed to the heads of the churches but rather to the people. In his letters we have an authentic source for the correct theology “of the people”—not of the laity.*

What are the “notes” (characteristics) of the Church? We know that the Church is one, holy, catholic, and apostolic—they are the notes we profess in the creed.<sup>5</sup> The church has, however, other characteristics, not professed in the creed but no less true: it is *resilient* and it is *fragile*.

The church is *resilient* due to divine assistance. The people of God, as long as they hold together in communion (and God will always preserve the unity of the “rest of Israel”), cannot lose the memory of God’s saving deeds in Christ. Nor can they lose the way to the Kingdom. We believe in a resilient Church.

The Church is *fragile* because it is composed of human beings. Yes, the Spirit protects the assembly; but the same Spirit does not take away the human frailty of its members. While as a collectivity they cannot lose the apostolic message, no divine guarantee exists that in practical matters they will always observe the highest degree of prudence. Anyone who doubts it should read a history of the Church from cover to cover; his or her doubt will be dispelled soon and forever. Now, ecclesiastical laws—human laws by definition—are the fragile Church’s creation. It follows that some laws may fall short of serving the Church well—or may even do bad service to the community.<sup>6</sup> We believe in a fragile Church.

<sup>5</sup> The notes point to the perfection of the eschatological church. We should add that the pilgrim church of Christ is also divided, unholy, at times and in places too particular and lacking in apostolic simplicity. The Church is the assembly of sinners redeemed who are on the way to being transformed to the image of Christ.

<sup>6</sup> It does not follow that the mark of the Spirit is absent in the legal system, or that some laws do not reach a high degree of prudence. Such an assumption would be incorrect—or downright silly.

*Because ecclesiastical laws fall into the fragile dimension of the Church, there are far reaching consequences for the ecclesiastical legislator (who has his share in our common fragility): he needs help and advice—more so than in doctrinal matters. The same principle applies to the administrators who implement the laws. Furthermore, scholarly interpreters and teachers of the laws have a special duty to examine the quality of the norms enacted and measure them by the theological values the norms are meant to serve. The opinion which holds that the vocation of an academic lawyer is “to exegete the law but not to evaluate it” is a pernicious opinion; it deprives the legislator of needed support and help. It is an opinion that fosters irresponsibility and conformity where critical judgments are warranted.*

*Briefly, the assistance of the Spirit to the episcopate is different in matters doctrinal and practical; ultimately the episcopate has the charism of infallibility but it does not have the charism of supreme prudence.*

### Council

In part three, I shall speak extensively of Vatican Council II. At this point, I wish only to draw attention to a distinction: every council in history brought forth a proclamation and every council was an event. This distinction is particularly significant for Vatican Council II.<sup>7</sup>

Every ecumenical council in the history of the Church has produced a “proclamation” concerning some point or points of the doctrine of the faith. They are objective propositions; we find them in collections usually entitled as “The Decrees of Ecumenical Councils.”<sup>8</sup> Further, at the same time every ecumenical council was an “event” which brought a life cycle of the Church to its closure and initiated a new one; each council was an end and a beginning. Beyond its teaching function (the intellectual enlightenment of the Church), councils always (or mostly) left an

<sup>7</sup> There is nothing unusual in distinguishing between “doctrine” and “event.” We continue to interpret the teaching of Jesus (doctrine) in function of his resurrection (event); the two mutually support and explain each other. We have a vast literature on the doctrine of Vatican Council II, but far less has been said about the nature of that event. The texts alone can never give us a full comprehension of the significance of the council.

<sup>8</sup> Cf. *Conciliorum Oecumenicorum Decreta*, ed. Istituto per le scienze religiose (Bologna: 1973). A bilingual edition (Latin and English) of conciliar texts edited by Norman Tanner was published in two volumes by Georgetown University Press, Washington, D.C. in 1990.

existential impact on the Church that sometimes “reverberated” for decades or centuries.

The proclamations of Vatican Council II have been, and will be, debated for a long time to come. Less attention is being paid to the council as an event.

### *Theology*

In this exposition the term “theology” means more than the art and craft of expounding the doctrine of faith in well-chiseled concepts and precise propositions. While such mental skill and agility is certainly needed in the Church, the true foundation of any theological enterprise is in wisdom that speaks of ineffable mysteries apprehended by faith. Such wisdom should play a principal role in discovering Christian values that the community should appropriate. This is to say that an intuitive *sensus fidei*, or a “supernatural instinct” should be numbered among the sources of canon law.<sup>9</sup>

### *Canon Law*

In colloquial conversations the term “canon law” is used—and abused—in several senses. At one end of the gamut, the speaker may be referring to petty regulations for the vexation of the faithful; at the other end he or she may have in mind the God-given structures of the Church. Authentic canon law (that is, the compound of ecclesiastical laws) is between these extremes: it is neither petty nuisance nor divine ordinance. It is a necessary human instrument in a divinely founded community to bring good balances into the operations of the group.

Such an instrument is indispensable. No community, not even a community of God’s children, can function without good order.<sup>10</sup> Further, no spiritual charism given to an assembly can survive in the vicissitudes of history unless it is supported and protected by legal structures and norms.<sup>11</sup>

<sup>9</sup> Cf. *Lumen gentium* 12: “The people unfailingly adhere to this faith, penetrate it more deeply through right judgment, and apply it more fully in daily life.” This is briefly the reason why there should be room in the Church for customary law.

<sup>10</sup> There is order even in the holy Trinity: the Son proceeds from the Father and the Spirit from the Father and (through) the Son.

<sup>11</sup> To accept the “church spiritual” but to reject the “church institutional” does not make sense within the Christian dispensation: it runs counter to the dynamics of the divine initiative in the Incarnation. Besides, there is no stability in history without a soundly built institution; if a spiritual movement does not become “earthly” in visible structures, it is

The best definition of canon law (ecclesiastical law) is given by its purpose: it is a system of structures and norms to secure freedom for the people to receive unimpeded the gifts of the Spirit *and* it is a system of structures and norms to secure freedom for the Spirit to dispense unimpeded his gifts. Here we find the dignity of ecclesiastical legislators: they are called to create freedom for the citizens of God's Kingdom *and* for his Spirit—an awesome task. Once freedom is created, life can sprout and unfold.

### *Theology and Canon Law*

A question often raised is: how do theology and canon law relate to each other? Which one of the two has priority? The answer is that they ought to operate in an essential organic unity—each retaining its own characteristics.

Theology operates on the abstract level: it has priority at the planning stage because it determines a value to be appropriated and it gives meaning to the law. Canon law operates on the concrete level: it provides norms of action in the existential order and it contributes directly to the building and well being of the Kingdom.

While a vision must precede every reasonable action, a vision still remains within the realm of theory. When a command is issued for an action, it is to shape reality. And reality has its own God-given priority.

For this reason structures and laws cannot be handled lightly. They have a priority that no theory can possess: they deal with existence. The actual building of a house has its own priority over the blueprint of the same house. But a law not grounded in a value is like a house built on sand; it is bound to collapse.

In the Church, canon law has an importance that no theory can match. It deals with the real existing social body.

The very question of priority is a misconceived query: there is one single process that goes from a vision to an operation: every stage in the process plays an indispensable role.

### *Conversion*

The concept of conversion will repeatedly return and can cause confusion. For this reason, I wish to stress that—as a rule—I use the term not

---

bound to pass away; history proves it abundantly. As we humans cannot be pure spirits, a human community cannot be purely spiritual.



in the sense of abandoning the old faith and turning to some new fantasies but in the sense of a “turning around” within the framework of our tradition and reaching a deeper intelligence of faith and a wiser path in the obedience of faith.

My conceptual clarifications—a sort of *apologia* for giving a special sense to common terms and expressions—are now concluded.

*Before entering, however, into the historical part a disclaimer is useful—to dispel misgivings—should they exist.*

*Nowhere in this exposition do I intend to be either conservative or progressive; my aim is to draw conclusions from verifiable evidence, or, to tell a story to the best of my ability subject to completion or correction as new evidence arises or as we reach better insights into the available data. To be as a matter of principle either conservative or progressive is to confess an ideological prejudice that neither faith nor reason should tolerate.*

*Part Two: Before the Council  
The State of The Church*

On the eve of the council the Church was bursting with divine energy but lacking balance in its human operations. Let me call on an authentic witness, who is not one to be taken lightly. The circumstances of his testimony add additional weight to his words. The witness is Pius XI; the time is a few days before his death.

The late Alex Carter, former bishop of Sault Ste. Marie, in Ontario, Canada, reports in his *Memoirs* an impromptu exhortation that Pius XI addressed in 1939 to the students of the Canadian College in Rome, on the fiftieth anniversary of their College. Carter was one of the students who were present. The pope's words as quoted by Carter:

You are the young priests who have come to Rome. You are going back to Canada and will continue to build the Church there. I do not place any limits on the providence of God, but I am sure that my life expectancy is very short. I want you to take this message away with you. The church, the mystical body of Christ, has become a monstrosity. The head is very large, but the body is shrunken. You, the priests, must rebuild that body of the church and the only way that you can rebuild it is to mobilize the lay people. You must call upon the lay people to become, along

with you, the witnesses of Christ. You must call them especially to bring Christ back to the workplace, to the marketplace.<sup>12</sup>

Carter comments that: “This powerful message was like a Last Will and Testament of the Pope. As a matter of fact that was his last public audience. All audiences were cancelled the following day and he died not long afterward.”<sup>13</sup>

The successor of Pius XI was Pius XII. While he “opened some windows,” (e.g., he liberated biblical scholars from their intellectual captivity), overall he continued with the trend of centralization.<sup>14</sup> On the eve of the council, the Church, the mystical body of Christ, was suffering from an internal dislocation of vital forces. Virtually all the local churches and the people of God at large were reduced to varying degrees of passivity.

For example, individual dioceses were allowed little initiative; the non-ordained faithful (I prefer that term to “laity”) were not entitled to proclaim the good news without a mandate from the hierarchy. The commonly held “official” doctrine was that the priests received their power of jurisdiction from the bishop. And the bishops received their power to govern from the pope.

Behind the situation was an understanding of the constitution of the Church which was never defined as a matter of faith, yet was operative in conceiving laws, in issuing administrative orders, and in setting policies: God designed the Church in such a way that all good things, especially intelligence of faith and prudent decisions, should descend from above, from the person of the pope, the Vicar of Christ.

In this understanding there was little space for creativity at any lower level: on the level of the non-ordained, the priests, and the bishops. Hard practices flowed from this understanding: the Holy See became ever more the near exclusive source of doctrinal insights and practical initiatives not only in the person of the pope but also in the curial offices.

While the Church may have been rich in energies, the restrictive structures and norms, however, left little room for their activation. How did the situation arise?

<sup>12</sup> Alex Carter, *A Canadian Bishop's Memoirs* (North Bay, Ontario:Tomiko Publications 1994) 50.

<sup>13</sup> Ibid., 51.

<sup>14</sup> Ever since the pope became the “prisoner of the Vatican” in 1870, a new cult of the person of the pope began to emerge. In earlier times when Catholic people made a pilgrimage to Rome, they went there “to visit Peter and Paul,” to do homage to the apostles.

The trend toward a highly centralized government originated with the policies of Gregory VII at the end of the eleventh century.<sup>15</sup> He intended to strengthen the bishops' independence vis-à-vis the secular princes, which was a needed and eventually successful reform. The leading role of the pope in this movement, however, led to a new understanding of the role of the primacy. A strictly monarchical government away from the old tradition of synodality was in the making. The next great impetus to centralization came from the Council of Trent, in the sixteenth century. The Church in Northern Europe was fragmenting; and the obvious remedy was unity of strategy, command, and action. Only the See of Rome could create and sustain such unity. In the nineteenth century, Vatican Council I provided significant doctrinal support for the centralizing activities of the papacy—although without canonizing them as the only way of life for the Church.<sup>16</sup> There is no "reason of faith" why the process of administrative centralization should be regarded as based on an authentic doctrinal development.

Over so many centuries, however, a misguided theological opinion has become the guide for practice: all enlightenment and good things descend from above. The task of the people (and of the episcopate) is to obey the descending commands.

### *The State of Canon Law*

*We need to remember the principle that canon law is within the fragile side of the Church and that the human legislator is not indefectible in prudential matters.*

---

Modern pilgrims go to Rome "to see the pope." The visit of the diocesan bishops *ad limina apostolorum* is widely perceived by all concerned as a visit *ad limina camerae papae*. Of course, it is right and just that believing people should show respect for Peter's successor; but a "cult of personality" in a secular sense is not fitting for God's people—it is not the style of God's court.

<sup>15</sup> See Ghislain Lafont, *Imagining the Catholic Church* (Collegeville, MN: Liturgical Press, 2000); this work is translated from the French *Imaginer l'Eglise catholique* (Paris: Cerf, 1995).

<sup>16</sup> Cardinal Newman's diagnosis is telling: "We have come to a climax of tyranny. It is not good for the Pope to live 20 years [in office]. It is anomaly and bears no good fruit; he becomes a god, has no one to contradict him, does not know facts, and does cruel things without meaning it." Obviously, this statement by a learned and holy person should be understood in the broader context of the ecclesial climate in Newman's time: it is not a dogmatic proposition but a kind of "desperate cry" (if not rhetorical device) pointing to a problem. See *The Letters and Diaries of John Henry Newman*, vol. XXV, eds. Stephen Dessain and Thomas Gornall (Oxford: Oxford University Press, 1973) 231.

In praise of canon law, we must acknowledge that canon law has done—and continues to do—an immense service to the Church. Just to mention a recent example: the 1917 code established concordance among discordant canons; it brought order, clarity, and legal security into the life of the community. So did and does the 1983 code.

Such praise has been voiced many times by prelates and scholars; I concur wholeheartedly. The system, however, was not—is not—without problems.

*Canon law has become the principal instrument of centralization.*

Over some nine hundred years an immense system of administrative structures has been built up that gradually led to a highly centralized government. To describe this history, a whole book would be necessary, but the final result is obvious. Whatever advantages such a style of government may have, the doctrine of faith does not demand it; and it is not the only way the Church can be governed.

*Canonical jurisprudence has lost its vital link with theology; it became a victim of "canonical nominalism."*

The late Gérard Fransen, a much-respected professor of history of canon law at the University of Louvain-la-Neuve, was the first to recognize and explain how the disease of positivism came to affect canon law.<sup>17</sup> In 1564, after the Council of Trent and to safeguard the integrity of the council's decisions, Pius IV forbade the publication of any "commentaries, glossaries, annotations, scholia, or interpretations of any kind concerning the Council's decrees."<sup>18</sup>

This was the beginning of "canonical nominalism"—to use Fransen's expression. Canon lawyers had to content themselves with the task of paraphrasing the official documents—without bringing any inquiring spirit into their work. With one stroke, that is, with one papal bull, the great tradition of "raising questions" that animated research in the Middle Ages was terminated. The method of Magister Gratianus who sought justification for every canon, the playfully serious method of *sic et non* invented, practiced, and taught by Abelard, the incisive inquiries through alternating denials and affirmations by Aquinas were declared out of

<sup>17</sup> See Gérard Fransen, "L'application des décrets du Concile de Trente. Les débuts d'un nominalisme canonique," *L'année canonique* 27 (1983) 5–16.

<sup>18</sup> DS 1849.

bounds. It was not the business of canon lawyers to search for values behind the canons. Unity—a value—had its own exorbitant price.<sup>19</sup>

As a result, for some four hundred years canon lawyers, perhaps without realizing what they were doing, operated within the narrow boundaries of legal positivism—well before the secular philosophers invented and professed it. First, they did it by imposition, then they continued by sheer force of habit and tradition. Anyone who wants proof should consult the standard manuals before Vatican Council II with this question in mind: just how many times do the authors examine the laws critically for the wisdom they contain— or for the law's connection with the foundational values of our Christian tradition—as such values are evidenced in the Scriptures, patristic literature, the pronouncements of the great councils, and so forth. The manuals will speak for themselves.

*Canon law has become static, ahistorical, and adverse to development.*

Every legal system needs stability; otherwise the community suffers from uncertainty. But every legal system must be aware of the flow of history around it and have ways and means of introducing changes. If not, the system becomes a rigid monument and not a life-supporting instrument.<sup>20</sup>

We all know the principle “change in the law is odious,” *mutatio legis odiosa*. We know equally well that if a law is not in step with history, it becomes irrelevant—or odious. We need both stability and flexibility. Virtue lies in a right balance between the two, and the balance needs to change with changing times. An age of rapid (social) developments may demand rapid adaptations in the legal system.

The two great legal systems of the West, classical Roman law and English common law, were born in, and shaped by, historical communi-

<sup>19</sup> A reasonable and legitimate question: why is there so much aversion to canon law throughout the Catholic Church? A tentative answer: because our people, blessed with a sense of faith, instinctively sense that some (many?) of our laws are poorly serving values of a higher order.

<sup>20</sup> While an intense development of doctrine marked the life of the Church in modern times, especially in ecclesiology, canon law has not sufficiently benefited from it. The result is a lack of balance in the social life of the community: its understanding of the mysteries is more advanced than the principles of its operations. The laws of the Church can play a vital role only if they consistently affirm and support theological values; otherwise they are a noisy *gong or clanging cymbal* (cf. 1 Cor 13:1). To accomplish this task, there must be a continuous interplay between doctrine and practice.

ties. The developing structures and norms responded to the emerging needs of the society. Laws are an integral part of our continually developing humanity.

The quest for order in the Christian church was also a response to the dynamics of history: to events within and without the community. Canon law cannot be otherwise. It cannot be a set of rules carved on an immobile monument that successive generations may read but never regard as organic part of their life. Now, when a code of laws is promulgated with well-chiseled rules and seemingly intended for all times, it risks becoming like a monument that has no vital connection with the community. Every legal system must include provisions for the on-going renewal of the law.

Civic communities avoid this problem: they have an on-going legislature. In the church we have the code but (in the practical order) no organism with the task of watching the needs of the community and proposing changes. Whenever needs arise (needs that laws could remedy), they cause tensions, then they lead to painful crises, finally they may lead to explosions.<sup>21</sup>

*Canon law has cut itself off from secular (human) wisdom.*

Jurisprudence is a human science; canon lawyers do not have the privilege of being the best at it. Once, canon lawyers and civil lawyers practiced jurisprudence together. This is not the case today.

Ever since the Renaissance, secular jurisprudence made immense strides—and progress—in such matters as freedom of conscience, respect for human rights, impartial courts, speedy administration of justice, responsibility for the common welfare, and so forth. Canon law remained mostly untouched by such developments; it remained attached to late scholasticism. Again, one should consult our manuals on “Philosophy of Law” used before the council: they are innocent of modernity. On the basis of knowledge gained from them, no one could carry on an intelligent conversation about the law with a well-intentioned contemporary secular thinker.

<sup>21</sup> This is exactly what happened when the crisis of sexual abuse descended on the Church. It was coming for some time, and there was no adequate preventive legislation. A sensible system of the “visitation of the dioceses” could have discovered the problems much earlier and could have taken necessary remedies. Any binding system of visitation remains unacceptable until this day

### *Part Three: The Council*

Every council is an end and a beginning: it concludes an era and opens another. Vatican Council II was no exception: it was a watershed in the Church's history. Yet, it had a particular character: it was more future-oriented than any other council that occurred before it.

#### *The Council as an Event*

The council was an event of conversion. To identify the extent of this conversion is not difficult: the *terminus a quo* can be found in the numerous and mostly unimaginative proposals submitted before the council by the worldwide episcopate, the *terminus ad quem* is recorded in the final documents of the council.

*And let me add immediately and forcefully—as forcefully as the style can bear it: **no one can appropriate the meaning of the council without going through the same process of conversion.** It is not enough to achieve an intellectual understanding of the texts; that is, of the concepts and propositions in the documents. It is not enough to implement an intellectual position through new policies and ordinances. To appropriate the council means to enter with mind and heart into a new horizon; it is to move out of the Tridentine environment and start living in a hitherto unknown one. There are many who interpret the conciliar texts; there are many who impose and/or invoke new rules; yet, there are also many who miss the living event. To recall the allegory of Plato's cave can be helpful here: there are interpreters who received the documents in the cave; and keep interpreting them in the cave. The problem is that the documents were written outside the cave, in plain sunshine;<sup>22</sup> and they can be properly explained only in that blessed world illuminated by the sun. To quote Plato is not inappropriate: he is only describing the behavior of human persons in various environments, and the Church is composed of human persons! He was one of the first philosophers to discover and exploit the sophisticated science of hermeneutics.*

*Once we realize that the council was an event of conversion, we can understand the struggles during the council: it was not just an academic debate. Further, we have the key to the under-*

<sup>22</sup> It took some time and some pain for the majority of the council fathers to get there, but they made it.

*standing of the Church's history after the council: the whole Roman Catholic communion the world over was—and still is—in the throes of a conversion process. Authentic reception equals authentic conversion.*

*The council fathers were—and we are—called to move into a new field of vision (into a “new life-environment” would be a better description); where they—we—must think and act in a different manner. Such transition (or transformation) is always painful; it means to move away from the security of the “known” toward the threatening insecurity of the “unknown.” It is not purely external (like settling under a different roof) but it demands an internal change in our personality; we must not “cling” to our familiar habits of thoughts and operations but must “empty ourselves” to make room for a “new creature”—or, in the case of the Church, to make room for a newly fashioned community.*

*At the council, behind the ideological battles witnessed by the speeches, vital fears played their role. To say so is not to reduce the conciliar debates to some silly psychology; it is simply to state that the participants were human beings; believers, yes, but human beings. For instance, to move from the clear and distinct certainty that an excessive interpretation of papal infallibility can give into the disturbing complexity of a synodal and collegial decision-making process can be an agonizing journey.*

*By way of anticipation, I may already point out that when we reach the issue of “how far does the post-conciliar legislation reflect the mind of the council?” the right question will be “how far does the new code bear witness to the great event of conversion, and how far is it an instrument of conversion for the whole community?”*

*Let us not hide an additional problem: the insights of the council are so deep and far reaching that they can be grasped only slowly—even for those who were present at it. In other terms: the meaning of the council keeps unfolding in our minds and hearts ever since its closure. This should not be surprising: a traveler may well see a mountain in a distance and perceive its outstanding features without having a detailed knowledge of its complex reality; in the same way the pilgrim Church (represented by the bishops at a council) may see a mystery in its out-*



*line and affirm its existence without an immediate perception of its depth and breadth.*

*To work on the unfolding of the mystery remains the task of the coming generations.*

The council as an event of conversion that took place in the minds and hearts of the participants—slowly and painfully, over the seasons of four years. The principal protagonist of this event was the gigantic figure of pope John XXIII—*il papa buono*, “the good pope,” as he became known worldwide. His stature is likely to increase; time will do its work in preserving the substantial over many accidentals. When blessed John XXIII convoked Vatican Council II, he reversed a trend of nine hundred years of centralization.<sup>23</sup> He was “inspired” to do so—or so he confessed it. He did it single handedly, notwithstanding “prudent advice” to the contrary.<sup>24</sup>

He knew there were problems with the Church. He could have decided on a series of encyclicals instructing the people on what to do. After all, he was the supreme teacher. He did the opposite. He called on the universal episcopate. Then the bishops came from every corner of the world, and—eventually—understood him and became aware of their own task.<sup>25</sup>

The episcopal college, presided by the bishop of Rome, fully operational, reversed a current coming from the depth of past centuries, and opened the way for a new tide of energies.

No wonder that Vatican Council II does not fit easily into any category of councils. It was convoked in relatively serene times to “update” the Church and to bring about an *aggiornamento*. It was called not “to disperse” but “to gather” fresh insights into the permanent core of our tradition.

<sup>23</sup> One is reminded of the exultant cry of the Psalmist: “The sea looked and fled, Jordan turned back” (Ps 114: 3). Pope John was certainly exultant on the evening of the opening day of the council in his speech from the window of his study—in his joy he asked mothers to bring his caresses to their children. He foresaw a far-reaching impact of the council.

<sup>24</sup> This trend of centralization led the Western branch of Christianity further and further away from the Eastern one; the Eastern churches continued to operate collegially on the basis of the ancient doctrine of synodality.

<sup>25</sup> The bishops began to grasp the pope’s deepest intent when a few weeks into the council, they started to vindicate their own right to compose the documents. The voice of the universal episcopate—muted for so long—was heard again in the Church. The council was coming to life; or life was (exuberantly) welling up in the episcopal college.

Because Vatican Council II was so unusual in its convocation, operation, and achievement, its reception by the universal Church cannot be but slow. It calls for the conversion of the whole Roman Catholic communion.<sup>26</sup>

### *Canon Law at the Council*

On January 25, 1959, at St. Paul's basilica John XXIII named three projects that he intended to initiate and promote as organic parts of his *aggiornamento*: a diocesan synod for Rome, an ecumenical council, and the revision of canon law. Events progressed in that order. The diocesan synod for Rome was held and concluded in January 1960. The council was convoked and opened October 11, 1962. The work for the revision of canon law was initiated on March 29, 1963 when the pope appointed a commission of thirty cardinals, twenty one of them from the Roman curia.

As far as I know, the theme of "canon law at the council" has not attracted the attention of any researcher—yet, such a history holds the clue to the understanding of the post conciliar developments. Since we have no conclusive study, I cannot do more than to indicate some pertinent questions to be investigated.

Question 1: Have the council fathers (the majority of them) realized that while during the council theological issues had to have priority; after the council legal structures and norms will be indispensable to promote the theological values asserted by the council?

Question 2: Has the council done anything to assure that the Commission for the Revision of Canon Law will faithfully translate the vision of the council into legislation? (The council appointed a *consilium* to assure that the reform of the liturgy would follow the mind of the council.)

Question 3: Is it of any significance that the better part of the members of the Commission for the Revision of the Code consisted of persons from the Curia that became known for regularly trying to oppose the majority of the council fathers, and by and large holding theological opinions that the council discarded?

Question 4: What was the interpretation of the council that the Commission for the Revision of the Code injected into the composition of the

<sup>26</sup> The receptions of the great councils were never instantaneous; those of the councils of Nicea, Chalcedon, and Trent were particularly slow.

new canons? In other terms: what were the theological values they have consistently promoted and supported during the process of revision?

More questions could be raised. In truth, we are far from any comprehensive and sound historical knowledge.<sup>27</sup> The best is to await a detached study of "canon law at the Council."<sup>28</sup>

In this context, however, for the sake of historical accuracy and completeness, it must be recorded that one group displayed an unusual perspicacity: here is the report of a historian:

Immediately after the council, Opus Dei would participate very little in the new organisms created in the Vatican as an outcome of the most reformist aspects of the council (secretariats for unity, for non-Christians, for nonbelievers, etc.), which were primarily occupied by the representatives of the most "open" or "advanced" currents, who were enjoying a wave of euphoria at that moment. These same "progressive" sectors, however, undervalued the importance of another area, which they found unattractive and did not want to devote any time to: canon law. Opus Dei, on the other hand, fomented the cultivation of this discipline; the University of Navarre became the seedbed for a school of canonists, and from the very moment of the creation of the Committee on the Revision of Canon Law, Opus Dei took an active role in it.<sup>29</sup>

<sup>27</sup> Anecdotal history is just that: anecdotal. Its value is limited. Yet, small events may have some significance and be precious indicators of hidden trends. It is fair to record them but they must be taken for what they are. With this proviso, I wish to recall two remarks by prominent persons. (1) During the council I had a conversation with Msgr. Alexandre Renard, then bishop of Versailles, later Cardinal Archbishop of Lyon. I mentioned that the reception of the council would depend largely on the new canon law. "Will the council do anything about it?"—I asked. His response was swift and to the point: "I do not care about canon law;" it is even more to the point in the original French "*Je m'en fiche de droit canonique*." Question: have some bishops (the council?) failed to realize the existential role of law to create the freedom necessary for the reception of the council? (2) Soon after the council, I heard Father Raimundo Bidagor, then recently named secretary of the Commission for the Revision of the Code of Canon Law, say in a small company of university professors that concerning the council "there was nothing to be grateful for." Question: what impact, if any, had his negative disposition toward the council on the positive work of revision that he had to organize and guide? After all, his charge was "to translate" the conciliar ideas into legal norms. Later, it was commonly talked about in Rome that Paul VI himself realized the seriousness of the situation; and he called on Mgr Willy Onclin to become co-secretary—and speed up the revision.

<sup>28</sup> The topic is fascinating; it is suitable for a doctoral dissertation.

<sup>29</sup> This is a quote from Joan Estruch, *Saints & Schemers: Opus Dei and its Paradoxes* translated from the Catalan (Oxford: Oxford University Press, 1995) 206. While the title

*Part Four: after the Council*  
*The State of the Church*

In trying to sum up the history of the post-conciliar years—complex and confusing as they were—an image comes into my mind. Think of two mighty rivers—surging from distant sources—each full of energy—flowing toward the ocean. If those two giants of currents meet at some point, what happens? Turbulence, on a mighty scale.

In the Church there was a current that originated some nine hundred years ago and was nourished and reinforced over the centuries to the eve of the council. It created its own “ethos.” The center was active, and the people at large led an existence of quiet passivity; people were given little responsibility and they were directed toward seeking their salvation through blind obedience. Much of God’s acre was lying fallow.

The event of Vatican Council II generated another current that opened the door for the recognition of God’s gifts dispersed in the community and asked each one to accept responsibility and exercise creativity for the benefit of the whole.<sup>30</sup> After the council the two currents met and clashed. The result was—and still is—turbulence among God’s people.

---

of the book is uncalled for and an incorrect translation of the Catalan original (*L’Opus Dei I les seves paradoxes*), the book contains a great deal of information not otherwise available. Today Opus Dei has a flourishing Faculty of Canon Law in Rome as part of their Pontificia Università della Santa Croce. Cardinal Julian Herranz, of Opus Dei, is the President of the Pontifical Council for the Interpretation of Legislative Texts. Their members seem to exercise a strong influence over the field of canon law—in legislation, interpretation, and implementation. The literary production of the members on the same field is immense although the late historian Gerard Fransen would probably identify it as a continuation of the post Tridentine trend of “canonical nominalism.” The avowed intent of the “Navarra School” is to “exegete” the text of the law but not to critically evaluate it on the basis of theological values: once the legislator has spoken (the law has been promulgated), the task of the interpreter is to explain it but not to judge it with the help of scriptural, patristic, and other sources—which all transcend the law. The nature of canon law, for this school, is the same as that of secular law; they differ only in the fact that canon law is subject to the ecclesiastical Magisterium while civil law is not. Other scholars do not find such a theory an adequate explanation of canon law because the norms of action in the Church are “saving norms;” they are an integral part of the grace-filled redeeming activity of the “saving community”—how could their nature ever be identical with the norms of a secular community that is the state?! The purpose of canon law is the *salus animarum* and it is generated by a religious group; the purpose of civil law is the temporal welfare of the citizens and it is created by secular organs. Now, if their purposes and generating sources are substantially different (one is heavenly, the other is earthly), how could their nature be the same?

<sup>30</sup> We hear much about *conservatives v. liberals* in the Church; cf. above. The labels are misconceived, misplaced, and misleading. Today’s “conservatives” are mostly cling-

To receive the council meant to turn away from the security of the old and accept the insecurity of a new way of thinking and new manner of operating. It is more than to reform the liturgical rules. It is more than having a new Code of Canon Law. It is conversion.

*The State of Canon Law*

The greatest event, of course, was the publication of the revised Code of Canon Law in 1983 with the apostolic constitution, *Sacrae disciplinae leges*. This is what we have at the present, and we have it for the foreseeable future.

Today, in the practical order, this legal system exercises a de facto priority over the theological vision of the council. The structures and the norms contained in the code (and the subsequent enactments complementing them) are daily shaping the Church and directing its operations.

In fairness, praise should be given for what has been achieved. The council had its own impact on our legal system. But has there been a substantial *aggiornamento*?

To come to a fair judgment, let us return to the shortcomings that existed before the council and see how far they have been remedied.

*Centralization.*

If Pius XI *redivivus* visited the Church today, he would find little new evidence for changing his judgment. The "episcopal synod" that Paul VI initiated to identify critical issues in the life of the Church and provide some episcopal leadership has become a mere consultative body to the pope (and the Roman curia) within well-defined and rather narrow limits.<sup>31</sup>

---

ing to convictions and habits developed mainly after the Council of Trent. There are few among them who are familiar with the Church of the first millennium, and even fewer are those who wish to return to its practices. Those who in common parlance are called "liberals" hardly form a cohesive group. Many of them are simply searching honestly for the correct practical implementation of the conciliar vision. Others are "free thinkers" of sorts; they want to propagate the council's vision but do not have enough knowledge to do so within the balancing parameters of the tradition; they easily fall into unacceptable excesses. With some simplification it is fair to say that the contemporary struggle between the conservatives and the (faithful) liberals is between the "Tridentines" and the followers of Vatican II.

<sup>31</sup> In connection with the papacy there is a thorny issue rarely pondered by theologians. We hold as dogma that the pope is the bishop of a diocese (Rome) with the right and duties that such an office involves; in that he is quasi-equal to other bishops. But because

The episcopal conferences exist and operate in the shadow of the Roman Curia; they have little room for any creativity. Even the limited freedom granted them by the Code of Canon Law has been reduced by the May 1998 apostolic constitution *Apostolos suos* to the point where the exercise of their mandate to teach is virtually impossible and where every order needs Roman consent—disguised under the name of “review.”<sup>32</sup>

Admittedly, since the council, the role of non-ordained persons (laity) in the internal life of the Church has visibly increased: they are working in chanceries, in ecclesiastical courts, parish councils, and other ministries. For this, we should rejoice. Yet, paradoxically, the new code drew a sharper line between the ordained and the non-ordained than did any law or custom before. Non-ordained cannot share in any way in the power to govern, *munus gubernandi*, not even by delegation. This excludes them from significant decision-making processes that affect the life of the church. This is a restrictive innovation that ignores a contrary tradition.

*Legal positivism, canonical nominalism.*

In the years after the council and before the promulgation of the new code, there has been a fairly voluminous “wisdom literature” about the role of law in the Church. Presently, an increasing number of textbooks are slipping back to the comfortable position of never asking the laws

---

he succeeds Peter, he also has the office of primacy. In other terms, according to Catholic belief, there is not a “super-bishop” in the church. The pope has the primacy because he is a local bishop—of a privileged place, of course. What is the full meaning of such an arrangement? What does it mean in the practical order? Why did the early church not decide to follow the usual secular pattern of having one “general supervisor”—with no other burden attached? This is a topic worthy of further exploration; it has its importance not only for the internal government of the Church but also for the progress of the ecumenical movement.

<sup>32</sup> It is interesting to note that the doctrine of episcopal collegiality underlying and defining the present status of episcopal conferences is virtually identical with the position of a minority at the council that claimed that *effective* collegiality exists only when an ecumenical council is in session or in analogous circumstances when the bishops—although dispersed physically—are called by the pope to act in a collegial manner. The majority that voted for collegiality had a much richer understanding of it based on the traditional doctrine of synodality that was operational even in the Western church throughout the first millennium. *Affective* collegiality is no more genuine and authentic than an *affective* primacy would be, as distinct from an *effective* one as proclaimed by the two Vatican councils. To define a theological reality as “affective” is to deny that it is a God given reality: it is to assert that our affections create it.

about their link to theological values. Canonical science is drifting toward an exegesis of the texts that would satisfy the Tridentine censors. It is no wonder the respect for law in the community is not increasing.

*The acceptance of an historical existence.*

We have stability in canon law: a code provides well for it. But we have no ways and means that are built into the system for the renewal of our laws—as civic communities do. Since the Church is embedded in an evolving universe, and it is an integral part of human history, it must be equipped to handle changes. But we do not have an organ to watch for great movements and propose changes in the law. We let tensions develop, let one crisis follow another, and even tolerate breakdowns before we reach for the remedy of prudent legislation.

(The inability of our legal system to respond to the sexual abuse crisis in a prompt, fair, and efficient way is an illustration of its rigidity. Supra-diocesan institutions, such as episcopal conferences, regional synods, and a “universal synod” would be eminently suitable for identifying problems and proposing new legislation.)

*Learning from secular sages.*

As we know, in the Middle Ages the study of canon law went hand in hand with the cult of civil law: they shared whatever wisdom they could find. The Reformation and Enlightenment ages put an end to this partnership, and canon law remained alone and did not benefit from significant progress in legal wisdom achieved in civic communities. This continues to be the case today.

There are examples at hand. The procedural norms of the Congregation for the Doctrine of the Faith have not changed sufficiently since the case of Galileo; we do not really hold, certainly not in practice, that delayed justice is no justice; our ways of protecting human rights in the church are hesitant and often ineffective; we lack good and effective rules for the accountability of office holders; and so forth.

*An in-depth inquiry into the development and state of canon law in the post conciliar decades that goes beyond the story of the rules and reaches their connection with values is still due.*

*If someone asked me today how a deeper reform of the legal system of the Church should begin, I would give a twofold answer, one in the realm of theory and another in the field of practice. Both are immediately feasible. (1) To handle the issues in*

*the realm of theory, we would need a small group of theologians and canon lawyers—working closely together—to identify and define the theological values that need legal support. Their inquiry should follow the order of canons in the new code, and include, of course, newly enacted norms. Such a comprehensive work has never been done. The result of the inquiry should be the first step towards an authentic renewal of the legal system. Once such a preparatory report is ready and public, it would be difficult to ignore it; its content would give it authority. There is a worthy challenge for the professional societies of canon law and of theology!.*<sup>33</sup> (2) *In the field of practice the reform should start with the administration of justice. We should make our courts autonomous (as much as possible without hurting any dogma) and start dispensing fair and speedy justice. The doctrine of sacramentally conferred episcopal power need not exclude operational independence. What an asset it would be for new evangelization if the Catholic Church had the reputation among the nations of being exemplary in the administration of justice!*

### Conclusion

The council came to an end forty years ago. But the internal struggles that for four distinct seasons animated the meetings and the inter-sessions are replayed in the Roman Catholic communion at large. As the council fathers struggled with the process of conversion, the Church at large is doing the same today. The dynamic forces of the Spirit that moved the council are poured out into the whole Church; they are dis-

<sup>33</sup> The work would have to be very focused and disciplined, but it could be done in a relatively short time. To identify the theological values relevant for legislation does not require a prolonged investigation into every aspect of the institution in question. To undertake a thorough "inquiry into theological and human values" would be an immense service to the Church; but to be useful (and to be ready in time) it must be done in a judicious manner. For example, to prepare the reform of the laws regulating the administration of the sacrament of penance, the two principal values can be found easily; they are "the contrite heart of the penitent" and "Christ's forgiving power in the Church." All relevant laws should converge on and support these values. On this basis the present laws could be evaluated, and new ones proposed. Or, the sacred values that a bishop or presbyters must serve are not difficult to identify: teaching, sanctifying, and governing God's people. Are there any *leges vigentes* that can distract them from such tasks? If so, how to amend them? Or, are there any structures that leave them less than accountable? If so, how to change them? Such a salutary examination of the whole *corpus* of canon law is a *condicio sine qua non* of any authentic renewal of the law.



rupting earlier attitudes and habits, and, yes, causing turmoil. We should have been able to foresee this, but we did not.

To live in our contemporary Church is like being called to be an actor in a drama—of immense proportions. The scene extends as far as the community has spread. The main theme of the play—designated by the council—is to liberate insights and energies present in every part of the Church for the benefit of all. So that they all may be free and all may enjoy a life in abundance. We are *not* spectators at this drama who are comfortably watching the play. We are participant actors whether we like it or not. The agonies and the ecstasies that a process of conversion entails touch us deeply—individually and intimately. The drama is not likely to end any time soon. But the outcome can hardly be in doubt: if the Spirit initiated the council, the same Spirit will accomplish the work—in ways that we cannot anticipate.

For the time being, the wise Rabbi, Gamaliel is of good counsel:

... If this plan or this undertaking is of human origin, it will fail; if it is of God, you will not be able to overthrow them. You might even be found fighting against God (Acts 5:38–39).<sup>34</sup>

<sup>34</sup> This article ends on a note of hope and on a hope that is well grounded because we have seen the beginning of a process initiated at the council by the Spirit, and because we believe that it is right and just to expect that such a divine gift will unfold. Yet, a question may linger in the mind of the reader: what if the fulfillment of the promise is delayed—and will continue to be so? What should we do? After all, we have waited and waited for forty years. We have expected an explosion of life but we were given the silence of immobility. *Quousque Domine?* The response is that the promise of the Spirit is alive and strong, but the time of its fulfillment has not been revealed to us. *We must not depart from Jerusalem* [that is from the Church] *but must await the promise of the Father* (cf. Acts 1:4). God will speak and act in his own good time. After all, the Church is the people (or the people are the Church), laws and regulations are merely structures to protect life. While we are waiting and hoping for the structural reforms, our principal task may well be to spread around the insights of the council and to do everything for the education of the people—so that one day the prayers, intelligence, and wisdom of the people may provoke the needed changes.