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THE REVISED CODE OF CANON LAW: SOME THEOLOGICAL ISSUES

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IN HIS January 25, 1983 apostolic constitution *Sacrae disciplinae leges*[1] promulgating the revised Code of Canon Law, Pope John Paul II consistently highlighted its relationship to the Second Vatican Council. He noted the original inspiration of Pope John XXIII to convoke an ecumenical council and to reform the 1917 Code of Canon Law, as well as the intense interest of the Council fathers in such legal reform. Both the conciliar enterprise and the Code revision process were motivated by a profound concern to renew Christian life in the mid- and late-twentieth century. Furthermore, John Paul II viewed the revised Code as a noteworthy effort to translate the richness of conciliar doctrine into canonical language—however difficult, if not impossible, such a task is.

This is especially true for the Council's image of the Church, to which the revised Code should constantly be referred as a primary point of reference. There should be a profound complementarity between the Code and the Council, especially the dogmatic constitution *Lumen gentium* and the pastoral constitution *Gaudium et spes*. The key ecclesiological themes of the Council should be among the fundamental criteria for interpreting and implementing the revised Code in practice. Among the significant elements of conciliar ecclesiology noted in the apostolic constitution were the following: the Church as the people of God and hierarchical authority as service; the Church as a communion, with its implications for the relationship between the universal Church and the particular churches and between collegiality and the primacy; the participation of all believers in the threefold office of Christ, with its implications for their duties and rights, especially those of the laity; and the Church's commitment to ecumenism.

The apostolic constitution concluded with the hope that the revised Code would be an effective instrument in aiding the Church to progress

[1] See *Codex iuris canonici auctoritate Ioannis Pauli II promulgatus* (Vatican City: Libreria Editrice Vaticana, 1983) (hereafter cited as Code). For the apostolic constitution, see pp. vii–xiv of the official text. For an English translation of the revised code, see *Code of Canon Law, Latin-English Edition*, translation prepared under the auspices of the Canon Law Society of America (Washington: Canon Law Society of America, 1983).

in accord with the spirit of the Council and thereby better fulfil its salvific mission in the world.

If the revised Code is to be an effective salvific instrument, it must be implemented responsibly and creatively. This task involves not merely canonists but also theologians, other scholars, and pastoral leaders at every level of the Church. Only serious and sustained interaction between them will enable the revised Code to serve the Church's legal-pastoral life authentically. A concern to foster such interchange prompted me to write an article in 1979 on the theological implications of some aspects of the Code revision process.[2] A similar preoccupation prompts the present article at this relatively early stage of the implementation of the revised Code, when commentaries on it are only beginning to appear.

A brief recapitulation of the structure of that earlier article may set the context for the following reflections. First I discussed the early postconciliar history and organization of the Code Commission (hereafter Commission) and its methodology in preparing initial drafts of individual sections of the revised Code. Subsequently I explained some key features of those initial drafts without offering any critical comments. Finally the drafts were examined critically in light of certain principles of institutional reform first articulated by an Austrian pastoral theologian, Ferdinand Klostermann. Such critical comments were necessarily rather brief, given the extensiveness of the material to be covered and understandable limitations of space. Similar limitations are operative in the present article as well.

Although not a theologian, I attempted basically to highlight certain theologically significant issues during the Code revision process up to and including 1978. I also indicated some relevant canonical sources which might be consulted to gain an insight into those issues.

What developments took place in the Code revision process after the last of the initial drafts of the revised Code were issued for consultation during 1978?[3] As was true for the drafts circulated for consultation before

[2] T. Green, "The Revision of Canon Law: Theological Implications," *TS* 40 (1979) 593–679.

[3] For some information on the Code revision process, see the preface to the revised Code itself on pp. xxv–xxviii of the official text. See also J. Alesandro, "General Introduction," in J. Coriden, T. Green, and D. Heintschel, eds., *The Code of Canon Law: A Text and Commentary*, commissioned by the Canon Law Society of America (New York/Mahwah: Paulist, 1985) 4-8 (hereafter *CLSA Commentary*); R. Metz, "La nouvelle codification du droit de l'église (1959–1983)," *Revue de droit canonique* 33 (1983) 110–68; F. D'Ostilio, *La storia del nuovo Codice di Diritto Canonico revisione promulgazione presentazione* (Vatican City: Libreria Editrice Vaticana, 1983) 33–68; H. Schmitz, "Der Codex Iuris Canonici von 1983," in J. Listl, H. Müller, and H. Schmitz, eds., *Handbuch des katholischen Kirchenrechts* (Regensburg: Pustet, 1983) 33–56.

1978, the input from various consultative organs was submitted to individual Code Commission committees, whose task was to revise the initial drafts in light of such input. Subsequently the revised drafts were co-ordinated, the canons were placed in sequence, and a one-volume schema of the whole Code was finalized in June 1980.[4] This document was forwarded to the members of the Code Commission, which was slightly expanded in the fall of 1980, presumably to make it more representative of the whole Church and to respond to proposals for a second world-wide consultation on the proposed Code. The evaluations of the 1980 schema were forwarded to the Code Commission Secretariat, which modified the text in some respects. It also prepared a *Relatio* clarifying certain controverted points in the 1980 schema and indicating certain emendations made by the Secretariat either on its own initiative or at the request of the Commission members.[5]

The amended 1980 schema, the *Relatio*, and six questions on particularly controverted issues served as the basis for a noteworthy October 1981 plenary session of the Commission. The Commission members were also asked to review 38 canons of the proposed *Lex fundamentalis* that had special relevance to the revision of the Latin Code. It had been decided that the *Lex* would not be promulgated at that time. The Commission members discussed about forty agenda items during their meeting from October 20–28. During this meeting some additional changes were made in the original 1980 schema, and the Commission members unanimously voted to forward the amended text to the Pope for promulgation.[6]

Subsequently the Secretariat reworked the document somewhat and presented a corrected text to John Paul II in March 1982. He reviewed this text with a few advisers and introduced some further changes in the proposed Code. Regrettably there is no official report yet on this last stage of the revision process. In December 1982 he announced that he would promulgate the revised Code on January 25, 1983, the 24th anniversary of John XXIII's convocation of Vatican II and announce-

[4] See Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Schema Codicis iuris canonici* (Vatican City: Libreria Editrice Vaticana, 1980) (hereafter *1980 Schema*).

[5] See idem, *Relatio complectens synthesim animadversionum ab Em.mis. atque Ex.mis. Patribus Commissionis ad novissimum Schema CIC exhibitarum, cum responsionibus a Secretaria et Consultoribus datis* (Vatican City: Typis Polyglottis Vaticanis, 1981) (hereafter *Relatio*).

[6] For a fairly detailed overview of some key developments in the Code revision process, especially in regard to the 1981 plenary session, see J. Alesandro, "Law and Renewal: A Canon Lawyer's Analysis of the Revised Code," in *Proceedings of the Annual Convention of the Canon Law Society of America* 1982, 1–40 (hereafter *PCLSA*).

ment of the revision of the Code. The revised Code took effect on November 27, 1983.

The present reflections are largely critical and not expository in character. Their main thrust will be to explore critically various theologically significant issues in the revised Code in light of the aforementioned principles of institutional reform. Nearly exclusive attention will be focused on the issues raised in the earlier article. Selected texts of the revised code will be examined to determine the impact of criticisms of the original drafts on the final stages of the revision process. I refer here especially to criticisms by canonical societies in Australia, Canada, Great Britain, Ireland, and the United States.

Yet, before examining certain significant issues in the 1983 Code, it seems appropriate to highlight some noteworthy organizational differences between it and its 1917 predecessor. Furthermore, I shall also allude briefly to the fate of the *Lex fundamentalis* and the integration of some of its canons into the present law.

Despite the risk of oversimplifying complex issues, one might note certain basic shifts from the 1917 to the 1983 Code.[7] The former document was pre-eminently a juridical and clerical code governing the Church viewed as a "perfect society" endowed with the powers of order and jurisdiction exercised by the hierarchy. The revised Code, following Vatican II, sees the Church above all as the hierarchically structured people of God exercising in the world a ministry of teaching, sanctifying, and pastoral service. There is an inseparable connection between its distinctly societal and communitarian aspects. The 1917 Code envisioned the Church as a society of those who were unequal, with clerics enjoying all the power requisite for public ecclesial service, while the laity could only co-operate with clerics in such service in a subordinate capacity. Although it is not free from certain theological-canonical problems regarding the laity, the 1983 Code tends to view clerics as exercising a role of ecclesial service within a community in which there is a fundamental equality among all believers and the laity are also called to share vitally in its mission.[8]

The 1917 Code was largely structured as an integrated legal system

[7] For a detailed discussion of these issues, see Alesandro, "General Introduction" 8-20; J. Coriden, "Highlights of the Revised Code," *Jurist* 44 (1984) 28-40; V. Fagiolo, "Le nouveau Code de droit canonique et sa structure," in *Liberté et loi dans l'église* (Beauchesne: Paris, 1983) 77-109 (hereafter *Liberté et loi*); H. Schmitz, "Der Codex iuris canonici von 1983," in *Handbuch* 33-54.

[8] See G. Fransen, "Le nouveau Code de droit canonique, présentation et réflexions," *Revue théologique de Louvain* 14 (1983) 275-88, esp. 279-80; G. Thils, "Le nouveau Code et l'ecclésiologie de Vatican II," ibid. 289-301, esp. 301. For a thoughtful examination of the

comparable to other such systems in the civil arena. The Church was viewed as a "complete society" like the state in almost all respects, although the former was differentiated from the latter by its supernatural purpose. A variation of the structure of the secular *Institutes* of Justinian served as the basic organizing principle for the 1917 Code: general norms, persons, things, procedures, penalties.

The 1983 Code reflects a significantly different organizing principle, at least in part. It is true that certain books are organized comparably to the 1917 Code (general norms, Book I; sanctions, Book VI; procedures, Book VII) and that another book does not reflect a uniquely ecclesial organizing principle (temporal goods, Book V). However, the three most notably innovative books are structured according to uniquely ecclesial criteria and reflect a serious effort to embody a conciliar ecclesiological vision (people of God, Book II; the Church's teaching office, Book III; and the Church's sanctifying office, Book IV. Such a legal organization conveys a sense of the uniqueness of the Church, whose juridical and social system must likewise be unique. Such a canonical model is profoundly influenced by conciliar teaching on the people of God, the rights and responsibilities of its various members, and their diverse functions in realizing Christ's priestly, prophetic, and royal mission. Books II–IV represent the most important conceptual shifts from the 1917 Code, since they highlight the richness of the Church's complex *communio* structure and its constitutive elements of word and sacrament.

The revised Code[9] is considerably shorter than its 1917 predecessor; the former contains 1752 canons, as distinct from 2414 canons in the latter. Among the reasons for the reduction of canons are the elimination from the 1983 Code of detailed provisions on canonization and beatification procedures (CIC 1999–2141),[10] the simplification of certain procedures involving clerics (CIC 2142–94), the remanding to distinctly liturgical law of certain provisions formerly contained in the law on sacraments and sacramentals, and a general tendency to expand the options for the proper law of religious communities and particular law at various levels (episcopal conferences, provincial councils, diocesan

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revised Code in light of Vatican II, see E. Corecco, "La réception de Vatican II dans le Code de droit canonique," in G. Alberigo and J. Jossua, eds., *La réception de Vatican II* (Paris: Cerf, 1985) 327-91.

[9] I presuppose that the reader has access to the 1983 Code; hence I rarely quote the canons in detail but simply allude to some noteworthy substantive and organizational issues.

[10] The abbreviation CIC refers to canons of the 1917 Code. The canons of the 1983 Code will be preceded by c. (cc.).

bishops in or out of synod).[11]

Before closing this brief expository section, it seems appropriate to comment briefly on the fate of the proposed *Lex fundamentalis*.[12]

The idea of a *lex* was first proposed by Paul VI at the inaugural meeting of the Commission on November 20, 1965. Two preliminary schemata were formulated in the late 60s prior to the drawing up of a draft that was sent to the bishops of the world and others for comments in the spring of 1971. After some significant criticism of this document had been received, the *coetus* on the *Lex* was expanded, and it spent several years during the 70s reworking the aforementioned draft.

A completed draft was finalized during 1980, and at the synod that year the late Cardinal Felici indicated that it was up to John Paul II whether the *Lex* would be promulgated as a separate document or whether certain canons would be inserted in the revised Code. In March 1981 a special committee of 18 cardinals and bishops voted 13-5 on the appropriateness of promulgating the *Lex*; yet the pope decided not to promulgate it, though the reasons for this decision are not clear. In any event, certain significant canons from the 1980 version of the *Lex* were incorporated in the revised Code, e.g. the introductory canons in Book II, the canons on the fundamental obligations and rights of all believers and of the laity, and some introductory canons on the Church's teaching and sanctifying offices.[13]

I now explore certain theologically significant issues the new Code raises. The extensiveness of the Code, space limitations, and the complexity of those issues preclude anything more than a brief overview, with suggestions for further reading and reflection.

In the aforementioned *Theological Studies* article[14] I examined various Commission drafts in light of certain principles of institutional reform: (1) historicity, (2) pneumatic-charismatic, (3) fundamental Christian equality and coresponsibility, (4) collegiality, (5) dialogue, and (6) sub-

[11] See B. de Lanversin, "De la loi générale à la loi complémentaire dans l'église latine depuis le nouveau Code," in *Liberté et loi* 121–34; F. Morrisey, "The Significance of Particular Law in the Proposed New Code of Canon Law," *PCLSA* 1981, 1-17; J. Passicos, "Vers un renouveau du droit particulier interdiocésain ou régional selon le nouveau Code de droit canonique," in *Liberté et loi* 135-44; J. Provost, "Preparing for Particular Legislation To Implement the Revised Code," *Jurist* 42 (1982) 348-82.

[12] See Green, "Revision" 601-5, for a brief report on the formulation of the *Lex* up to the mid-70s; see also D'Ostilio, *La storia* 45-48.

[13] For the text of these canons, see *Communicationes* 15 (1984) 91-99. For some reflections on these canons, see C. Corral Salvador, "La recepción de la proyectada 'Ley fundamental de la Iglesia' en el nuevo Código de derecho canónico," *Estudios eclesiásticos* 58 (1983) 137-61.

[14] Note 2 above.

sidiarity. The following reflections deal with the same issues according to the same principles. Each principle will be briefly articulated and its implications for the revised Code considered. A major concern is evaluating how significantly criticisms of the aforementioned drafts by English-speaking canonists influenced the present law.

PRINCIPLE OF HISTORICITY[15]

The Church is a pilgrim people of God moving through history and perennially called to reform so as to mediate the good news of salvation ever more effectively. Accordingly, this principle implies that church structures cannot be static but must be continually open to evolution in the Spirit where necessary.

A significant preoccupation of critics of legal codification was the fact that numerous ecclesial institutions were experiencing noteworthy postconciliar development, be it older established institutions such as diocesan synods and chapters of religious communities or newer conciliar-inspired institutions such as presbyteral councils and episcopal conferences. This phenomenon of ongoing change precluded precise legal descriptions of such institutions in themselves or in relationship to one another. Furthermore, a respect for the fluidity of such legal-pastoral developments counseled against prematurely canonizing the *status quo* lest healthy institutional growth be impeded.

This concern does not seem to have significantly affected the last stages of the revision process. Codification is obviously a fact of ecclesial life and there has been a noteworthy crystallization of the postconciliar *ius vigens* in the present Code. This development seems to reflect the Commission's prevailing interest in fostering legal stability in the Church and its fear of the possibly detrimental effects of continuing the postconciliar pattern of periodic issuance of statutes in various areas, e.g. liturgical life, matrimonial nullity procedures, and selection of bishops.[16]

One can hardly question the value of legal stability, which is crucial

[15] Green, "Revision" 628-30.

[16] *Communicationes* 14 (1982) 121-22. The Commission Secretariat's concern for a prompt conclusion of the revision process is evident in the *Praenotanda* of the *Relatio* on the 1980 Schema sent to the Commission members prior to the October 1981 *plenarium*: "Practica anomia seu carentia legis per tantum temporis spatium protracta valde periculosa est: nam: a) sine lege aut ea ignorata, Pastores securis orbantur normis quae rectum ministerii pastoralis exercitium dirigant; b) unusquisque iura et officia sibi propria ignorat et facile arbitrium in legem mutatur; c) abusus in ecclesiasticam disciplinam, qui postea difficile extirpantur, irrepunt; d) rectae conscientiae multis anxietatibus anguntur et in contemptum legis veluti impelluntur; e) ipsa vita, institutiones, activitas et incepta apostolica Ecclesiae altero claudicant pede: nam—ut recte dixit Paulus VI f.m.—vita . . . ecclesialis sine ordinatione iuridica nequit existere" (*Communicationes* 9 [1977] 81).

for the security of the community and which perhaps some earlier critiques of the revised Code did not take seriously enough.[17] Yet, another basic value is a certain flexibility in the legal system to accommodate the demands of an evolving society.[18] For example, one may seriously question whether the canons on such institutes as the synod of bishops (cc. 342–48) and the presbyteral council (cc. 495–501) among others are formulated in such a way as to accommodate such demands. Furthermore, in the area of sacramental ministry the canons on sacramental sharing (c. 844) and on general absolution (cc. 961–63) do not seem to be nuanced enough to take cognizance of emerging theological and pastoral developments.[19]

Some critics of the aforementioned drafts feared that some parts of the revised Code would be prematurely obsolescent, given rapid pastoral developments in the Church, e.g. emergence of small Christian communities. Though there were some positive developments in the last stages of the revision process,[20] the present law is still somewhat problematic in this respect. Hence continuing efforts must be made to evaluate and where necessary refine legal-pastoral forms in light of changing ministerial needs.

[17] See R. Castillo Lara, "Some Reflections on the Proper Way To Approach the Code of Canon Law," *PCLSA* 1984, 24-40; idem, "La communion ecclésiale dans le nouveau Code de droit canonique," *Studia canonica* 17 (1983) 331-55.

[18] See L. Orsy, "The New Canon Law: A Practical Proposal," *America*, Sept. 26, 1981, 155-57. Orsy wisely proposed the gradual issuance of various parts of the law to regulate significant aspects of ecclesial life. Such an approach would seemingly be more appropriate than one indivisible code in transitory times such as ours characterized by the accelerated rhythm of change. See idem, "The Church's New Laws," (London) *Tablet*, May 7, 1983, 421-23; idem, "Assessing the New Laws," ibid., May 14, 1983, 445-47; idem, "Law in Action," ibid., Dec. 1, 1984, 1195-97.

[19] For a thoughtful commentary on canon 844, see F. McManus in *CLSA Commentary* 609-11. The canons on general absolution and especially canon 961 on the conditions for its use seem even more restrictively formulated than original norms 131-34. This seems prompted by a fear of abuses, especially a concern that the value of individual auricular confession be jeopardized by increasing emphasis on general absolution. For a reflective commentary on the general-absolution canons, see F. McManus in *CLSA Commentary* 676-80. For a more thorough discussion of this issue, see L. Orsy, "General Absolution: New Law, Old Traditions, Some Questions," *TS* 45 (1984) 676-89. See also T. Green, "The Church's Sanctifying Office: Reflections on Selected Canons in the Revised Code," *Jurist* 44 (1984) 359-73.

[20] One positive development is a somewhat less demanding approach to ecclesiastical organization in response to criticisms of the inapplicability of certain structures in Third World countries. For example, certain structures mandated in the original *People of God schema* are facultative in the present law, e.g. deaneries (c. 374,2/original norm 223,1), ecclesiastical regions (c. 433,1/original norm 187,1), the office of the *moderator curiae* or chief executive officer of a diocesan chancery (c. 477,2/original norm 286).

Although canonists tend to focus most of their attention on the shaping of the law, they and other scholars need to consider ever more seriously the quality of its reception by the community. This is because the law's strengths and weaknesses are revealed only when it is confronted with the demands of real life.[21] The revised Code's enhancing of particular-law options should be helpful in this regard.

A concern of some critics of the original *sacramental law schema* especially was its tendency to legislate answers to widely controverted and still unresolved theological, pastoral, and canonical questions.[22] This seemed premature and not conducive to judicious legal norms genuinely serviceable to the community. One may sympathize with the Commission's continuing reluctance to deal with such complex issues as the relevance of faith to a genuinely sacramental union, the meaning of the dissolution/dispensation of the marriage bond, and the legitimacy of significant liturgical adaptation to different cultures, traditions, and spiritual needs. However, it is unfortunate that the Commission has generally chosen simply to reaffirm the existing discipline in these and other problem areas.

PNEUMATIC-CHARISMATIC PRINCIPLE[23]

Both conciliar and postconciliar documents have emphasized the dignity of the human person, which has also meant an increasing concern to articulate and protect fundamental human and ecclesial rights in the Church. Furthermore, Vatican II stressed that all the faithful and not just church authorities receive the gifts of the Spirit. Accordingly, the aforementioned principle means that church law is to express clearly the basic rights of believers and foster and protect their exercise within the community.

The issue of rights in the Church is complex, and here I intend simply to comment briefly on certain positive and negative features of the revised

[21] See Orsy, articles cited n. 18 above; idem, "Reception and Non-Reception of Law: A Canonical and Theological Consideration," *PCLSA* 1984, 66-70.

[22] For a listing of some of those problems in the proposed norms on marriage and the other sacraments, see n. 212 in Green, "Revision" 675-76. See also G. Robinson, "Unresolved Questions in the Theology of Marriage," *Jurist* 43 (1983) 69-102. For a helpful examination of the canons on marriage consent, see L. Orsy, "Matrimonial Consent in the New Code: Glossae on Canons 1057, 1095-1103, 1107," *Jurist* 43 (1983) 29-68.

[23] Green, "Revision" 630-41.

Code in this respect from a substantive and procedural standpoint.[24] Often a mixed judgment on various legal institutes is called for, since they reflect both positive and negative features.

From a substantive standpoint, a noteworthy positive feature of the revised Code is its articulation of the fundamental obligations and rights of all believers (cc. 208–23), especially the laity (cc. 224-31). Though certain problems in the expression of these obligations and rights will be noted shortly, the very presence of these norms represents a significant step forward towards a more vital legal order, the implications of which will probably take decades to comprehend adequately.

Certain other positive elements in the law might be noted. One area that can raise especially delicate questions concerning the rights of believers is penal law. There is an understandable community concern to deal effectively with serious breaches of ecclesial faith and order that may jeopardize the rights of persons and impair the Church's mission. Yet a reconciling community must always be attentive to the possibilities of reintegrating an offending party within it.

Despite certain problems, the present penal law largely restates the positive features of the original *penal law schema*, e.g. the reduced number of penalizable offenses, the stress on penalties as a last resort when other pastoral measures have failed, and the fairly consistent emphasis on *ferendae sententiae* penalties requiring official ecclesiastical intervention to ascertain both the seriousness of the offense and the presence of possibly mitigating factors. The addition to the original schema of detailed norms on assessing imputability (cc. 1323–27) should foster a more pastorally satisfactory exercise of penal discretion. While the law's external-forum focus is acceptable, the exceptional provision for the confessor's remitting nondeclared *latae sententiae* penalties in urgent cases (c. 1357) seems pastorally advisable.[25]

[24] For a detailed consideration of various aspects of the complex issue of rights in the Church, see E. Correco, N. Herzog, and A. Scola, eds., *Les droits fondamentaux du chrétien dans l'église et dans la société*, Actes du IV^{e} Congrès International de Droit Canonique, Fribourg (Suisse) 6-11. X. 1980 (Fribourg: Editions Universitaires, 1981). See also J. Provost, "Ecclesial Rights," *PCLSA* 1983, 41-62; G. della Torre, "Il popolo di Dio," in *La nuova legislazione canonica* (Rome: Pontificia Universitas Urbaniana, 1983) 140-51. For a detailed commentary on canons 208-231 on the fundamental obligations and rights of all believers and specifically the laity, see J. Provost in *CLSA Commentary* 134-73; also P. Bonnet and G. Ghirlanda, *De christifidelibus: De eorum iuribus, de laicis, de consociationibus* (Rome: Pontificia Universitas Gregoriana, 1983).

[25] For some reflections on the reworking of the original *penal law schema*, which largely influences the current law, see T. Green, "Penal Law Revisited: The Revision of the Penal Law Schema," *Studia canonica* 15 (1981) 135-98. See also A. Stenson, "Penalties in the New Code," *Jurist* 43 (1983) 406–21. For a commentary on Book VI of the Code, see T. Green in *CLSA Commentary* 891–942.

Two potentially significant rights articulated in the revised Code are those of association (c. 215) and the promotion of apostolic initiatives (c. 216), which are further concretized in the canons on associations of the faithful (cc. 298–329). Although these canons largely restate the original *People of God schema*, their placement in the present law differs somewhat from the former text, since they are notably separated from the other significant associational phenomenon in ecclesial life, i.e. religious communities (cc. 573–746). The broad purposes warranting the establishment of such associations reflect the law's respect for the varied charismatic initiatives of the faithful.[26]

Certain positive features of Book III on the Church's teaching office are noteworthy. Several canons recognize the primacy of conscience in the search for religious truth. There is a heightened sensitivity to the role of laypersons in preaching, catechetics, missionary work, education, and the communications media. Finally, there is a repeated stress on primordial parental educational rights and responsibilities vis-à-vis their children.[27]

There were certain positive developments relative to the status of women during the latter stages of the revision process. Canon 104 on the establishment of domicile and quasi domicile and 112,1,2° on change of rite respect conjugal equality, as does canon 111 on the baptism of a child in an interritual marriage, although in the last case the rite of the father prevails if there is a conflict between the spouses. Furthermore, the sexist approach of the original *procedural law schema*, which barred women from significant tribunal ministries, has been transcended in the present law. Hence, despite certain limitations on lay tribunal ministry, women as well as men may be judges in some circumstances (c. 1421,2), assessors (c. 1424), auditors (c. 1428,2), promoters of justice, and defenders of the bond (c. 1435).[28]

The present law has somewhat but not fully responded to criticism of the original *People of God schema* for not taking adequate cognizance of the distinctive status of permanent deacons, especially those who are married. Canon 288 enhances their employment options by generally

[26] See initial canon 298 on the broad spiritual concerns that may motivate the formation of associations of the faithful. For an examination of its implications for the revised Code, see F. Morrisey, "Applying the New Code of Canon Law," *Origins* 15, no. 21 (Nov. 7, 1985) 352-54.

[27] For an insightful commentary on the canons in Book III, see J. Coriden in *CLSA Commentary* 545-89.

[28] For a recent discussion of various legal issues affecting women in the Church, see Committee on Women in the Church, "The Canonist: Obstructionist or Enabler for Women in the Church," *PCLSA* 1983, 126-53.

exempting them from the provisions of canons 284, 285,3-4, 286, and 287,2 prohibiting certain types of employment for other clerics. One positive feature of canon 517,2 is its preference for a deacon to function in a parish leadership capacity if there is a shortage of priests; the original *People of God schema* had simply referred to those who were not priests exercising such a role.

Besides the above-mentioned positive aspects of the law regarding substantive rights, certain positive features regarding procedural rights are noteworthy. Concerns had been expressed about possible due-process deficiencies in the original *penal law schema.* Indeed, certain rights such as confronting one's accuser and having a fair hearing are not explicitly stated in the law. However, they seem to be contained implicitly in the canons governing the judicial penal process (c. 1728,1). Furthermore, canon 221,3 affirms the fundamental right not to be penalized except according to the norm of law; and canon 1723 clarifies the right of the accused to counsel, who is to have the last word in the case prior to the decision (c. 1725).

The current procedural law reaffirms the contemporary tendency to maximize access to church courts for baptized and nonbaptized petitioners alike (c. 1476) and to drop former restrictions on spouses challenging the validity of their marriages (c. 1674). Similarly, former restrictions on the competence of the petitioner's court have been somewhat modified. Canon 1673,3 admits such competence with certain qualifications and thereby recognizes increasing societal mobility, the petitioner's procedural rights, and the frequently noncontentious character of marriage cases.

Questions had been raised about inadequate checks on possibly arbitrary episcopal discretion in the original schemata. Unfortunately, this issue does not generally seem to have been addressed during their revision. Yet one positive development is the provision for required consultation with the metropolitan if a bishop is going to dissolve the presbyteral council for due cause (c. 501,3).

Some negative aspects can now be highlighted. A sharply criticized aspect of the original *People of God schema* and the *Lex* was their discussion of the fundamental obligations and rights of believers (cc. 208-23). While there were some improvements during the revision process, some of the initial concerns still seem relevant. First, the law still seems to overemphasize the obligations and underemphasize the sacramentally-grounded rights of believers, e.g. the consistent reference to obligations before rights, contrary to the sources of the canons. Furthermore, the law frequently conditions the formulation of rights so that their limitations seem essential to the rights themselves rather than to their exercise.

Despite certain positive developments, the present law does not highlight the sacramental basis of fundamental Christian rights as adequately as it might, thereby somewhat weakening the basis for significant lay governmental involvement. Finally, another major concern was the Commission's failure to articulate a basic right to exercise personal charisms (*Apostolicam actuositatem*, no. 3), which seemed significant in grounding the proper apostolic role of the laity. Although this issue was discussed during the latter stages of the revision process, the present law unfortunately articulates no such right.[29]

In light of contemporary problems, one may regret the dropping of the explicit prohibition of sex discrimination contained in norm 17 of the original *People of God schema*. However, canon 208 on fundamental Christian equality probably suffices in this connection. Unfortunately, there is no explicit provision for the involvement of women religious in the synod of bishops, unlike the options available to certain clerical religious (c. 346). Furthermore, the present law regrettably retains the seemingly inexplicable prohibition of the formal installation of women as lectors and acolytes (c. 230,1) in keeping with *Ministeria quaedam* 7. Nevertheless, laywomen may *de facto* perform various nonsacerdotal liturgical ministries (c. 230,2-3).

While there have been some positive procedural law changes enhancing the role of women, there are still problems regarding lay judges, who may technically function only if there is a shortage of clerics (" . . . suadente necessitate . . . ") and only with two clerical judges in a college of three judges (c. 1421,2). Furthermore, only clerics may be single judges in formal cases (c. 1425,4). This restrictiveness seemingly contradicts a basic principle of canonical reform, i.e. that the law should not readily bar individuals from exercising ecclesial ministries unless it is a serious matter of church discipline affecting the common good. Integrity of character and legal expertise and not clerical status should be the basis for tribunal eligibility once it has been recognized that the laity may exercise judicial jurisdiction.[30]

The CLSA at least had expressed concerns about the approach to laicized priests in the original *People of God schema*. These concerns

[29] For a discussion of critiques of the original *People of God schema*, specifically on the issue of rights, see T. Green, "Critical Reflections on the Schema on the People of God," *Studia canonica* 12 (1980) 235-322, esp. 281-89. I have updated this article in light of the 1983 Code; see "Persons and Structures in the Church: Reflections on Selected Issues in Book II," *Jurist* 45 (1985) 24-94.

[30] On the issue of lay judges, see J. Provost, "Roles for Lay Judges," in W. Schumacher and J. Cuneo, eds., *Roman Replies and CLSA Advisory Opinions 1985* (Washington, D.C.: CLSA, 1985) 58–64.

focused on such matters as the appropriateness of local ordinaries' rather than the Holy See's granting of laicization, the seemingly nonpastoral approach characterizing this institute, and the inadequate stress on the continued ecclesial service of the dispensed priest. Unfortunately, such concerns did not seem to influence the formulation of the Code (cc. 290–93); in fact, the current Holy See laicization practice is more restrictive than the former policy under Paul VI.[31]

Earlier I noted that there have been some positive legal developments regarding permanent deacons. However, certain problems still need to be addressed. Besides the fact that no part of the law deals specifically with such deacons, the law still fails to grant appropriate exemptions from the law on clerics in areas such as incardination/excardination (cc. 265–72), common life (c. 280), residence (c. 283), and military service (c. 289,1).

Perhaps a more significant problem is the prohibition of remarriage of married deacons after the death of their spouses, although family commitments may at times suggest such a course of action (c. 1087). This was a sharply-debated issue during the latter stages of the revision process, and in fact both the 1980 schema (canon 250,2) and the October 1981 Commission *plenarium* session affirmed the freedom of married deacons to remarry. However, some Commission members opposed this approach because it seemed to contradict both *Sacrum diaconatus ordinem* 16 and the Eastern tradition (Catholic and Orthodox). This argument obviously prevailed in the long run, and the restrictiveness of the original schema was reintroduced during the 1982 papal consultation process.[32] In current Holy See practice permanent deacons contemplating remarriage are frequently asked to seek a dispensation from the exercise of their clerical obligations before being authorized to remarry, unless there is a compelling pastoral reason warranting the continuing exercise of such obligations.

From a procedural standpoint one might note certain negative features of the revised Code. Canon 1342,1 affirms that penal procedures in

[31] For a commentary on current laicization procedures, see M. O'Reilly, "Canonical Procedures for the Laicization of Priests," *PCLSA* 1982, 233-46; also E. Kneal, "Laicization CLSA Survey 1982," ibid. 247-50. For the Oct. 13, 1980 norms of the Congregation for the Doctrine of the Faith, see *AAS* 72 (1980) 1132-37. See also J. Lynch in *CLSA Commentary* 229-38.

[32] For some reflections on the norms on permanent deacons up to and including the October 1981 *plenarium*, see W. Varvaro, "Proposed Legislation for Permanent Deacons: Developments and Difficulties," *PCLSA* 1981, 238-53. For a more recent commentary on the 1983 Code and the revised NCCB guidelines on permanent deacons, see J. Provost, "Permanent Deacons in the 1983 Code," *PCLSA* 1984, 175-91.

principle are to be judicial rather than administrative, which seems to protect more adequately the rights of all involved in the process. However, recourse to administrative procedure seems relatively easy despite the above principle. Accordingly, it seems appropriate that the ordinary or significant administrative authority (c. 134,1) initiating such a process be required to consult others before making initial decisions regarding such a procedure. Regrettably, such consultation is discretionary in the present law (c. 1718,2). Frankly, given the significant marriage-case burdens experienced by many tribunals, it seems unlikely that the system would be able to cope with an influx of penal cases, which one hopes would be relatively rare.

Concerns had been expressed about somewhat vague terminology in certain canons on penalizable offenses in the original *penal law schema.*[33] This still seems to be a problem in the present law, and one might draw attention to one canon that requires careful interpretation if the obligations and rights of all involved are to be duly recognized and protected. Canon 1371,1° specifies a possible penalty in certain circumstances for those teaching a doctrine condemned by the Roman Pontiff or ecumenical council or pertinaciously rejecting a doctrine on faith or morals taught authentically by the pope or the episcopal college even if they do not intend to proclaim it with a definitive act.[34] This canon deals with situations other than apostasy, heresy, or schism as described in canon 1364. It is imperative that dialogue be fostered at various levels between the bishops and various scholarly societies to minimize possible misunderstandings and foster the ongoing pursuit of religious truth (c. 748). It is to be hoped that such dialogue can reinforce the basic values of respect for authentic teaching and acknowledgment of the legitimacy of scholarly research and publication (c. 218). Should bishop-scholar disputes arise, it is also necessary that conflict-resolution mechanisms be developed lest the Church's exercise of the *munus docendi* be significantly impaired.[35]

[33] See Green, "Revision" 638-39.

[34] "Iusta poena puniatur: 1° qui, praeter casum de quo in can. 1364,l, doctrinam a Romano Pontifice vel a Concilio Oecumenico damnatam docet vel doctrinam, de qua in can. 752, pertinaciter respuit, et ab Apostolica Sede vel ab Ordinario admonitus non retractat." Norm 52 of the original schema had read in part: "Iusta poena puniri potest: 1) qui, praeter casum de quo in 48,1 [heresy], doctrinam a Romano Pontifice vel a Concilio Oecumenico traditam impugnat vel damnatam docet, et ab Apostolica Sede vel ab Ordinario admonitus non retractat . . . ."

[35] For some thoughtful reflections on magisterium-theologian relationships from a substantive and procedural standpoint, see L. O'Donovan, ed., *Cooperation between Theologians and the Ecclesiastical Magisterium.* A Report of the Joint Committee of the Canon Law Society of America and the Catholic Theological Society of America (Washington: CLSA, 1982). In this connection one might note the problems posed by the recent withdrawal from

Another problem area in penal law not dealt with in the revised Code is the presumption of imputability if there has been an external violation of the law (c. 1321,3). This contradicts the Anglo-American presumption of innocence until guilt is proven that should be operative in canon law as well.

Generally speaking, the Commission has tried seriously to implement the various principles for the revision of the Code approved by the 1967 Synod, however one may judge the adequacy of various institutes. However, the present law seems quite inadequate in implementing one of those principles, i.e. principle 7 on the protection of subjective rights, especially through the establishment of administrative tribunals throughout the Church.[36]

A significant criticism of the 1917 Code was its inadequate provisions for recourse against allegedly arbitrary administrative discretion. The 1917 Code system of hierarchical recourse required one to approach the hierarchical superior of the administrator whose exercise of authority was being challenged, e.g. the Holy See if a complaint were against a bishop. Difficulties in exercising procedural rights in this area prompted canonists to suggest the advisability of setting up local administrative tribunals (distinct from ordinary tribunals handling marriage cases) to pass judgment on the alleged violation of rights by administrative decisions.

The development of such administrative tribunals was a significant Commission preoccupation, and a special *coetus* on administrative procedure was set up to deal with this issue. An initial schema was formulated in 1972 and subsequently reworked in the mid-70s, and 28 canons on such procedure including administrative tribunals were included in the 1980 schema (canons 1688-1715). After extensive discussion at the October 1981 *plenarium*, it was voted 53-6 to leave it to the discretion of episcopal conferences to establish such tribunals. However, during the 1982 papal consultation process any reference to such tribunals was

various works of the imprimatur, whose precise meaning is not entirely clear. While it is technically required for fewer books than was true before the 1983 Code (cc. 823-32), the imprimatur seems to be interpreted now somewhat more strictly than before in terms of a work's conformity to church teaching, even though there has been no official Commission interpretation of the law. For a careful examination of some aspects of this question, see J. Coriden, "The End of the Imprimatur," *Jurist* 44 (1984) 339-56.

[36] Principle 7 for the revision of the Code read in part: "Dum in Codice Iuris Canonici recursus et appellationes iudiciales sufficienter regulatae secundum iustitiae exigentias reputantur, e contra communis opinio canonistarum censet recursus administrativos non parum deficere in ecclesiastica praxi et administratione iustitiae. Exinde necessitas ubique persentitur ordinandi in Ecclesia tribunalia administrativa secundum gradus et species, ita ut defensio iurium in eisdem habeat propriam et canonicam proceduram quae apud auctoritates diversi gradus apte evolvatur."

dropped from the law. Unfortunately, no official reports on that process are available, so the rationale for the above decision is not entirely clear.[37]

It is true that the 1983 Code contains a brief section on administrative recourse (cc. 1732-39), which encourages diocesan conciliation/arbitration procedures (c. 1733). However, a significant procedural need of the Church is the development of a jurisprudence in administrative conflict situations somewhat comparable to the centuries-old evolution of marriage-nullity jurisprudence.[38] Local administrative tribunals could perhaps have served a significant purpose in developing such a jurisprudence. This may well be an area in which there can be some creative initiatives at the level of the episcopal conference such as the 1971 NCCB due-process procedures.

PRINCIPLE OF FUNDAMENTAL CHRISTIAN EQUALITY AND CORESPONSIBILITY[39]

An especially difficult issue throughout the Code revision process was structuring in a properly nuanced way the relationship between the ordained and nonordained members of the Church in the realization of its mission. The value of fundamental Christian equality (*Lumen gentium* 9 and 32) needed to be taken as seriously as the reality of functional diversity within the hierarchically structured *communio* that is the Church. The aforementioned principle calls for the transcending of the stratified ecclesiology of the 1917 Code with its sharp clerical-lay distinction and its highly hierarchical, minimally communitarian governance patterns.

For some canonists, a significant criterion of evaluating the original schemata was their adequacy in fostering the integral, even if diversified, involvement of the whole People of God in fulfilling its sanctifying, teaching, and pastoral governance missions. Only certain aspects of this complex issue can be highlighted here.

[37] For some brief comments on the administrative tribunal/recourse problematic, see T. Green in *CLSA Commentary* 1029-30. For some observations on the administrative-recourse problematic prior to the last stage of the Code revision process, see T. Molloy, "Administrative Recourse in the Proposed Code of Canon Law," *PCLSA* 1982, 263-73. For a detailed examination of the issues relevant to the administrative tribunal, see K. Matthews, "The Development and Future of the Administrative Tribunal," *Studia canonica* 18 (1984) 3-233.

[38] My earlier *TS* article noted several areas in which the original *People of God schema* seemed inadequate in its provisions for recourse against allegedly arbitrary episcopal discretion. These still seem to be somewhat problematic in the present law, e.g. possible recourse against the recalling of a cleric serving outside his diocese of incardination (c. 271,3) or against the denial of excardination (c. 270) or against the possible suspension or dissolution of a diocesan synod, for which neither a just cause is explicitly required nor any consultation prescribed (c. 268,1). See Green, "Revision" 639.

[39] Green, "Revision" 641–48.

The Church's Sanctifying Mission

A noteworthy criticism of the original schemata, especially the *sacramental law schema*, was their overly individualistic, inadequately communal view of the liturgy (especially the sacraments) and their failure to involve the nonordained significantly in liturgical (especially sacramental) celebration. There are still such problems in the present law; however, certain improvements of the original schemata are also noteworthy. I comment first on the positive developments, then on the problems.[40]

First, there is a more integral view of liturgically-related material in Book IV than earlier in the revision process, when it was treated in two separate schemata, i.e. the *sacramental law schema* and the *schema on sacred times and places/divine worship.* Furthermore, a significant new introductory section in Book IV highlights certain notable themes related to the Church's *munus sanctificandi* (cc. 834–39). Among those themes are the sanctification of believers through the liturgy (c. 834), the role of different members of the faithful in fulfilling the *munus sanctificandi* (c. 835), and the preferably communal nature of liturgical celebration involving the structured participation of diverse ministries and orders (c. 837).

Secondly, certain positive features of the canons on baptism are noteworthy. Canon 851 calls for broad community involvement in its celebration—an issue not really addressed in the original schema. A key pastoral task is facilitating the knowledgeable involvement of parents and sponsors in the baptismal celebration and subsequent fulfilment of their Christian responsibility. One might also note the explicit allusion to the catechumenate (absent in the original schema) and to the gradual introduction of the catechumen into ecclesial life (c. 865,1).

Thirdly, despite certain reservations about the wisdom of formulating introductory theological canons on the sacraments apart from a theological preamble, one may welcome canon 897, which refers to the Eucharist as the source of the Church's life and growth and as the sign and cause of the unity of the People of God and the building up of the Body of Christ. Furthermore, a new canon 899 on the Eucharistic celebration stresses both the presidency role of the bishop or priest and the diverse ministerial roles of other believers.

Fourthly, despite certain problems the canons on anointing are somewhat improved by a new reference to possible episcopal norms on com-

[40] See T. Green, "Sacramental Law Revisited: Reflections on Selected Aspects of Book IV of the Revised Code: De ecclesiae munere sanctificandi," *Studia canonica* 17 (1983) 288-89, 295-96, 311-24; idem, "Sanctifying Office" 360-72, 390-91, 392; idem, "The Revised Schema *De matrimonio:* Text and Reflections," *Jurist* 40 (1980) 72-74.

munal anointing services (c. 1002).

The last positive feature to be noted is canon 1063 on various dimensions of pastoral care of engaged couples. Instead of the somewhat narrow, though legitimate, focus of the 1917 Code on ascertaining freedom to marry, canon 1063 speaks more comprehensively of the pastor's seeing to it that the ecclesial community assists engaged couples through appropriate preaching and catechesis, personal marriage preparation, and a fruitful liturgical celebration of marriage. Canon 1064 highlights the local ordinary's responsibility to supervise the preparation of appropriate guidelines with the possible assistance of experienced laypersons.

Despite these positive developments, certain areas of the present law still pose problems. Unlike the original schema, canon 890 explicitly refers to parents as well as pastors regarding confirmation preparation. However, the present law is still somewhat unsatisfactory in its explicit provisions for the involvement of the whole Christian community in the celebration of confirmation. Hence one needs to interpret the Code in light of numbers 3-4 of the *Ordo.*

Secondly, the absence of an appropriately communal emphasis in the revised Code seems most evident in the canons on penance (cc. 959-97), which generally highlight the priest-penitent relationship and reflect the individual confession-absolution focus of the 1917 Code. Such a focus is certainly legitimate, but it seems to do justice neither to the *Ordo*'s rich communal perspective on reconciliation nor to the stress on communal sacramental celebration of canon 837. Even the canons on the celebration of penance (cc. 960–64) minimally emphasize the liturgical-pastoral values of a communal celebration; rather, the pre-eminent concern seems to be precluding possible violations of the norms on general absolution.

Thirdly, the canons on anointing (cc. 998-1007) are generally rather cryptically formulated, and therefore need to be interpreted in light of the *Ordo* with its emphasis on the Church as a healing community of faith ministering to its ailing members.

Fourthly, the present law does not seem to address adequately the criticism of the seeming clericalization of the ministries of lector and acolyte, which seem to be viewed primarily as prerequisites for orders rather than as distinctly lay realities (c. 1035).

Finally, despite the earlier positive response to canons 1063–64 on premarriage preparation, one may still question the somewhat hesitant acknowledgment of lay expertise in structuring such preparation (" . . . si opportunum videatur . . ." in c. 1064).

The Church's Teaching Mission

One significant criticism of the original *schema on the Church's teaching office* was its failure to do justice to the conciliar teaching on the

prophetic role of the whole People of God and to highlight the necessary interaction between the activity of the magisterium and the influence of the *sensus fidelium.* While there are some improvements in the current law, the above-mentioned concern still seems to be somewhat relevant. It is true that a new canon 759 highlights the sacramentally-grounded evangelical role of the laity, who may be invited to co-operate with the bishop and the presbyterate in exercising the ministry of the word. However, the rich conciliar teaching on the whole People of God's sharing in Christ's prophetic office (*LG* 12 and 35) and discerning the signs of the times (*GS* 11) does not seem properly highlighted. Provision is certainly made for lay involvement in the ministries of preaching and catechetics, yet it still appears as if the sacred function of teaching is viewed largely in terms of its specifically clerical dimension.

Despite concerns about the need for the Code to focus fairly comprehensively on formation for various ministries, canons 232-64 still view ministerial formation largely in terms of priestly formation and do not provide explicitly for appropriate interaction between those preparing for ordained ministry and those being educated for various nonordained ministries. Yet, sustained and serious collaboration between such ministers seems crucial to the future ministerial life of the various churches.

A particularly delicate issue throughout Book III is the ongoing relationship between church authorities and those engaged in various teaching and research activities. This complex question can hardly be treated thoroughly here. Suffice it to note that the hierarchy has a legitimate concern to protect the integrity of the faith and that the Catholic theological enterprise needs to be viewed within the broad context of ecclesial communion. Yet one may wonder whether the current law unduly emphasizes hierarchical controls on such teaching and research, while failing to reflect a legitimate openness to sound independent scholarship (c. 218).[41]

Some canonists desired a somewhat more explicit encouragement of lay-preaching options than norm 18 of the original schema, which itself significantly improved the 1917 Code. Canon 766 basically restates that schema with its provision for episcopal-conference determination of such

[41] One legal text that has prompted a significant amount of attention in this connection is canon 812 on the mandate to teach theological disciplines in Catholic universities or other institutes of higher studies. This canon will be discussed briefly later in relationship to the principle of subsidiarity. For some probing reflections on the afore-mentioned mandate, see L. Orsy, "The Mandate To Teach Theological Disciplines: Glosses on Canon 812 of the New Code," *TS* 44 (1983) 476-88; also J. Strynkowski, "Theological Pluralism and Canonical Mandate," *Jurist* 42 (1982) 524–33.

options; yet this might be an area of possibly noteworthy particular-law developments in the future.[42]

The Church's Pastoral-Governance Mission

A significant issue in certain critiques of the original schemata was the inadequate emphasis on the appropriate involvement of the nonordained in the Church's public life and a seeming failure to recognize the governmental implications of the sacraments of initiation. Despite certain positive developments during the later stages of the Code revision process, the revised Code is still somewhat problematic in its treatment of the laity.

The possible possession and/or exercise of the power of governance by laypersons was one of the most sharply debated issues during the Code revision process. In fact, it was one of the six special questions submitted to the plenary session of the Commission in October 1981.[43] The Commission admitted that laypersons could indeed participate in the exercise of the power of governance. However, canon 129,2 on the power of governance still raises questions about the precise basis and nature of lay ecclesial involvement. The canon states that laypersons may "co-operate" in the exercise of the power of governance, but the precise implications of this "co-operation" are not entirely clear. For authors such as Provost,[44] the term "co-operate" is a compromise formulation that precludes one's having to decide whether one can "possess" the power of governance without sacred orders. Yet it leaves open various options for *de facto* lay exercise of the power of governance. Further theological-canonical reflection and ongoing pastoral experience will be necessary if this issue is to be dealt with responsibly.

Besides the above-mentioned general concern about lay participation

[42] The issue of lay preaching is currently being examined by the NCCB Committee on Pastoral Research and Practice in conjunction with other NCCB committees. For an interesting exploration of various aspects of the issue, including developments in Germany in the 1970s, see J. Provost, "Lay Preaching and Canon Law in a Time of Transition," in N. Foley, ed., *Preaching and the Non-Ordained* (Collegeville, Minn.: Liturgical, 1983) 134-58.

[43] For some reflections on this issue prepared for the plenary session, see A. Stickler, "De potestatis sacrae natura et origine," *Periodica* 71 (1982) 65-91; J. Beyer, "De natura potestatis regiminis seu iurisdictionis recte in codice renovato enuntianda," ibid. 93-145.

[44] For a detailed discussion of this issue, see J. Provost, "The Participation of the Laity in the Governance of the Church," *Studia canonica* 17 (1983) 417-48. For a different view of the capacity of laypersons to exercise the power of governance, see D. Jaeger, "The Relationship of Holy Orders and the Power of Governance according to the Revised Code of Canon Law," *Canon Law Society of Great Britain and Ireland Newsletter* no. 62 (September 1984) 20-38.

in the Church's mission, one may identify various specific implications of that problematic.

De facto, lay observers have attended certain synods of bishops. Unfortunately, however, there is no explicit provision for such involvement in canons 342–48, which envision the synod as an almost exclusively episcopal reality, with some religious clerics in attendance. Given the potentially significant ecclesial implications of such synods, an explicit allusion to possible lay involvement seems appropriate somewhat comparable to canon 443,4 on particular (plenary or provincial) councils.

Canon 377 on the selection of bishops does not appreciably improve the original *People of God schema* on nonepiscopal and, more specifically, lay involvement in the selection-of-bishops process. This is clearly a delicate legal-pastoral issue, yet one wonders whether the Church is as well served as it might be, given the law's failure to permit a broader range of competencies/charisms to be involved in the process on a systematic rather than simply *ad hoc* and facultative basis, as is true in paragraph 3 of the aforementioned canon. Not entirely clear are the precise legal implications of canon 211 on the basic duty and right of believers to be involved in the Church's mission, and of canon 212,3 on their basic right and duty to express an opinion on issues affecting the good of the Church. Yet such canons seem quite relevant to this issue of appropriately broad ecclesial input into this significant legal-pastoral undertaking.[45]

The canons on diocesan government still tend to personalize unduly the particular church in the figure of the bishop or other key leadership figure. For example, the quinquennial report is viewed primarily as the bishop's personal responsibility and not as a report of one portion of the People of God to the rest of the People of God (c. 399). Furthermore, the diocesan synod seems to be envisioned more as a legislative instrument of the bishop than as an assembly of a portion of the People of God in which the bishop plays a pre-eminent leadership role (cc. 460–68).

The original *People of God schema* was criticized for not emphasizing the importance of a diocesan pastoral council as forcefully as various conciliar and postconciliar sources (norms 326–29). With due regard for differing ecclesial circumstances, it seemed fitting that the law highlight the bishop's responsibility to introduce suitable organs for broad-based consultation according to diocesan needs and resources. Regrettably, the present law (cc. 511–14) is relatively unchanged from the schema. Such councils are facultative, not mandatory, and the bishop is not even

[45] For a well-researched study of lay involvement in the selection of bishops, see H. Müller, *Der Anteil der Laien an der Bischofswahl* (Amsterdam: Gruner, 1977).

encouraged to foster the circumstances appropriate for their establishment, should such an initiative be premature at the moment.

Parish law (cc. 515–52)[46] is still largely a law on pastors, with relatively minimal direct attention given to other members of the parish community. Obviously, the latter are indirectly envisioned when reference is made to various obligations of the pastor in exercising his teaching, sanctifying, and pastoral-leadership functions. Yet certain positive developments reflected in the present law are noteworthy. First of all, a new canon 529,2 stresses the pastor's responsibility to recognize and promote the proper role of the laity in the Church's mission.

Secondly, a new canon 537 requires the pastor to be assisted by a finance council in his administration of parish goods.[47] Furthermore, a new canon 536 provides for the possible establishment of parish pastoral councils at the discretion of the diocesan bishop after consultation with the presbyteral council. Perhaps such consultative bodies should have been stressed more forcefully. Yet there is an extraordinary diversity of parish configurations throughout the Church, even more so than at the diocesan level. Hence perhaps more time is necessary for a consensus to emerge on parish legal-pastoral developments world-wide before further refinements can be incorporated in the code.

PRINCIPLE OF COLLEGIALITY[48]

The recent Extraordinary Synod of Bishops (November-December 1985) focused ecclesial attention on the theoretical foundations and practical implications of episcopal collegiality. Various presynodal reports of episcopal conferences both welcomed the positive experiences of postconciliar collegial activity and expressed concerns about whether the principle of collegiality was being as fully realized as desirable in ecclesial life.[49]

One may speak of collegiality in a broad sense as a spirit of mutual cooperation, collaboration, and fraternal interaction within the college of bishops, head and members. More strictly, however, it refers to the world-wide solidarity of the bishops, who possess full and supreme authority in

[46] For a thorough examination of various issues in parish law, see J. Lynch, "The Parochial Ministry in the New Code of Canon Law," *Jurist* 42 (1982) 383–421.

[47] This is a specific example of a general principle of church financial administration: every juridic person must have a finance council or a couple of financial counselors to advise the administrator (c. 1280).

[48] See Green, "Revision" 648–51.

[49] See, e.g., the report of the NCCB entitled "Vatican II and the Postconciliar Era in the U.S. Church," *Origins* 15, no. 15 (Sept. 26, 1985) 225, 227–33, esp. 229, 231–32; also the report of the Bishops' Conference of England and Wales entitled "Vatican II and the 1985 Synod of Bishops," *Origins* 15, no. 12 (Sept. 5, 1985) 177, 179–86, esp. 179–80.

the Church through sacramental consecration and hierarchical communion.[50] The translation of this complex theological-canonical reality into structural terms has been one of the most significant issues during the Code revision process, surfacing most noticeably during discussions of the *Lex fundamentalis* and Book II on the People of God. A few observations on the present law's treatment of this complex problematic may be helpful.[51]

During the revision process certain canonists expressed concerns about the organization of the canons on the pope–college of bishops relationship. They also questioned the Commission's apparent tendency to treat the pope apart from the broader context of the college of bishops and to highlight papal primacy while inadequately articulating the significant role of the college of bishops in the governance of the universal Church.

Some of the same criticisms seem relevant to the present law, which largely restates the original *People of God schema* but also incorporates certain canons on the ecumenical council taken from the 1980 *Lex fundamentalis* schema (cc. 337-41). In general, the norms on the pope do not seem to be inserted within the broader ecclesiological context of the universal Church, unlike the norms on the bishop, for example, which situate him within the framework of the particular church. The systematic priority of the pope over the college seems evident in the very structuring of the law. For example, chapter one, section I, part II of Book II is entitled "De Romano pontifice deque collegio episcoporum," and this chapter is subdivided into article 1 "De Romano Pontifice" and article 2 "De collegio episcoporum."

The doctrine of the unicity of the subject of supreme ecclesial power does not seem to be taken as seriously as it should, given the Code's fairly consistent placing of the pope before the college, e.g. canon 749 on infallible teaching authority and canon 782 on the supervision of the Church's missionary enterprise.

Two key texts are canon 331 on the pope and canon 336 on the college of bishops; both concentrate on the papal role in a way that does not seem as balanced as the conciliar treatment of papal-episcopal relations (*Lumen gentium*, chap. 3). The Commission rather surprisingly rejected suggestions to treat the supreme pontiff within the context of the college of bishops comparable to *Lumen gentium*. Secondly, although the pope is quite clearly an integral part of the episcopal college, one wonders about the necessity of making four references to him in the above-

[50] P. Granfield, "The Uncertain Future of Collegiality," *PCTSA* 1985, 96.

[51] For a more detailed discussion of various aspects of this issue, see J. Provost, "The Hierarchical Constitution of the Church (cc. 330–572)," in *CLSA Commentary* 258–310.

mentioned canon on the college. Finally, the pope's freedom to exercise his authority is unqualified despite proposals to state the objective limits of such an exercise.[52]

The priority of the pope over the college seems evident as well in the canons on the synod of bishops (cc. 342–48). Like the college of cardinals (cc. 345–59) and the Roman Curia (cc. 360-61), the synod seems to be described essentially as an aid to the pope alone and not to the episcopal college, which is rarely mentioned in the canons on supreme church authority and largely in the context of the canons on the ecumenical council. The synod was certainly created to assist the pope, yet it is important to provide a proper ecclesiological basis for that role. Unfortunately, canon 334 does not explicitate the bishops' solicitude for the universal Church in that connection.

The canons on the synod indeed largely reflect the 1965 motu proprio *Apostolica sollicitudo*. However, they do not seem appropriately open-ended to permit a healthy evolution of the institute, a concern of various authors writing on the recent synod. For example, canon 343 on the synod's competence is not as open to its playing a distinctly deliberative role as was the motu proprio (norm 2). Furthermore, the synod's representative role vis-à-vis the world episcopate was debated throughout the latter stages of the revision process, yet unfortunately the Commission did not adequately emphasize this significant dimension of the institute, e.g. by restating the significant phrase "partes agens totius catholici episcopatus" (norm 1 of the motu proprio; *Christus Dominus* 5).[53]

Another issue during the revision process was the relationship between the college of bishops and the Roman Curia. It was questioned whether the Curia's service to the episcopal college as well as to the pope was emphasized as forcefully as in *Christus Dominus* 9.

One significant difficulty in dealing with this issue has been the fact that the 1967 apostolic constitution *Regimini ecclesiae universae* governing the Roman Curia has been in the process of revision by two successive papal commissions since 1974. There has been little or no publicity on this project, and the present law contains only two canons on the Curia as a whole (cc. 360–61), one of which indicates that, unlike the 1917 Code, the canons on the Curia will be contained almost entirely in a separate text ("lege peculiari definiuntur . . . ," c. 360). A draft of canons on the Roman Curia was discussed during a plenary session of the college

[52] For a brief yet thoughtful clarification of certain problematic issues in papal-episcopal relationships in the present law, especially the ecumenical council, see J. Komonchak, "The Ecumenical Council in the New Code of Canon Law," *Concilium* 167 (1983) 100–105.

[53] See J. Komonchak, "A New Law for the People of God," *PCLSA* 1980, 33–34.

of cardinals in November 1985; however, at the time this article was finished no decision had been made to promulgate that draft. Given the Curia's significant ecclesial influence, its responsibility to foster the welfare of all the churches, and recent tensions in Curia–episcopal conference relationships, it might be appropriate that there be fairly broad-based consultation of the episcopate on curial reform comparable to the evaluation of the original Commission schemata; yet there seems to be no indication that such a consultation is envisioned.

While bishop-presbyter relationships are not technically a manifestation of collegiality in its strict sense, there has been a noteworthy conciliar and postconciliar emphasis on the importance of institutionalizing collaborative governance patterns in the various particular churches. One institutional form of collaboration is the presbyteral council, which might appropriately be considered here.

Three significant criticisms of the original *People of God schema* were its somewhat restrictive approach to the council's potentially deliberative role, the schema's less forceful emphasis on the council's elective character than in other official sources, and the somewhat questionable treatment of the council's continuing existence in certain extraordinary circumstances.

The major issue addressed during the latter stages of the revision process was the council's competence and its relationship to the bishop. Fears were expressed that granting the council deliberative competence would unduly circumscribe episcopal discretion and place undue pressures on bishops in their governance role. Allusions were made to bishop-presbyter conflicts in the 1970s in North America and Western Europe, and the fear of "democratizing" bishop-presbyter relationships influenced the shaping of the law so as to limit the council exclusively to a consultative vote (c. 500,2) and impede the bishop from granting it a deliberative vote even if such a vote were not explicitly provided for in the Code (c. 135,2). However, canon 500,2 also calls upon the bishop to hear the council in all significant pastoral matters (" ... in negotiis maioris momenti ... "). This is an area where bishops, canonists, and council members need to collaborate to enhance collegial relationships within dioceses. As such relationships mature, the limitations of the law may increasingly be experienced as less and less significant, provided that the people of God are served ever more effectively through such collaboration.

Although the original schema spoke of an appropriate part of the council being elected ("congrua pars"), canon 497,1° more felicitously calls for about half of the council being elected by the priests ("dimidia circiter pars"). This change seems to embody better than the original

schema the insight that the council is to be a genuinely representative body ("presbyterium representans"), however difficult it is to clarify the precise meaning of "representation" in this context.

Another positive change in the present law is the requirement that the bishop consult the metropolitan if the former dissolves the council for not fulfilling or gravely abusing its function (c. 501,3). At least there is some provision for extradiocesan consultation before such a significant step is taken, even though the implications of such presbyteral nonaccountability are not entirely clear in the law.

Despite criticisms of the establishment of a separate but related institute of the college of consultors (c. 502), this kind of "executive board" of the council remains in the present Code to advise[54] the bishop on various matters, particularly of a financial character. Although some canonists wished the presbyteral council to remain in existence during the vacancy of the see as a symbol of the continuity of the presbyterate, the current law indicates rather that the college of consultors assumes the council's functions (c. 501,2); yet a new bishop is to reconstitute the council within a year of taking possession of the see.

PRINCIPLE OF DIALOGUE[55]

This principle, rooted in the conciliar openness to the richness of other religious traditions, means that church structures should be evaluated regularly to determine whether they foster or hinder the implementation of various aspects of the ecumenical imperative.

While *Sacrae disciplinae leges* alluded to the Church's ecumenical thrust as a significant dimension of conciliar ecclesiology, distinctly ecumenical concerns do not seem to have been a noteworthy priority during the Code revision process; yet certain points of ecumenical import might be briefly considered here.[56]

[54] At times the college plays a deliberative and not simply consultative role, e.g. episcopal positing of acts of extraordinary administration (c. 1277), episcopal authorization of alienation of church goods in some circumstances or episcopal alienation of diocesan goods in similar circumstances (c. 1292,1).

[55] Green, "Revision" 651–56.

[56] For some general observations on the ecumenical implications of the revised Code, see O. Garcia, "Ecumenical Aspects of the Revised Code," *PCLSA* 1983, 201–20; H. Heinemann, "Ökumenische Implikationen des neuen kirchlichen Gesetzbuches," *Catholica* 39 (1985) 1–26. Heinemann notes an explicit emphasis on the ecumenical responsibilities of papal legates (c. 384,6) and diocesan bishops (c. 383,3) and a special responsibility of the pope and the college of bishops in this area (c. 755). Yet he regrets the failure of the principles of revision of the Code to address this concern explicitly, and the law's failure to allude explicitly to the ecumenical responsibilities of all the faithful and specifically pastors in local communities (4–6). See also Garcia 201–5.

While several norms in the original schemata dealt with the binding force of ecclesiastical law on those not fully in communion with the Catholic Church, only one canon currently deals with this issue. Canon 11 states that merely ecclesiastical laws bind only those baptized in the Catholic Church or received into it who enjoy sufficient use of reason and are seven years old, unless the law expressly provides otherwise. Occasionally, however, members of other religious traditions are indirectly bound by church law given their relationship with a Catholic, e.g. celebration of a mixed marriage.

While the 1917 Code tended to view other Christians as excommunicated Catholics (guilty of heresy or schism: CIC 1325,2; 2314), such a presumption of culpability is not operative in the current law, for which "heresy," "schism," or "apostasy" refers to the antiecclesial behavior of Catholics who have in bad faith separated themselves from the Church in one way or another (c. 751). Generally the revised Code uses more nuanced terminology than its 1917 predecessor and speaks of those not in full communion as being in different stages of relationship with the Catholic Church rather than simply as "non-Catholics" without any further differentiation.

One question to be clarified further in this connection concerns the precise implications of basic Christian obligations and rights (cc. 204, 208–31) for those not in full communion. Some of those basic obligations and rights seem to apply to all the baptized, given the profound bond of unity linking those reborn through baptism. Yet one's participation in ecclesial life is obviously conditioned by the degree that one is linked with the community of believers "by the bonds of profession of faith, of the sacraments, and of ecclesiastical governance" (c. 205).

The Code might have explicitly differentiated more consistently between "churches" (Eastern Orthodox) and "ecclesial communities" (Western Christians), as did *Unitatis redintegratio* and implementing documents such as the May 1967 Ecumenical Directory.[57] Since this is frequently not the case, questions are raised about the precise meaning of certain norms, e.g. canon 874,2 on baptismal sponsorship. (Does the notion of "Christian witness" apply equally to Orthodox and to Western Christians?)

One text that clearly alludes to such differentiations is canon 844 on sacramental sharing (penance, Eucharist, and anointing). The canon

[57] For example, see Secretariat for Promoting Christian Unity, *Ecumenical Directory*, Part 1, May 14, 1967, in *Acta apostolicae sedis* 59 (1967) 574–92. Numbers 39–54 deal with *communicatio in sacris* with Eastern Orthodox, whereas numbers 55–63 concern *communicatio* with Western Christians not in full communion.

reflects a sense of the ecclesiological and sacramental grounds for allowing participation in liturgical worship with members of the separated Eastern churches (§2–§3). However, the law is much less receptive to the possibility of similar sharing with members of other "ecclesial communities" (§4), although this latter term is not explicitly used.

Canon 844 succinctly expresses the current law on sacramental sharing. Yet the criticism of norm 2 of the original *sacramental law schema* still seems somewhat relevant. The law might have been formulated in a somewhat more open-ended fashion to take cognizance of contemporary ecumenical developments based on prayer, pastoral experience, and theological reflection. Perhaps too much emphasis is placed on the Eucharist as a symbol of unity fully achieved and too little stress on it as a means of fostering such unity. However, the discretion accorded individual bishops and episcopal conferences in paragraph 5 may enable them to respond appropriately to the distinct ecumenical challenges facing their churches. An improvement over the original schema is the reference to required consultation with hierarchs of other churches before ecumenical policy is formulated. This constitutes an additional burden on church authorities, but it highlights the inappropriateness of legislating in ecumenical matters in a unilateral fashion.

The present law on ecumenical or mixed marriages (cc. 1124–29) reflects certain desirable organizational changes from the original *sacramental law schema*, although the law content-wise largely repeats the schema, which basically restated parts of the March 1970 motu proprio *Matrimonia mixta* of Paul VI.[58] The present law places the norms on ecumenical marriages in a separate section, and such situations are generally viewed no longer as matrimonial impediments but as special pastoral challenges requiring particular attention on the part of the community of faith. Nevertheless, the law still differentiates between disparity-of-worship situations (Catholic and nonbaptized person, c. 1086), which are diriment impediments to be dispensed from if a marriage is to be valid or recognized ecclesially, and other ecumenical situations (Catholic and baptized member of another church) which do not technically require such a dispensation, although the local ordinary still must grant the requisite permission for such a marriage. While this organizational change is a positive one, one may wonder whether the section on ecumenical marriages might well be placed in the canons on pastoral preparation for marriage (cc. 1063–72). Treating ecumenical marriages after canonical form does not seem particularly appropriate in light of

[58] For some reflections on mixed marriages in the 1983 Code, see L. Pivonka, "Ecumenical or Mixed Marriages in the New Code of Canon Law," *Jurist* 43 (1983) 103–24.

the varied issues involved, only one of which concerns canonical form.

There still remain certain inconsistencies in the provisions for observers from other churches in Catholic conciliar processes. Such observers are explicitly referred to in connection with diocesan synods (c. 463,3). Regrettably, however, no allusion is made to such ecumenical involvement in other significant conciliar processes such as an ecumenical council (c. 339,2), the synod of bishops (c. 346), or particular councils (c. 443). However, it might be noted that supreme church authority can determine that those who are not bishops can be called to an ecumenical council and participate according to its norms (c. 339,2). Furthermore, canon 443,6 indicates that guests may be invited to particular councils. In both of these latter instances ecumenical observers might conceivably be envisioned. One would hope that the Vatican II pattern of ecumenical involvement would be a possible model, though not the only model, for such ecumenical involvement in various Catholic conciliar processes.

Perhaps more significant than such ecumenical participation in Catholic conciliar processes is the steady evolution of decentralized patterns of governance in the Church contrary to the highly centralized forms that have characterized post-Tridentine Catholic polity and have been ecumenically counterproductive in various respects.

Finally, the present law drops a somewhat negatively formulated norm 46,3 of the original *People of God schema* that indicated that members of other churches could belong to Catholic associations unless their presence would be detrimental to the faith. Unfortunately, however, there is no reference to the potential for ecumenical collaboration at all levels as highlighted in a document such as the February 22, 1975 instruction of the Secretariat for Promoting Christian Unity.[59]

PRINCIPLE OF SUBSIDIARITY[60]

A particularly significant conciliar datum was its emphasis on the church as a *communio ecclesiarum* gathered together in the Spirit. While hardly minimizing the unity of the Church, the Council focused special attention on the significance of the particular church and on the value of a healthy pluriformity in various areas, e.g. theology, liturgy, and spirituality (*LG* 23). Such pluriformity also seems canonically relevant, especially given increasing difficulties in incarnating the Church in diverse cultures and responding to their various legal-pastoral needs.

[59] The text was not published in the *Acta apostolicae sedis* but was issued in various languages by the Secretariat for Promoting Christian Unity. For an English text, see J. O'Connor, ed., *The Canon Law Digest* (Mundelein, Ill.: Chicago Province S.J., 1978) 8:870–904.

[60] Green, "Revision" 656–68.

Although questions were raised at the recent synod about the applicability of the principle of subsidiarity to the Church,[61] principle 5 for the revision of the Code clearly indicated its canonical relevance, while the complexity of the principle was also recognized.[62] In brief, while there must be a fundamental unity in basic principles of church order and in its fundamental institutions, there must also be more latitude for particular-law initiatives, so that decisions are made at the most appropriate level.[63] Clarifying the practical implications of this principle has been rather difficult. In fact, a major issue during the revision process has been the adequacy of Commission efforts to transcend prior excessively centralized governance patterns and structure more balanced Holy See–episcopal conference–individual bishop relationships.

The following reflections examine not the notion of subsidiarity but some of its practical implications for the enhanced decisional competence of episcopal conferences and diocesan bishops vis-à-vis the Holy See. This brief analysis will be organized in accord with the Church's sanctifying, teaching, and governing missions.

The Church's Sanctifying Mission

First, canon 838 systematically improves the original schemata on *sacramental law* and *sacred times and places/divine worship* by succinctly clarifying the competent liturgical authorities. It highlights the role of the Holy See and the diocesan bishop, while limiting the conference's role to those matters requiring a uniformity of practice in a given region. Regrettably, however, the revised Code does not explicitly allude here to permissible liturgical adaptations by episcopal conferences, diocesan bishops, and presidents of liturgical assemblies. Yet one must remember that it is necessary to consult the respective liturgical books for a properly comprehensive view of liturgical authority (c. 2).

[61] Synod of Bishops, "The Final Report," *Origins* 15, no. 27 (Dec. 19, 1985) 449 (section C.8c).

[62] *Communicationes* 1 (1969) 80.

[63] One sees such initiatives in the increased legislative competence of episcopal conferences, diocesan bishops, and religious communities. For some reflections on the role of episcopal conferences, see W. Aymans, "Wesensverständnis und Zuständigkeiten der Bischofskonferenzen in Codex Iuris Canonici von 1983," *Archiv für katholisches Kirchenrecht* 152 (1983) 46–61. For some observations on the enhanced role of diocesan bishops, see T. Green, *A Manual for Bishops: Rights and Responsibilities of Diocesan Bishops in the Revised Code of Canon Law* (Washington, D.C.: USCC, 1983). For some considerations of particular-law developments in religious communities, see J. Hite, "Appendix 2: Canons That Refer to the Constitutions and Proper Law of Institutes of Consecrated Life and Societies of Apostolic Life," in J. Hite, S. Holland, and D. Ward, eds., *A Handbook on Canons 573–746* (Collegeville, Minn.: Liturgical, 1985) 371–82.

Perhaps even more unfortunate is the Code's failure to deal with the critical issue of appropriate liturgical adaptations besides those currently provided for in the liturgical books. The Code might well have incorporated a canon on the responsibility of episcopal conferences/diocesan bishops in dialogue with the Holy See to foster liturgical progress in various cultures in keeping with our liturgical traditions (*SC* 37-40).

Certain reservations had been expressed about the complexity of the original *sacramental law schema* in some respects, yet the Commission rejected suggestions for broader episcopal-conference discretion in such matters as the time, place, registration, and proof of sacramental celebration.

Some canonists also sought broader episcopal-conference discretion in areas such as Eucharistic reservation/veneration (cc. 934–44) and Mass stipends (cc. 945–58). While the latter institute is somewhat reduced in contrast to the original schema, the former is about as lengthy. Yet the canons on indulgences (cc. 992–97) are significantly reduced in response to criticism that this is properly a matter for particular, not universal, law.

While the Commission generally enhanced the individual bishop's pastoral discretion and minimized his being unduly limited by the conference, one exception to that rule is the questionable restriction of the bishop's determination of the conditions for general absolution (c. 961,2). He can make such decisions only "in light of criteria agreed upon with other members of the conference." Furthermore, he seems to be precluded from issuing general norms here, contrary to his legislative discretion regarding sacramental sharing (c. 844,5).[64]

The historically-conditioned character of ordination irregularities/impediments prompted some critics to suggest that the universal law might express only a few general principles to be specified by episcopal conferences. However, such suggestions were rejected and the Holy See maintains even greater control over dispensations in this area (cc. 1040–49) than in the matter of matrimonial impediments.

Finally, the liturgical competence of the episcopal conference regarding holy days and penitential practice has been restricted. Norm 45 of the original *schema on sacred times and places/divine worship* had envisioned only two universal holy days of obligation, Christmas and a Marian feast determined by the conference, which could specify additional holy days. Apparently there was noteworthy diversity in the evaluations forwarded to the Commission. Yet the original schema was modified only during the so-called papal consultation process in 1982, and the exact reasons

[64] Green, "Sanctifying Office" 365–73, esp. 367–71.

for such a change are not clear. In any event, canon 1246 restates the ten holy days of obligation of the 1917 code, while empowering the conference to drop some of them or transfer their observance to Sunday. Accordingly, the conference's role is not entirely curtailed but notably limited.

Norm 48 of the original *schema on sacred times and places/divine worship* had not prescribed any specific days or works of penance for the whole Church, but left such determinations to the conference. Norm 49 had also permitted bishops to determine penitential days *per modum actus*. Apparently there was noteworthy criticism of this approach, and the Commission judged it imperative to specify certain penitential obligations and days for the whole Church (cc. 1249–52), while providing for episcopal-conference discretion regarding the forms of penance (c. 1253). No provision is made for the liturgical initiative of individual bishops in this regard.

The Church's Teaching Office

Some reservations had been expressed about the detailed treatment of ministerial formation in the original *schema on the People of God*. Some canonists sought more latitude for episcopal conferences, bishops, and educators to shape models of formation responding to the diverse ministerial needs of the various churches. However, the present law (cc. 232–64) is nearly as detailed as the original schema.

Another complex issue that surfaced especially forcefully during the last stages of the revision process is that of the canonical mandate to teach theological disciplines in Catholic institutes of higher learning (c. 812). The issue is noted here because it poses quite sharply the problem of promulgating universal academic legislation, given notable differences in educational systems throughout the Church. The granting of such a mandate by the competent ecclesiastical authority may be expedient in some contexts, e.g. areas of noteworthy church-state conflict where the Church's academic freedom would otherwise be jeopardized. However, in American academic settings such an ecclesiastical intervention may prove quite detrimental, because the conditioning of a university appointment on the decision of an agency extraneous to the academic body could have serious civil-law consequences, including the loss of certain benefits and privileges. A distinctly canonical concern is the challenge of harmonizing the basic values underlying canon 218: appropriate academic freedom for the scholar and the magisterial responsibility to protect the integrity of the faith (c. 810). The creative and responsible implementation of these canons in the United States will require serious and sustained dialogue

between bishops, academic authorities, scholars, and civil lawyers in consultation with the Holy See.[65]

The Church's Pastoral Governance Mission

The CLSA evaluated the original *religious law schema* generally quite positively regarding its implementation of the principle of subsidiarity. Authors such as Hite[66] and Morrisey[67] seem fairly positive regarding the revised Code in this regard. Apparently, religious institutes and societies are enabled to adapt the general norms to their diverse situations and needs and to the different areas where they are to serve.

The original *penal law schema* had been welcomed for its notable simplification of the 1917 Code and its provision for greater latitude for intra-universal authorities. Yet there was also a concern both for episcopal-conference norms to guide the penal discretion of individual ordinaries and for appropriate recourse mechanisms against such discretion. No such norms, however, are envisioned besides the general norms on imputability (cc. 1321–30) and penal discretion (cc. 1341–53). Furthermore, recourse against penal discretion follows the ordinary rules on appeal against penal sentences (cc. 1628–40) or recourse against penal decrees (cc. 1732–39).

The implementation of the principle of subsidiarity in the canons on temporal goods is generally comparable to the original schema, but the monitoring role of the episcopal conference was somewhat circumscribed during the latter stages of the revision process. For example, the present law drops proposed norms on the conference's establishing guidelines on taxation by local ordinaries and occasionally confirming the bishop's authorization of the alienation of church goods.

While the current procedural law occasionally permits particular-law initiatives, generally they seem relatively insignificant, although certain particular-law developments in the 70s (e.g. American Procedural Norms) have influenced the current law. Furthermore, the present Book VII still seems to reflect a perspective of Church judgments having civil-law implications, which does not seem true for most particular churches.

[65] See Orsy reference in n. 41 above; also J. Coriden in *CLSA Commentary* 575–76. Similar concerns have been posed by a proposed pontifical document on Catholic universities dated April 15, 1985 and recently circulated for evaluation purposes. For a copy of a hitherto unpublished critique of the document by the CLSA, one might contact: Executive Coordinator, Canon Law Society of America, Catholic University of America, Washington, D.C. 20064. See also C. Curran, "Anxiety in the Academy," in (London) *Tablet*, Nov. 9, 1985, 1177–78.

[66] Note 63 above; also J. Hite in *CLSA Commentary* 450–51.

[67] F. Morrisey, "Introduction," in *Handbook* (n. 63 above) 17–19.

In recognition of the growing judicial maturity of courts throughout the world, some canonists had proposed a modification of the rule that third-instance cases normally be heard by the Rota. This would also minimize tribunal costs, expedite the processing of cases, and ease the burdens on the parties in such cases. However, the Commission rejected this proposal in order to foster more noteworthy jurisprudential uniformity according to Rotal decisional patterns (c. 1444,1,2°).

Another area where concerns have recently surfaced about the problems of implementing universal law in different cultures is the matter of the confidentiality of tribunal acts. Canon 1598 on the publication of tribunal acts and canon 1615 on the publication of tribunal sentences have posed the problem of reconciling the values of the basic right of defending one's position (implying a right of access to tribunal acts) and the right of witnesses and medical experts to a certain confidentiality regarding their testimony. In addition, recent efforts to subpoena tribunal acts for civil-court proceedings have posed relatively new problems for church tribunals.

Tribunal officials in various English-speaking countries had sought a modification of the proposed law to permit appropriate particular-law discretion in dealing with such issues, which are not equally critical throughout the Church. While certain positive changes were made in the law on the publication of the process (c. 1598), the Commission was unwilling to remand this whole matter to particular law, which could take cognizance of relevant civil-law variables. The resolution of this critical issue will require ongoing study and dialogue between civil and canon lawyers, bishops, and the Holy See.[68]

Some canonists had suggested more noteworthy episcopal-conference/individual-bishop discretion in the selection of bishops and in the shaping of new ministerial forms responding to shifting postconciliar ministerial needs. However, there seem to have been few significant developments in this regard during the reworking of the original schemata.

The seemingly excessive Holy See intervention in the conciliar life of the particular churches noted in the original *People of God schema* still remains a problem, e.g. the necessary Holy See approval of the holding of particular councils (c. 439) and the choice of a president (c. 441,3) and the Holy See reviewing of their decisions and those of episcopal conferences prior to promulgation (cc. 446, 456).

Finally, one might note a few points relative to the appropriate governmental autonomy of diocesan bishops. While they enjoy significant administrative and judicial discretion, canon 135,2 still rather question-

[68] E. Dillon, "Confidentiality in Tribunals," *PCLSA* 1983, 171–81.

ably restricts their ability to delegate their legislative authority, e.g. to a group such as a presbyteral council. In practice this limitation may not be unduly problematic in the life of the particular churches as relationships mature between bishops and corporate groups such as presbyteral councils and diocesan pastoral councils. However, in principle this legislative restraint seems questionable in regard to those called to lead the particular churches (*LG* 27).

Generally speaking, however, one must welcome canon 87 on episcopal dispensing power regarding universal law. It seems more acceptable than the original *People of God schema* (norm 246) in reconciling the values of the bishop's sacramentally-based governmental authority and autonomy and the pope's responsibility to safeguard the unity of the universal Church. Yet this is an area where there should be a constant reassessment of universal-particular church relationships to maintain an appropriate balance between the aforementioned values.

The CLSA critique of the original *People of God schema* alone had called for broader episcopal discretion relative to the laicization of priests and their possible readmission to the exercise of the ministry. However, the present law still envisions bishops and religious ordinaries instructing the laicization process, yet reserves the final decision to the pope working through the Congregation for the Doctrine of the Faith.

Although there has been no difficulty in practice on the issue, one wonders about the theoretical necessity of the law's reserving to the episcopal conference decisions on the admissibility of lay judges (c. 1421,2) or one-judge courts (c. 1425,4). Like most other decisions on tribunal organization, such determinations should probably be within the competence of the diocesan bishop in light of his proper judicial role.

The preceding reflections have attempted to address certain key issues in the revision of the Code. Rather than a thorough analysis of such issues, my intention has been simply to clarify certain developments in the latter stages of the revision process. In some instances criticisms of the original schemata constructively influenced their reshaping; in others, however, the Commission chose not to heed such critiques. It is to be hoped that these observations will prompt theologians to undertake a more searching examination of particular issues and thereby aid canonists and pastoral leaders in their ongoing task of interpreting and implementing the revised Code. This should enhance the exercise of the Church's sanctifying, teaching, and pastoral-service ministries.