



PIOTR KROCZEK

**The Art  
of Legislation:**  
the Principles  
of Lawgiving  
in the Church



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## Introduction

There is, in the Church, a phenomenon of law. This is the fact and it cannot be denied.<sup>1</sup> What is more, law is a great tool by which the Church leads the faithful to salvation understood as the promised future to come and as salvation realized here and now.<sup>2</sup> Due to the extraordinary significance of law in the Church, the church lawmaker has a task of special importance: the law must not only be drafted but it must be drafted well. The topic for discussion has been, is and will be the quality of legislation in the Church.<sup>3</sup>

Legislation is called an art<sup>4</sup> and it is an art indeed because: “There is hardly any kind of intellectual work which so much needs to be done not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws.”<sup>5</sup> Legislation is far more an art than just a technique of drafting laws or the formal framework of legislative drafting.<sup>6</sup> The expression “art of legislation” refers to canon law, as well.<sup>7</sup>

It is obvious that any legislator’s ambition is to make a good law. It requires of him to make accurate decisions on high level of substantial and factual competence, and express them precisely and comprehensibly. Neatly and

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<sup>1</sup> H. Heimerl, H. Pree, *Kirchenrecht: allgemeine Normen und Eherecht*, Wien-New York 1983, p. 3: “Das Kirchenrecht ist ein Faktum.”

<sup>2</sup> P. Kroczek, *Zasada „clara non sunt interpretanda” w prawie kanonicznym*, Kraków 2005<sup>2</sup>, p. 96.

<sup>3</sup> R. Sobański, *Grundlagenproblematik des katholischen Kirchenrechts*, Wien-Köln 1987, p. 116–119.

<sup>4</sup> J. Bentham, E. Dumont, *Theory of Legislation*, vol. II, *Principles of the Penal Code*, Boston 1840, p. 138; J. Bentham, *An Introduction to the Principles of Morals and Legislation*, vol. II, London 1823, p. 93, p. 158, p. 264; M. Ruthnaswamy, *Legislation: Principles and Practice*, Delhi 1974, p. 34, p. 221, p. 222.

<sup>5</sup> J. S. Mill, *Considerations on Representative Government*, New York 1867, p. 109.

<sup>6</sup> Cf. G. Bowman, *Art of Legislative Drafting*, *European Journal of Law Reform* 7 (2007) no. 1–2, p. 4.

<sup>7</sup> R. Sobański, *Nauki podstawowe prawa kanonicznego*, vol. II, *Teologia prawa kościelnego*, Warszawa 2001, p. 127; J. H. Provost, *Some Rules of Governance*, [in:] *Code, Community, Ministry. Selected Studies for the Parish Minister Introduction the Code of Canon Law*, ed. E. G. Pfnausch, Washington 1992<sup>2</sup>, p. 21–23; P. Kroczek, *Prawodawca i jego sztuka*, *Prawo Kanoniczne* 50 (2007) no. 1–2, p. 175–183; E. Baura, *Profili giuridici dell’arte di legiferare nella Chiesa*, *Ius Ecclesiae* 19 (2007), p. 13–36.

properly written acts of law are the essence of system of law. In such system of law, the users of law are able to find an appropriate and useful law that they can interpret and use norms from it in a way that is intended by the legislator. To achieve this, the outcome of a work of the legislator should meet the necessary features of law given by Gratian in canon titled: *Qualis debeat esse lex*. He wrote: “Erit autem lex honesta, iusta, possibilis, secundum naturam, secundum consuetudinem patriae, loco temporisque conueniens, necessaria, utilis, manifesta quoque, ne aliquid per obscuritatem inconueniens contineat, nullo privato commodo, sed pro communi utilitate ciuium conscripta.”<sup>8</sup> It must be admitted that to measure up to these requirements is a great challenge.

While presenting *status quaestionis*, it must be said that although the subject of legislation has been thoroughly worked out in civil jurisprudence,<sup>9</sup> the church authors have discussed it only in some measure or as a digression.<sup>10</sup>

<sup>8</sup> D. IV, c. 2 (hereafter cited according to schema: *distictio, canon* or *causa, questio, canon*).

<sup>9</sup> There are many books in English about general drafting of law. See, for instance: R. Dickerson, *The Fundamentals of Legal Drafting*, Boston 1986<sup>2</sup>; J. C. Redish, *How to Write Regulations and other Legal Documents in Clear English*, Washington 1991; B. Child, *Drafting Legal Documents: Principles and Practices*, St. Paul 1992<sup>2</sup>; B. R. Atre, *Legislative Drafting. Principles and Techniques*, New Dehli 2006<sup>2</sup>. There are books about drafting special laws, like: S. J. Burnham, *The Contract Drafting Guidebook: a Guide to the Practical Application of the Principles of Contract Law*, Charlottesville 1992; B. A. Garner, *Guidelines for Drafting and Editing Court Rules*, Washington 1996. There are also handbooks for legislation, e.g., B. A. Garner, *Legal Writing in Plain English: a Text with Exercises*, Chicago 2001. Also in Polish there are many books about the problem in question, e.g.: A. Michalska, S. Wronkowska, *Zasady tworzenia prawa*, Poznań 1983; J. Wróblewski, *Zasady tworzenia prawa*, Warszawa 1989; S. Wronkowska, M. Zieliński, *Problemy i zasady redagowania tekstów prawnych*, Warszawa 1993; C. Kosikowski, *Legislacja finansowa: tworzenie projektów ustaw i aktów wykonawczych oraz kontrola ich konstytucyjności*, Warszawa 1998; Biuro Rzecznika Praw Obywatelskich, *Konferencja „Legislacja w praktyce”, 21 lutego 2002 r.*, Warszawa 2002; K. H. Goetz, R. Zubek, *Stanowienie prawa w Polsce: reguły legislacyjne a jakość ustawodawstwa*, *Ius et Lex* 3 (2005) no. 1, p. 237–258; M. Błachut, W. Gromski, J. Kaczor, *Technika prawodawcza*, Warszawa 2008; A. Malinowski, *Redagowanie tekstu prawnego. Wybrane wskazania logiczno – językowe*, Warszawa 2008<sup>2</sup>; *Zarys metodyki pracy legislatora. Ustawy. Akty wykonawcze. Prawo miejscowe*, ed. A. Malinowski, Warszawa 2009; Biuro Trybunału Konstytucyjnego, *Proces prawotwórczy w świetle orzecznictwa Trybunału Konstytucyjnego. Wypowiedzi Trybunału Konstytucyjnego dotyczące zagadnień związanych z procesem legislacyjnym*, Warszawa 2010<sup>9</sup>; A. Malinowski, *Polski tekst prawny. Opracowanie treściowe i redakcyjne. Wybrane wskazania logiczno-językowe*, Warszawa 2011. About legislation in the European Union, see: A. Malinowski, *Teksty prawne Unii Europejskiej. Opracowanie treściowe i redakcyjne oraz zasady ich publikacji*, Warszawa 2010.

<sup>10</sup> Some authors and works can be mentioned: L. Örsy, *Quantity and Quality of Laws after Vatican II*, *The Jurist* 27 (1967), p. 385–412; A. J. Maida, *Visionary or Reactionary: the Canonist’s Challenge to Create*, *CLSA Proceedings* 39 (1977), p. 1–9; G. May, A. Egler, *Einführung in die kirchenrechtliche Methode*, Regensburg 1986; R. Sobański, *Teoria prawa kościelnego*, Warszawa 1992; R. Sobański, *Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993*, *Prawo Kanoniczne* 38 (1995) no. 1–2, p. 139–162; J. M. Huels, *A Theory of Juridical Documents Based on Canons 29–34*, *Studia Canonica* 32 (1998), p. 337–370; H. Pree, *Le tecniche canoniche*



This book does not intend to offer a complete theory of law. Rather, given the nature of law, it deals with the practical problem of formulating laws. Its focus is then located at the meeting point of theory and practice. It presents theoretical background for the practical process of legislation in the Church. This book is a modest try to build a theory of legislation in the Church and propose some principles of lawgiving. The rules must include the techniques of legislative drafting, which are methods and rules of drafting legal text. As far as the process of formulating texts of law is involved, the book will not propose any radical change in currently and widely used methods. It will try to highlight some of them, simplify, and sometimes enrich them with new ideals taken from civil jurisprudence, always presenting problems in the Church's perspective.

The *novum* of the book then does not consist in radically changing the currently used methods, but rather in advancing their critical and systematic presentation, which by virtue of in-depth analysis of legislative methods together with their theological and philosophical assumptions, and with due attention to the intricacies of the current ecclesial legal practice, arrives at the formulation of the very needed practical guidelines for the church legislators. The presentation of the problem in such a way gives the right to say that the book represents a *novum* in the field of canon law. The art of legislation has never been comprehensively presented as a main topic in canonical literature.

It seems that there is an urgent need for what is attempted in this book. Laws made in today's Church both universal and particular are not perfect. According to even more critical opinions they are full of pitfalls and errors, because they are wrong in the realm of the subject matter and formal requirements.<sup>11</sup> Hopefully, this book would be of help to those who are responsible for law in the Church, because "constare non potest ius, nisi sit aliquis iuris peritus, per quem possit cottidie in melius produci."<sup>12</sup>

Three research methods are mainly used in this book. The most prevalent is analysis. It is used to look closer at the present norms on legislation. Description is used for presenting the Church and the phenomenon of its law. Finally, synthesis is of help in formulating the rules for legislation at the end of the book.

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*di flessibilizzazione del diritto: possibilità e limiti ecclesiali di impiego*, Ius Ecclesiae 12 (2000), p. 375–418; F. G. Morrissey, *Papal and Curial Pronouncements: Their Canonical Significance in Light of the Code of Canon Law*, 2<sup>nd</sup> ed. rev. and updated by M. Theriault, Ottawa 2001; E. Baura, *Profili giuridici dell'arte di legiferare...*, p. 13–36; R. Sobański, *Metodologia prawa kanonicznego*, Warszawa 2009.

<sup>11</sup> R. Sobański, *Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993*, Prawo Kanoniczne 38 (1995) no. 1–2, p. 161–162; T. Pawluk, *Uwagi na temat ustawodawstwa diecezjalnego*, Prawo Kanoniczne 34 (1991) no. 1–2, p. 26.

<sup>12</sup> *Dig.* 1.2.2.13.

The works of the Church canonists and theologians will be used as the foundation for deliberations on legislation. But the history of the primitive Church proves that orientation of church law on spiritual and supernatural reality, that overcomes aims of civil law, does not alienate canon law from law, and does not deprive canon law of features and qualities characteristic of every law.<sup>13</sup> Although this study focuses exclusively on canon law, many times it will refer to civil jurisprudence. It seems that connecting the two systems of law, civil and canonical, could be of benefit to both, especially the canonical system.

Because canon lawyers learn method from civil lawyers, legislators as canonists must also have civil jurisprudence formation and keep an eye on its achievements.<sup>14</sup> They must be open to the methods of thinking and legal instruments used by their civil fellow lawyers, but do this critically and selectively.<sup>15</sup> The view on canon law as an ecclesiastical reality does not preclude the possibility of drawing on the achievements of civil jurisprudence.<sup>16</sup> The obligation that “in sacris disciplinis solidam illam doctrinam a maioribus traditam et communiter ab Ecclesia receptam sectentur, devitantes profanas vocum novitates et falsi nominis scientiam” (*CIC* 1917 can. 129<sup>17</sup>; cf. can. 279 of the 1983 code), should be respected by the church legislators. By this the canonical legislators will master good method necessary for their work.<sup>18</sup>

The book consists of four main parts and two minor ones. The first chapter deals with the Church as the “matrix” of its own law. Travestying a famous Reiffenstuel’s sentence one can say that it is impossible to write law where its fundamentals are unknown.<sup>19</sup> For law the fundament is always community. It is impossible to discuss law without having first a glimpse into the group of people who are to live according to rules of law. The main problem under investigation, namely, the legislation problem, can be broached by the statement that understanding the phenomenon of law in the community is possible only

<sup>13</sup> R. Sobański, *Charyzmat i norma kanoniczna*, Studia Warmińskie 31 (1994), p. 72.

<sup>14</sup> R. Sobański, *Metodologia prawa...*, p. 36–37.

<sup>15</sup> R. Sobański, *Metodologia prawa...*, p. 86; R. Sobański, *Szkoły kanonistyczne*, Warszawa 2009, p. 114.

<sup>16</sup> P. Kroczek, *Zagadnienie interdyscyplinarności prawa kanonicznego*, *Polonia Sacra* 26 (2010), p. 175.

<sup>17</sup> *CIC* 1917 can. 129: “sacred disciplines, the solid and traditional doctrine that has been commonly received by the Church shall be followed, avoiding profane verbal novelties and what falsely passes for science.” Translations of *CIC* 1917 are taken from: *The 1917 Pio-Benedictine Code of Canon Law in English Translation with Extensive Scholarly Apparatus*, E. N. Peters, curator, San Francisco 2001.

<sup>18</sup> For a review of approaches to canonical methods and systematization of them, see: R. Sobański, *Prolegomena do metodologii prawa kościelnego*, [in:] *Czcść sprawiedliwości w miłości. Księga pamiątkowa w 20 rocznicę posługi prymasowskiej od uksw dla Księdza Kardynała Józefa Glempa*, ed. W. Chrostowski, Warszawa 2001, p. 131–151.

<sup>19</sup> Cf. A. Reiffenstuel, *Ius canonicum universum*, vol. I, Parisiis 1864, I, 1.

by understanding the specific features of the community. It could be done only by getting to know the group of people in question, especially their origin, action and goal. In a word, the chapter shall try to answer questions about law as a phenomenon in the Church – *quid est ius in Ecclesia?*<sup>20</sup> The unavoidable part of the chapter is presentation of the power of legislation in the Church and presentation of bearer of the power in question, that is, the competent legislator – the agent of legislation.

The next chapter deals with legislation as activity of already described and presented legislator. Legislation is a process by which law as a system of norms is changed. The process in question consists of stages and can be carried out in many ways, because there are many ways of making law. It must be underlined that legislation depends on many factors, and many determinants have influence on it. Legislation has a textual component and thus the important problems involved in it are ones like encoding norms, supposition in law, uniformity of law and others. All of them are discussed. The chapter also includes presentation of some of the techniques of legislative drafting. The particular way of formulating text of law and proper usage of these specific drafting techniques is of help for the legislator in process of making law and gives him clues how to solve typical legislation problems. They are the standards according to which it is possible to assess the quality of law, which is to be clear, easy to interpret and to apply.<sup>21</sup>

The last chapter focuses on law as product of legislation. It proposes categorization of acts of law by range, author, and effect. It presents kinds of documents of legal significance and deals with the problem of hierarchy of acts of law in the Church. It also gives characteristics that any act of law is to have. All these help to distinguish a normative act of law from other church documents and make it easier for the legislator to write act of law according to canonical rules. In sum, it can be said, that in this chapter law would be presented in the optic of question – *quid est iuris?* It leads to presentation of addressees and subject matter of act of law and to formulations in act of law. This part also deals with the problem of attitudes of community to the law given to it and with the desired by the legislator reception and unwanted by him nonreception of law by the community. There is also included a modest attempt at finding means for an increase of reception of law as well as the presentation of the possible roots of nonreception of law. The problem of obeying and applying law as well as obligation that comes from law are found in the chapter.

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<sup>20</sup> Cf. R. Sobański, *Grundlagenproblematik...*, p. 7. For a more detailed analysis of the matter, see: T. Gałkowski, *Il "quid ius" nella realtà umana e nella Chiesa*, Roma 1996.

<sup>21</sup> S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej*, Warszawa 2004, p. 8 and p. 11.

The lawmaker cannot be simply a master of theory of law who is detached from reality. That would separate him from normal people and make him impervious to the problems of their everyday life. On the other hand, he cannot be only casuistic by trying to find answers only in case law because he will miss the overview of the role of law in life. The ability to connect theory and practice is essential for the legislator.<sup>22</sup> Both dimensions will be presented in the conclusions of the book, where summary of the findings and conclusions from chapters are presented and find their concise and direct formulation in the rules of lawgiving in the Church. The rules form a method by which legislation should be carried out to be successful.

The book has two minor parts: index of the most commonly represented words, which are of great importance for process of legislation. There are also listed in it the names of scholars from the main text and documents of the Second Vatican Council. The book contains also bibliography. It consists of two main parts: sources and literature. The first one is divided into: Normative sources of law and Other sources, where books of special significance for legislation are presented.

It is expedient to mention that: 1) quotations and expressions from *CIC* 1917 and *CIC* 1983, other church documents and cited works of different authors are given in original version. Their translations are in brackets or in footnotes when it seemed to be advantageous and appropriate; 2) in the main text, the names of classical authors are given in English notation; in bibliographical data they are presented in original notation; 3) all canons refer to *CIC* 1983, unless otherwise indicated.

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<sup>22</sup> Cf. R. Sobański, *Słowo wstępne na ogólnopolskim sympozjum kanonistycznym w ATK w dniu 2.05.1983 r.*, *Prawo Kanoniczne* 27 (1984), p. 243.

# 1. Church (as Legislator)

To begin with law in the Church, the very first thing that should be considered is the Church.<sup>1</sup> The Second Vatican Council decreed that the teaching of canon law should take into account *Mysterium Ecclesiae* (OT 16). It means that the theory of canon law and the phenomenon of Church must always be seen in mutual harmony and should be fathomed out together. Only in the mystery of the Church its law finds its identity.<sup>2</sup> The entire legislation is ecclesiological<sup>3</sup> and it can be also said that ecclesiology is relevant for legislation. It results as a postulate that church law is to be written in light of the teaching and way of thinking characteristic of the Second Vatican Council.<sup>4</sup>

## 1.1. Model of the Church

Trying to get to know the Church as the matrix of its own law, it is important to find a good tool to do that. Due to the fact that the Church is a multilevel and very complex reality, to recognize and to understand it a model should be used.

### 1.1.1. Approach to Model

Models are of central importance in science. The bibliography on the subject is abundant and still growing.<sup>5</sup> Models are used to approach reality

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<sup>1</sup> R. Sobański, *Zagadnienie wstępu do nauki prawa kanonicznego*, *Prawo Kanoniczne* 17 (1974) no. 1–2, p. 6; M. Żurowski, *Prawo Nowego Przymierza*, Warszawa 1989, p. 7.

<sup>2</sup> A. Kenyon, *A Concept of Ecclesial Law*, *Studia Canonica* 15 (1981), p. 399.

<sup>3</sup> W. Aymans, *Ecclesiological Implications of the New Legislation*, *Studia Canonica* 17 (1983), p. 63.

<sup>4</sup> Paulus PP. VI, *Allocutio ad E. mos Patres Cardinales et ad Consultores Pontificii Consilii Codici Iuris Canonici recognoscendo*, 20.11.1965, *AAS* 57 (1965), p. 985–990, especially p. 988: “Nunc admodum mutatis rerum condicionibus – cursus enim vitae celerius ferri videtur – ius canonicum, prudentia adhibita, est recognoscendum: scilicet accommodari debet novo mentis habitui, Concilii Oecumenici Vaticani Secundi proprio, ex quo curae pastorali plurimum tribuitur, et novis necessitatibus populi Dei”

<sup>5</sup> See, for instance: K. Doets, *Basic Model Theory*, Stanford 1996; W. Hodges, *A Shorter Model Theory*, Cambridge 1997; M. Manzano, *Model Theory*, Oxford 1999; P. Rothmaler, *Introduction to Model Theory*, Amsterdam 2000.

by its analogy to a created model. Attempts to get to know reality without them would be often in vain due to complexity of problems.

The proper choice of a model for the object is a very complicated task. It requires taking into consideration many factors. The more aspects are considered and the more important they are, the better. Discussing the most effective way of using a model needs taking into account essential features of social phenomena and the specific subject of the research. The process of creating a model must be done very carefully. Needless to say, it is essential for the outcome of research.<sup>6</sup>

A clue to understand the idea of a model of the Church can be taken from social sciences. In this field of science models are really essential.<sup>7</sup> In social science, model is defined as an abstract representation, which helps to think more clearly. It is, for instance, a simplified description of society or a part of society, which aids in understanding or studying it.<sup>8</sup> Such model should reduce and structuralize social reality, assuming that some aspects of reality will not be taken into consideration. On the other hand, it does not mean any reduction or cutback. Any model should not be a sheer speculative idea but it must be taken from cognition of reality. This is condition of its usefulness.<sup>9</sup>

Looking from the outside perspective at the Church, it is just a community of people. Of course, such a view is a simple reduction to external features only, but it brings about some clarification of general idea of a model of the Church. For the purpose of finding a model, it is enough to see the Church in this way. It must be underlined that sociological sciences help only to understand the idea of a model of the Church, not to comprehensively build it.

### 1.1.2. Different Models of the Church

It seems that it would be very difficult to find an area where there is more disagreement among theologians than in ecclesiology. It results in a number of models of the Church.

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<sup>6</sup> J. Huber, *Rational Choice Models in Sociology*, *The American Sociologist* 28 (1997) no. 2, p. 42–53; B. Pabjan, *The Use of Models in Sociology*, *Physica A*, vol. 336, issue 1–2, p. 146–152.

<sup>7</sup> W. Outhwaite, *The Philosophy of Social Science*, [in:] *The Blackwell Companion to Social Theory*, ed. B. S. Turner, Malden 1998, p. 91.

<sup>8</sup> Cf. entry: *Model*, [in:] A. G. Johnson, *The Blackwell Dictionary of Sociology. A User's Guide to Sociological Language*, Malden-Oxford 2000<sup>2</sup>, p. 197.

<sup>9</sup> Cf. H. M. Blalock, *The Formalization of Sociological Theory*, [in:] *Theoretical Sociology. Perspectives and Developments*, ed. J. C. McKinney, E. A. Tiryakian, New York 1970, p. 275–281. See also: P. Sztompka, *O pojęciu modelu w socjologii*, *Studia Socjologiczne* 1 (1968), p. 50.

Some models of the Church are used rather unintentionally.<sup>10</sup> They are results of the way of understanding the reality of the world where the schemas of known world institutions are transformed and used for understanding the Church. When R. Bellarmine said about the Church that the one and true Church is a group of men bound together by the profession of the same sacraments, under the rule of the legitimate pastors, and especially of the one vicar of Christ on earth, the Roman Pontiff, and that the Church is a group of men as visible and palpable as that of the Roman people, or the Kingdom of France, or the Republic of Venice,<sup>11</sup> he simply understood the Church like a state. This understanding and derived from it definition had serious consequences in canonical law system and solutions presented by laws. Similarly, Pope Leo XIII did in *Epistola Encyclica Immortale Dei*.<sup>12</sup> The Pope taught that the Church no less than the State itself is a society perfect in its own nature and its own rights.<sup>13</sup> It has become more than just an opinion of theologians or canon lawyers. It has a character of doctrine.<sup>14</sup> The *CIC* 1917 did not use the term *societas perfecta*, but Pope Benedict XV at the beginning of *Constitutio Apostolica Providentissima Mater Ecclesia*, by which he promulgated the code in question, said: “Providentissima Mater Ecclesia, ita a Conditore Christo constituta, ut omnibus instructa esset notis quae cuilibet perfectae societati congruunt, inde a suis primordiis, cum, Dominico obsequens mandato, docere ac regere omnes gentes inceptit, aggressa est iam tum sacri ordinis virorum christianaque plebis disciplinam datis legibus moderari ac tueri.”<sup>15</sup>

In contrast, using the same unintentional method for building a model, that is, observing and analyzing the well-known institutions, R. Sohm saw the Church exclusively as a spiritual community of love and a purely charismatic movement. The Church according to him is a spiritual congregation. The kingdom, which is established in the Church, is a spiritual kingdom formed

<sup>10</sup> R. Sobański, *Model Kościoła-tajemnicy jako podstawa teorii prawa kościelnego*, Prawo Kanoniczne 21 (1978) no. 1–2, p. 41.

<sup>11</sup> R. Bellarmine, *De consillis et Ecclesia*, 1, III, c. 2, [in:] R. Bellarmine, *Opera omnia*, Parisiis 1871, II, p. 75.

<sup>12</sup> Leo PP. XIII, *Epistola Encyclica Immortale Dei* de civitatum constitutione christiana, 1.11.1885, ASS 18 (1885), p. 161–180.

<sup>13</sup> *Immortale Dei*, p. 171: “Ad summam, sic agunt cum Ecclesia ut societatis perfectae genere et iuribus opinione detractis, plane similem habeant ceterarum communitatum, quas respublica continet: ob eamque rem si quid illa iuris, si quid possidet facultatis ad agendum legitimae, possidere dicitur concessu beneficioque principum civitati.”

<sup>14</sup> See more: L. Gerosa, *Interpretacja prawa w Kościele. Zasady, wzorce, wskazówki*, transl. K. Kubis, A. Porębski, Kraków 2003, p. 40–41, ft. 11.

<sup>15</sup> Benedictus PP. XV, *Constitutio Apostolica Providentissima Mater Ecclesia* Codex Iuris Canonici promulgatur, 27.05.1917, AAS 9 (1917) II, p. 5. For more about the understanding of the Church as *societas perfecta* in teaching of the Church, see: R. Sobański, *Kościół jako podmiot prawa. Elementy eklezjologii prawnej*, Warszawa 1983, p. 36–39.

not like a state or a political union.<sup>16</sup> This scholar having this model in mind arrived at the conclusion that law and the Church are contradictory – “Das Wesen der Kirche ist geistlich, das Wesen des Rechtes ist weltlich. Das Wesen des Kirchenrechtes steht mit dem Wesen der Kirche in Widerspruch.”<sup>17</sup>

There are models of the Church constructed purposely by taking some data from Sacred Scripture. Some models give valuable insights to ecclesiologists by describing the three Old Testament community models: 1) the pre-monarchic, called also “the new church start,” 2) the monarchic, or the “temple community” and 3) the post-exilic, or the “textual community.”<sup>18</sup> Other models are based on figures of the Church constructed in the New Testament.<sup>19</sup>

The standard and very well-known work in the area of the Church models is A. Dulles’s book *Models of the Church*.<sup>20</sup> The author described five ways of understanding the Church using both mentioned methods:

1. The Church as *Institution* defines the Church primarily in terms of its visible structures, especially the rights and powers of its officers.
2. The Church as *Mystical Communion* where the Church is a mysterious and intimate spiritual union of people with God and each other through the Body of Christ. The unity is granted by bonds of creed, worship, and ecclesiastical fellowship.
3. The Church as *Sacrament* is a sign and transmitter of God’s grace in the world and the visible presence of God on earth.
4. The Church as *Herald* is a kerygmatic model that emphasizes faith and proclamation and including the mission of the People of God, the baptized, to proclaim God’s Word.
5. The Church as *Servant* asserts that the Church should consider itself as part of the total human family sharing the same concerns as the rest of men. It calls for dialogue with society and assisting persons in a variety of needs.

Later on in the revised and expanded edition of his work<sup>21</sup> A. Dulles added the sixth model to this list:

6. The Church as *Community of Disciples* that is including Catholics’ sense of being formed by the Scriptures, acting lovingly, sharing in Jesus’ mission and service, and being co-responsible for

<sup>16</sup> R. Sohm, *Outlines of Church History*, transl. M. Sinclair, London 1895, p. 24.

<sup>17</sup> R. Sohm, *Kirchenrecht*, vol. 1, *Die geschichtlichen Grundlagen*, Leipzig 1923, p. 700.

<sup>18</sup> W. Brueggemann, *Rethinking Church Models Through Scripture*, *Theology Today* 48 (1991), p. 128–138.

<sup>19</sup> See more: P. S. Minear, *Images of the Church in the New Testament*, Philadelphia 1960.

<sup>20</sup> A. Dulles, *Models of the Church*, New York 1974<sup>1</sup>.

<sup>21</sup> A. Dulles, *Models of the Church, Expanded Edition*, New York 1987<sup>2</sup>.



the Church's mission and identity. As A. Dulles notes, he finds precise expression of it in the writings of Pope John Paul II.<sup>22</sup>

The idea from the Second Vatican Council must be mentioned here. The Church is presented and named as: *mysticum Christi Corpus* (the Mystical Body of Christ, *LG* 8, *LG* 23), *Corpus Christi* (the Body of Christ, *LG* 32, *LG* 33), or *Corpus Domini* (the Body of the Lord, *LG* 17), *Templum Spiritus Sancti* (the Temple of the Holy Spirit, *LG* 17), *Populum Dei* (the People of God, *LG* 11, *LG* 12, *LG* 13). All these names are to approach the mystery of the Church in many aspects and dimensions. They help to deepen self-awareness of the Church.<sup>23</sup>

In summation it can be repeated after one scholar that "there is no one single or normative model of church life. It is dangerous and distorting for the Church to opt for an absolutist model that it insists upon in every circumstance. Moreover, we are more prone to engage in such reductionism if we do not keep alive a conversation concerning competing and conflicting models. Or, to put it positively, models of the church must not be dictated by cultural reality, but they must be voiced and practiced in ways that take careful account of the particular time and circumstance into which God's people are called. Every model of the church must be critically contextual."<sup>24</sup> Many models of the Church can be used for different purposes. The choice depends on the purpose and goals to be reached. By the metaphors, images, pictures, and models the inner nature of the Church can be made known (*LG* 6).

The context of a model of the Church in this book is law. It means that to get to know the Church as a matrix of its law a special model is required. Church law must present a multidimensional reality of the Church. This law is rooted in self-consciousness of the Church as living body that is continuously enriched by the changing world and inspired by the Holy Spirit.<sup>25</sup> The Church is both object and subject of the reflection.

### 1.1.3. R. Sobański's Model of the Church as the Mystery

R. Sobański worked out a model of the Church as the mystery.<sup>26</sup> This model would be a base for building the theory of lawgiving in the Church in accord

<sup>22</sup> A. Dulles, *Models of the Church, Expanded Edition*, New York 1987<sup>2</sup>, p. 206.

<sup>23</sup> W. Aymans, *Die Kirche in der biblischen Bildsprache*, [in:] *Handbuch des Katholischen Kirchenrechts*, ed. J. Listl, H. Schmitz, Regensburg 1999<sup>2</sup>, p. 3–8.

<sup>24</sup> W. Brueggemann, *Rethinking Church Models...*, p. 129.

<sup>25</sup> Cf. A. J. Maida, *Visionary or Reactionary: the Canonist's Challenge to Create*, CLSA Proceedings 39 (1977), p. 9.

<sup>26</sup> R. Sobański, *Model Kościoła-tajemnicy...*, p. 39–60; R. Sobański, *Modell des Kirchenmysteriums als Grundlage der Theorie des Kirchenrechts*, Archiv für katholisches Kirchenrecht 145 (1976), p. 22–44; R. Sobański, *Kościół – prawo – zbawienie*, Katowice 1979, p. 54–77.

with reality of the Church.<sup>27</sup> There are several arguments for choosing this model for presenting the problem of legislation in the Church.

First of all, the model does not limit cognition of the Church only to external phenomena. If it did this it would have nothing in common with theology. The model of the Church as the mystery exhorts taking into consideration the fact that the Church is an object of faith and faith must be taken as an essential factor in understanding both the Church and church law. The model focuses on the internal life of the Church and as a result of this it takes into consideration Church's external actions.

Secondly, R. Sobański is of the opinion that it is impossible to deal with law in separation from community, it is impossible to deal with the Church in separation from its faith.<sup>28</sup> His model is very good in showing the presence of the law and its significance in the life of the Church in light of faith of the Church. Surely, the Church and its faith must be connected very tightly during the building of the model to avoid an accusation summarized in famous dictum: "Jesus foretold the Kingdom, and it was the Church that came."<sup>29</sup>

The next argument for this model follows the theological point of view and allows explaining the phenomenon of faith in the Church and the law as its outcome without resorting to categories or notions from social life or philosophical arguments, like *ubi societas, ibi ius* or *bonum commune*. The model is an endogenic one. Asking for help from the sources outside the Church to explain the presence and shape of law in the Church would be a mistake.<sup>30</sup> The Church indeed has sociological features of community, but all in all it does not take its existence from human nature of people, but from the Holy Spirit. The relation of the Church to Jesus is not just a relation of a society to its founder. The relationship goes far deeper. Jesus is far more the Church's foundation than its founder. The Church is revealed as the work of the Father, the Son and the Holy Spirit. Its fundamental structure is Trinitarian.<sup>31</sup> The exogenic models may diminish understanding of the Church and canon law.

There are some points of departure to build up the model in question.

1. The cognition of the law of the Church does not mean knowing the specific law norms but understanding their significance and role. The proper perspective of the canon law is possible in optics of the Church and after prior understanding of her.
2. Any model in science is a combination of elements. Also, a model of the Church is built up like that. There are two important elements

<sup>27</sup> Cf. R. Sobański, *Model Kościoła-tajemnicy...*, p. 41.

<sup>28</sup> R. Sobański, *Kościół – prawo...*, p. 61.

<sup>29</sup> A. M. Loisy, *The Gospel and the Church*, transl. Ch. Home, New York 1904, p. 166.

<sup>30</sup> For further reference, see: R. Sobański, *Kościół – prawo...*, p. 79–84.

<sup>31</sup> P. J. Huizing, *Reflections on the System of Canon Law*, *The Jurist* 42 (1982), p. 245–246.

of the Church: visible and invisible. Supernatural and redemptive reality is invisible but it was revealed as a visible one on the earth. A good analogy for the Church's elements is the hypostatic union between two natures of Jesus Christ. The Church is a tool of redemption in analogy to human nature of Jesus Christ. But, as any analogy this one too has its limits.

3. Any model of the Church based only on a visible element, that is, on the sociological character of the Church is not acceptable for explaining the role of canon law, because it omits the divine element of the Church (cf. *LG* 8). Social element is important and should not be omitted, but it does not play a major role.
4. The Second Vatican Council teaches that the Church is the mystery, established and continually sustained here on the earth by Jesus Christ. It is the community of faith, hope and charity. But, the society is also structured with hierarchical institutions and organs. The Church must not be considered as two separate realities: neither the visible assembly and the spiritual community, nor the earthly Church and the Church enriched with heavenly things. Rather they form one complex reality, which coalesces from a divine and a human element (*LG* 8). This is possible only in light of the Church as the mystery.
5. The term "mystery" in the model of the Church should not be understood as something not cognizable or something secret. The mystery must be understood in terms of *Constitutio dogmatica Lumen gentium*<sup>32</sup>. The mystery of the Church is cognizable, but only in the light of faith.

R. Sobański, on the basis of these assumptions, set up his model in the following steps<sup>33</sup>:

1. The organism of the Church is like a natural social organism. It lives as community in many communities. It lives like any other society, that is, its members are organized and cooperate together. That is why it can be understood and described by historical or social methods.
2. But the organism of the Church has not only social features. It is in a mutual connection with the Holy Spirit. It is not a hypostatic union but it is a union of action. The Holy Spirit works through the Church as *agens principalis*. The Church lives thanks to the Holy Spirit.
3. The Church in its actions is a tool for the Holy Spirit, so the activity of the Church and effectiveness of the work depends fully on the power of the Holy Spirit. But, on the other hand, it can be said that the effectiveness

<sup>32</sup> Sacrosanctum Concilium Oecumenicum Vaticanum II, *Constitutio dogmatica Lumen gentium* de Ecclesia, 21.11.1964, AAS 57 (1965), p. 5–75.

<sup>33</sup> R. Sobański, *Model Kościoła-tajemnicy...*, p. 50–52.

is in certain relation to the faithful and their readiness to join in cooperation. They are gifted by the Holy Spirit for the cooperation among themselves and between them and the Holy Spirit.

4. It leads to the conclusion that there is no single action taken by the Church not being inspired by the Holy Spirit, and there is no sociological dimension of the Church without significance for salvation.
5. The Holy Spirit works through the social organism of the Church, that is, through the faithful. As they co-work with the Holy Spirit, they keep their personal characteristics and qualities, and use them in the work. By this, the significance of human features is underlined and appreciated.

The model of the Church as the mystery is based on the connection between the Holy Spirit and social organism, and their mutual cooperation. The human and social features are the real value. The Church must not be limited only to the social element. But this element plays a significant role and is essential for substantial and methodological approach to the reality of the Church. It must not be seen as an independent body but only as an inseparable connection with the Holy Spirit. The Third Person of God works in the Church, for the Church, through the Church. Without the Holy Spirit, the tool that is the Church and its action would not have any significance for salvation.

But how is the Church working? In the Body [Church] the life of Christ is poured into the believers who, through the sacraments, are united in a hidden and real way to Christ who suffered and was glorified. The sacraments are followed by the proclamation of the Word. The two dimensions of the Church's works are of essence: the Sacrament and the Word (cf. can. 213 and *LG* 7).<sup>34</sup>

The two dimensions are not the only ones. Every action of the Church serves the salvation. Whatever the Church is doing, it is expressing God's will and fulfills God's plan for the world. It serves as "fermentum et veluti anima societatis humanae in Christo renovandae et in familiam Dei transformandae existit" (*GS* 40).<sup>35</sup> It is certain that the Church has no proper mission in the political, economic or social order. "Missio quidem propria, quam Christus Ecclesiae suae concredidit, non est ordinis politici, oeconomici vel socialis: finis enim quem ei praefixit ordinis religiosi est. At sane ex hac ipsa missione religiosa munus, lux et vires fluunt quae communitati hominum secundum Legem divinam constituendae et firmandae inservire possunt" (*GS* 42).<sup>36</sup>

<sup>34</sup> The two pillars were emphasized by K. Mörsdorf, *Wort und Sakrament als Bauelemente der Kirchenverfassung*, Archiv für katholisches Kirchenrecht 134 (1965), p. 72–79.

<sup>35</sup> *GS* 40: "a leaven and as a kind of soul for human society as it is to be renewed in Christ and transformed into God's family."

<sup>36</sup> *GS* 42: "The purpose, which God placed before the Church, is a religious one. But out of this religious mission itself comes a function, a light and an energy, which can serve to structure and consolidate the human community according to the divine law."

Undoubtedly, using this model of the Church it is possible to try to look closer at and thus to better understand law in the Church. When the norm of the law is in action, the Church is fulfilling duties and mission. It is entirely a theological task. Sociological dimension of the community is only a carrier of the mission. The canon lawyer looking at the Church must not see only a sociological organism built by human relation, but must see the Church primarily as a community between God and men. It means that the external bond imposed by law means nothing, if there are no internal bonds.<sup>37</sup> Following legal rules should be preceded by obligation created by faith. A user of canon law is not only a human being who must respect the law and obey the rule under the threat of penalty, but his position in the community is based on the fact that he is freed by Christ, gifted by the Holy Spirit and called to sanctity. He has intelligence, conscience and is able to make free choices. The dignity of the user of law is underlined by the main purpose of the law in the Church, which is salvation of souls.

## 1.2. Origin and Development of Phenomenon of Law in the Church

### 1.2.1. Salvation

The entrance of God in the history in the person of Jesus Christ has created a new situation for the people. Those who started to believe in Him as a promised Messiah set up a specific group of people. They considered themselves as the fulfillment of the prophet's words: "Ever present in your midst, I will be your God, and you will be my people" (Lv 26, 12). They realized they came to be in a new situation before God and in relation to other people.<sup>38</sup>

The community was aware of the fact that the kingdom of God manifested its coming through them and they began to preach the salvation given by Christ. The features of the salvation are clearly emerging. The first is, that salvation has essentially eschatological character and could be achieved fully only through Yahweh's final judgment (Mt 13, 4–8; Mt 13, 24–30; Mt 13, 47–50). The second, that the salvation already exists, or at least will exist in the proximate future (Mt 13, 31–32; Mt 13, 33).<sup>39</sup>

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<sup>37</sup> R. Sobański, *De theologicis et sociologicis principiis theoriae iuris ecclesialis elaborandae*, Periodica 66 (1977), p. 674.

<sup>38</sup> Cf. R. Sobański, *Chrzest jako podstawa jedności Kościoła*, Warszawa 1971, p. 16.

<sup>39</sup> D. M. Stanley, *The Apostolic Church in the New Testament*, Westminster 1967, p. 46–47.

### 1.2.2. Faith

The first thing that joined them together was faith. In faith they saw Christ as the only source of salvation (cf. Acts 4, 11–12) and the salvation as possible only in faith. Living according to faith was their main goal. The receiving of the faith was possible only inside the community of believers.

All these brought the first Christians to the consciousness of being chosen by God to the true faith (Rom 8, 33; 1 Pt 1, 1) and being saint in the sense that they were joined to Christ and were called to sainthood: “For you know what instructions we gave you through the Lord Jesus. This is the will of God, your holiness: that you refrain from immorality, that each of you know how to acquire a wife for himself in holiness and honor, not in lustful passion as do the Gentiles who do not know God” (1 Thes 4, 2–5; cf. Eph 1, 4).<sup>40</sup> They thought about themselves as a community united by God in faith, as an image of unity of the Holy Trinity (Jn 17, 21–23; Jn 10, 30; 1 Jn 5, 7), so the unity was an aim and main feature of the community of Christians.

### 1.2.3. *Koinōnia*

The believers considering Christ as their Savior, united in faith by worshipping one God were receiving the sacrament of baptism. The ritual of baptism was also a sign of the incorporation into community. All this created a new and specific awareness of the members of the community and shaped their self-identity. They showed the unity among themselves and difference between them and non-believers.

Who joined the community started a new life (cf. Rom 6, 4) and could not participate in any other community (cf. 1 Cor 6, 15–20). The unity was seen in many aspects of life: beliefs, behavior, and an outlook on life. The new rules formed, from the beginning, an inner meaning of community. As a consequence, joining the community required repentance (Mk 1, 15) and it meant changing life. The situation required that believers had to be away from those who did not respect the teaching of Christ. As a result, following the rules of faith made believers in Christ different from others and they formed their own style of living. They were aware of their distinctness from the world and the fundament of it was the faith and its requirements.<sup>41</sup> The follower of Christ was different from others (1 Cor 5, 12) and that is why others called them

<sup>40</sup> Translations of the Bible are taken from *The New American Bible*, New York 1991.

<sup>41</sup> On the other hand, it must be noticed that the one who became Christian was not cut off completely from the society, as author of the Epistle to Diognetus noticed, see: *Epistola ad Diognetum*, PG 2, col. 1159–1186.

Christians (cf. Acts 11, 22). They gathered together for prayers and to break bread (Acts 2, 43) and that was the highest point of being in the community.<sup>42</sup>

As an expression of the awareness of the specificity of the community in question was the word *koinōnia* (κοινωνία), in Greek: 1) association, communion, fellowship, close relationship, 2) attitude of good will that manifests an interest in a close relationship, generosity, fellow-feeling, altruism, 3) sign of fellowship, proof of brotherly unity, 4) participation, sharing<sup>43</sup> was in use to describe the community of the faithful. The same meaning as *koinōnia* had the Latin word *communio*. It is translated in classical Latin as sharing, mutual participation.<sup>44</sup> In the reality of the Church and in the Church language the word acquired a new, deeper, that is, religious meaning.

As it can be seen, faith forms a community of those who worship God, who share with one another a common experience of God's salvation and a common call to bear witness to God's salvation-creating power in the world.<sup>45</sup> Exactly as St. Cyprian said: "Sacrificium Deo majus est pax nostra et fraterna concordia, et de unitate Patris et Filii et Spiritus sancti plebs adunala."<sup>46</sup>

#### 1.2.4. Institutional Realization of Law

The first Christians lived according to faith being together as "a chosen people" (1 Pt 2, 9) and doing this meant building community and rules for its members. The faith was seen in the way of living and in the moral standards. It was manifested by baptism as a rite of admission and by special conditions for permission to take part in the Lord's Supper. On the other hand, misbehavior was punished by partial or definitive exclusion (excommunication) from community (cf. 2 Cor 2, 6; 1 Cor 16, 22; Acts 13, 11; Mt 18, 17; Mt 25, 30; 2 Thes 3, 3–11; 1 Tm 1, 20; Ti 3, 10). The state of early Church can be summarized by the verse from the first Letter to Corinthians: "But let everything be done decently and orderly" (1 Cor 14, 40). Joining the group of Christ's believers implied the necessity of acceptance of a set of rules and behavioral norms that shaped the self-identity of such group. Anyone who did not stick to conditions was outside the community. It means that they were organizing their society making law even when they did not have an awareness of intention to do that. They recognized the norm of faith as the norm of law automatically. The law

<sup>42</sup> J. M. Powers, *Eucharistic Theology*, New York 1967, p. 52–58.

<sup>43</sup> Entry: *κοινωνία*, [in:] *A Greek-English Lexicon of the New Testament and other Early Christian Literature*, rev. and ed. F. W. Danker, Chicago 2000, p. 552, col. b – p. 553, col. b.

<sup>44</sup> Entry: *Communio*, [in:] D. P. Simpson, *Cassell's Latin Dictionary, Latin-English, English-Latin*, New York 1968, p. 121.

<sup>45</sup> Entry: *Community*, [in:] *The Anchor Bible Dictionary*, ed. D. N. Freedman, vol. 1, New York 1992, p. 1103.

<sup>46</sup> Cyprianus Carthaginensis, *Liber de oratione Dominica*, PL 4, col. 536.

was realized by intuition that has its source in faith and is so obvious that does not require any pre-reflection nor formal formulation.<sup>47</sup>

As time went by the Christians started to understand that law in their life came from their own situation of being-in-love with Christ<sup>48</sup> and as the Jews did, they started to link their law with God's action in the world. They took all law regulations directly from God's will.<sup>49</sup>

### 1.2.5. Subsidiary Topics

There are other efforts to find good justification and explanation for the existence of the phenomenon of law in the Church. They must be presented for the full picture, although their weakness of argumentation can be shown and their reliability undermined.

#### 1.2.5.1. *Ubi societas, ibi ius*

There is an opinion according to which law is in the Church because every society must have law.<sup>50</sup> No society, the Church included, can exist without laws being obeyed by its members. No member of society, including a faithful, can choose which laws he desires to obey and which he intends to neglect as not suiting him. Society cannot be ruled by principle of anarchy. It needs law.<sup>51</sup>

The first impression is that the rule holds true for the Church. It seems that church law comes from sociological structure. As a law of society of believers it serves its supernatural aims and it does not regulate supernatural life but external acts which are in relation to supernatural life. Social nature of the Church demands bringing into the Church the genuine and up-to-date law.<sup>52</sup> The role of the idea of society in legal thinking is very important.<sup>53</sup>

But having in mind the presented origin of the phenomenon of law, it is clear that law in the Church cannot be justified by the statement that *ubi societas, ibi ius*. This sentence does not exhaust the reality and complexity of *communio*. To describe the phenomenon of law in the Church, one cannot only take a sociological rule and just apply it to the Church. The nature of the

<sup>47</sup> R. Sobański, *Kościół – prawo...*, p. 23–24.

<sup>48</sup> Cf. R. Sobański, *Kościół – prawo...*, p. 28.

<sup>49</sup> A. Stiegler, *Der kirchliche Rechtsbegriff. Elemente und Phasen seiner Erkenntnisse Geschichte*, München-Zürich 1958, p. 33.

<sup>50</sup> M. Żurowski, *Wspólnota kościelna "communio" podstawą prawa kościelnego*, *Prawo Kanoniczne* 20 (1977) no. 1–2, p. 77.

<sup>51</sup> T. Gałkowski, *Ubi societas ibi ius w czasach globalizacji*, [in:] *Ars boni et aequi. Księga pamiątkowa dedykowana księdzu profesorowi Remigiuszowi Sobańskiemu z okazji osiemdziesiątej rocznicy urodzin*, ed. J. Wroceński, H. Pietrzak, Warszawa 2010, p. 615–616.

<sup>52</sup> Cf. *Praefatio*, principium 1, p. xxxi.

<sup>53</sup> Historical development of the idea, see: R. Sobański, *Kościół jako podmiot prawa...*, p. 12–43.



Church requires a different approach.<sup>54</sup> Church law is not one of laws started in societies. It is a very specific one. The aim of the law is not that of organizing the life of people on the earth but of helping them to gain salvation. It is done by helping them to organize their religious life. And if church law organizes the earthly life it is so because the supernatural aim is still on the horizon. There is no other motivation. Law as phenomenon in the Church cannot be explained as a necessity that comes from the sociological structure. If it were true, it would mean that the Church's legislator thinks in the way of the world, that is, as civil legislators do. That would mean that he failed in his mission.

The Church as a society is, of course, specific. It is *communio* but still it has features characteristic for every society. No one can deny the sociological and the natural features of the Church and consequences that flow from it. The presence of the norms in the society is a logical consequence of existence of society and its internal complexity. Necessity of norms is obvious for existence of society, for protection of rights of the community and individuals. In this sense, law appears as an aid for human weakness. Due to human limitations law helps to achieve individual goals through achievement of goals of the society.<sup>55</sup>

The point is to just show that the principle in question is not enough to explain the existence of church law. It cannot be said: *ius in Ecclesia quia societas est*, but only: *societas quia ius in mysterio Ecclesiae est*.<sup>56</sup> Also, it is not enough for the legislator to understand his work using only rules that govern society.

#### 1.2.5.2. Common Good

According to St. Thomas Aquinas, every law is ordained to the common good. He cites St. Isidore who said that "lex est nullo privato commodo, sed pro communi utilitate civium conscripta."<sup>57</sup> The society needs law to realize mutual aim that is good. The way of thinking is the same as it was above with necessity of law due to community features in the Church. The line of thought is the same. The Church needs law to realize its goals. Again law appears as a remedy for human weakness.

There is an opinion that the Church's need of juridical institutions is the ransom for the human condition. The presence of law in the Church is evidence of the frailty of men; it is a sign of weakness.<sup>58</sup> Contrary to this, one can rhetorically ask with one author: "Law or the gospel, law or love? Indeed hard to see, why the coordination factor in the Church would be law instead

<sup>54</sup> R. Sobański, *Teoria prawa kościelnego*, Warszawa 1992, p. 48.

<sup>55</sup> J. M. Aubert, *Loi de Dieu, loi des hommes*, Turnai 1964, p. 14.

<sup>56</sup> R. Sobański, *Kościół jako podmiot prawa...*, p. 43.

<sup>57</sup> *ST*, I–II, q. 90 a. 2 s. c.

<sup>58</sup> R. Metz, *What is Canon law?*, London 1960, p. 25

of love or even next to love. Would love not suffice? Could love be not operative enough?"<sup>59</sup> Important is his answer that with absolute certainty neither human weakness nor necessity of coordination of the Church, condition the existence of church law.<sup>60</sup> He is absolutely right. Common good is not necessary to explain the origin of law in the Church.

But still common good is for the legislator an important motivation for his action. It directs solutions in a law. The common good is the sum of conditions of social life, which allow social groups and their individual members relatively thorough and ready access to their own fulfillment. It involves rights and duties with respect to the whole human race (*GS* 26). There are many canons in *CIC* 1983 that refer to: *bonum commune* (the common good), *bonum Ecclesiae* (the good of the Church), *bonum omnium Ecclesiarum* (the good of all the Churches), *bonum communis Ecclesiarum* (the common good of the Church, e.g., can. 212 § 3, can. 223 § 1 and § 2, can. 264 § 2, can. 282 § 2, can. 287 § 2, can. 323 § 2, can. 334, can. 345, can. 357 § 1, can. 360, can. 618, can. 819, can. 946, can. 1299 § 2). The legislator must have this in mind.

### 1.2.6. First Written Regulations

As it was demonstrated, the origin of church law must be traced back to the times when the Church itself was formulated. As time goes by and the structure of the Church becomes more complex and Church more spread, the need of some written regulation comes to existence. Initially it was done together with writing of rules of faith, that is, Sacred Scripture.

#### 1.2.6.1. Law in Sacred Scripture

The signs of existence of law are common in the New Testament and were taken in a significant part from the Old Testament. That is why the approach to the law in the New Testament must begin with explanation of the law of Judaism in the Old Testament.

The Covenant is mutually connected with law (*Gn* 9, 1–7; *Gn* 17, 9–14; *Ex* 20, 1–17). In the Old Testament, entering into an alliance with God means to respect law given by God. The law in Judaism was regarded as the revealed will of God determining a peculiarly Jewish way of life both of individual and of the community sometimes in a very small detail.<sup>61</sup>

<sup>59</sup> R. Sobański, *Kościół – prawo...*, p. 81.

<sup>60</sup> R. Sobański, *Kościół – prawo...*, p. 81.

<sup>61</sup> P. Grelot, entry: *Prawo*, [in:] X. Léon-Dufour, *Słownik teologii biblijnej*, transl. K. Romaniuk, Poznań 1982, p. 771 ff.

Fidelity to the law assured the Jews of continued good relations with the God who had revealed the law.<sup>62</sup> From the very beginning the primitive Church was emphasizing the entire element of law.<sup>63</sup> The idea of it was for St. Paul a basis for preaching Christianity: "I am speaking to people who know the law" (Rom 7, 1). In his writing, the law taken from the Old Testament is reduced to the single commandment of love.<sup>64</sup> "Love does no evil to the neighbor; hence, love is the fulfillment of the law" (Rom 13, 10). It means that one who loves his neighbor fulfils the law. It must be underlined that love is the fulfillment of the Law, not because it replaces the Mosaic Law with another external norm of conduct, but because it is itself a dynamic force impelling man to seek the good of others, energizing his faith in Christ Jesus: "faith working through love" (Gal 5, 6).

Thus Christ abolished the Law (Eph 2, 15). Thus He cancelled the bond that stood against us with its legal demands; this He set aside, nailing it to the cross (Col 2, 14). Thus He became the end of the Law (Rom 10, 4). St. Paul started talking about "the law of Christ" (Gal 6, 2) and "the law of the spirit of life" (Rom 8, 2), and in contrast to "the law of sin and death" (Rom 8, 2). For St. Paul called the Law a curse not so much because it gives rise to legalism, but he believed that it is hopeless to seek justification by the Law. The curse is lifted and the new law established through Christ's passion and death.<sup>65</sup>

It was clear that the sense of law proper to the Old Testament has no place in Christianity.<sup>66</sup> The gospel is not a "new law" in the sense of law of the Old Testament. The gospel is a completely different quality. The justification is no longer expected through fulfilling of law.<sup>67</sup> The analysis of the presence of Mosaic law in the New Testament led to the conclusion: "The five New Testament authors who explicitly address the issue of the law's continuing validity raise the question in different ways and provide correspondingly different answers. [...] Despite these differences in the way the five authors use the Mosaic law, all are unified in the conviction that it has been overwhelmed and swept away in the eschatological current unleashed by the life, death, and resurrection of Jesus. Much of the Mosaic law, both at the level of structure and specific commands, has been creatively appropriated in this new, eschatological situation. Still, too much of the law has been omitted or radically reinterpreted for the emphasis to fall on the continuity between law and gospel. Continuity is present, but

<sup>62</sup> J. L. McKenzie, *Law in the New Testament*, *The Jurist* 26 (1966), p. 167.

<sup>63</sup> D. Ryan, *Law in the Church. The Vision of Scripture*, *Studia Canonica* 17 (1983), p. 6.

<sup>64</sup> There are scattered remarks about it, e.g., Rom 2, 12; Rom 9, 31; Rom 10, 4–5; Rom 13, 8–10; 1 Cor 9, 10; 1 Cor 15, 56; 2 Cor 3, 17–18; Gal 2, 16; Eph 2, 15.

<sup>65</sup> F. F. Bruce, *The Curse of the Law*, [in:] *Paul and Paulinism. Essays in Honor of C. K. Barrett*, ed. M. D. Hooker, S. G. Wilson, London 1982, p. 27–35.

<sup>66</sup> J. L. McKenzie, *Law in the New Testament...*, p. 174–176.

<sup>67</sup> J. A. Fitzmyer, *Saint Paul and the Law*, *The Jurist* 27 (1967), p. 19–36.

the gospel is something new.”<sup>68</sup> But it cannot justify radical opinions like the one that the New Testament has no trace of positive law in the ecclesia,<sup>69</sup> or that nothing was prescribed in the primitive Church, except love.<sup>70</sup> It does not mean that no rules, guidelines or positive prescriptions are presented. Contrary, there are many of them. They are mainly in writings of St. Paul.<sup>71</sup> Because of his approach to law St. Paul was classified and called “an Oriental lawyer.” “An Oriental lawyer is [...] primary occupied with scripture, i.e., texts and interpretation, and hardly ever with expediency or considerations others than those arising out of his materials and the needs of applying them to contemporary life.”<sup>72</sup>

Describing St. Paul’s administration work it has been observed that: “Among the issues Paul might be called upon to handle were Jew–Gentile relations, threats of schism, disorders in services of worship, irregularities in the observance of the Lord’s Supper, a misunderstanding between two members of the local church, unhealthy excitement about the end of the world, litigation between Christians, occasional instances of serious immorality, the question of whether a Christian could eat food that had been consecrated by pagan rites, innumerable problems connected with marriage, the role of women in the Church, various false teachings, the administration of charity by the Churches, relations of Christians with their pagan neighbors and how Christian slaves and masters should treat each other.”<sup>73</sup> The Apostle understood that community is not free from such issues and a legal aspect of life is simply needed. He was empowered to influence the faithful in these matters.<sup>74</sup>

Especially important are two so-called *Pastoral Epistles*, that is, 1<sup>st</sup> Timothy and Titus. There is in no other New Testament text that would give so clear an evidence of the Church’s attempt at putting in order (*epidiorthose*, επιδιορθωση, cf. Ti 1, 5) that is: establishing organization and structure (1 Tm 5, 17–18), disciplinary and penal legislation (1 Tm 5, 20), liturgical legislation (1 Tm 2, 8; 1 Tm 2, 11–15).<sup>75</sup> Many examples of laws built on that can be found. For instance,

<sup>68</sup> F. Thielman, *The Law and the New Testament. The Question of Continuity*, New York 1999, p. 182.

<sup>69</sup> J. L. McKenzie, *Law in the New Testament...*, p. 168.

<sup>70</sup> J. Robinson, *Honest to God*, London 1963, p. 116.

<sup>71</sup> There is a commonly held agreement that St. Paul has written only 7 of texts traditionally attributed to him: Rom, 1–2 Cor, Gal, Phil, 1 Thes, Phlm; see: R. E. Brown, *An Introduction to the New Testament*, New York 1997, p. 6.

<sup>72</sup> See more: J. Duncan, M. Derrett, *Law in the New Testament*, London 1970, chapter: *Paul as an Oriental Lawyer*, p. 396–368, here: p. 396.

<sup>73</sup> J. Knox, *Chapters in the Life of Paul*, ed. D. R. Hare, Macon 1987, p. 87.

<sup>74</sup> St. Paul as Roman citizen resorted to secular law to protect himself from enemies. See more: J. Knox, *Chapters in the Life of Paul...*, p. 87.

<sup>75</sup> R. F. Collins, *The Origin of Church Law*, *The Jurist* 61 (2001), p. 134–156, here especially: p. 135.

a structural change in the life of the community at the earliest moment of the Church is accompanied by ease with which the Twelve introduced the creation of the Seven in response to a need (cf. Acts 6, 1–6). Other examples of written laws are: recognition of the bishops (*episkopoi*, ἐπίσκοποι), priests (presbyters – *presbyteroi*, πρεσβύτεροι) and deacons (*diakonoi*, διάκονοι, cf. Phil 1, 1), necessity of delegation for preaching and proclaiming the gospel (Acts 10, 42; Acts 1, 8) such as Christ’s delegation given to the Apostles (cf. Jn 20, 21) or the ministry of St. Peter as sign of the unity of Church (Mt 16, 17–19). Very important legal issue was dealt with at the Council of Jerusalem (Acts 15). It shows the exercise of legislative power in the early Church in a response to a growth of the members coming from Gentiles.<sup>76</sup>

Although there is always place in the Church for law (1 Tm 1, 5–9), this all leads to the conclusion that the Church enunciated and acted on the principle of maximum adaptation with a minimum of acts of law.<sup>77</sup> As it was said sharply: “[is it] quite mistaken notice that Christ’s teaching was anti-law, and that Christ came to free men from law? Away with the letter, and back to the spirit. That is folly. [...] The notion, that his coming meant the end of law and legal thinking is false.”<sup>78</sup> As it was presented, the New Testament validates the existence of law in the Church.

### 1.2.6.2. Law in Other Books

Not only the discipline of primitive Christians is described in the New Testament. There are other books containing the discipline in the Post-Apostolic and Early Church that can show the self-consciousness of the first Christians and their discipline.<sup>79</sup>

The *Didache* or *Doctrina duodecim Apostolorum*<sup>80</sup> is one of the first and most precious post-apostolic writings, which contains a collection of moral, liturgical and disciplinary instructions. It can be called “a church manual.” There are precise liturgical prescriptions about the Eucharist.<sup>81</sup> The author points out also the days of fasts<sup>82</sup> or the way of frequency of prayers during the

<sup>76</sup> See more: F. F. Bruce, *Commentary on the Book of Acts*, [in:] *The International Commentary of the New Testament*, ed. F. F. Bruce, Grand Rapids 1975, p. 298–316.

<sup>77</sup> Cf. CLSA, *The Role of Law in the Church*, *The Jurist* 27 (1967), p. 166.

<sup>78</sup> J. Duncan, M. Derrett, *Law in the New Testament*, London 1970, p. xxvi.

<sup>79</sup> J. A. Coriden, *Introduction to Canon Law*, New York 1990, p. 10–12.

<sup>80</sup> *Die Apostolischen Väter. Griechisch-deutsche Parallelausgabe auf der Grundlage der Ausgaben von Franz Xaver Funk/Karl Bihlmeyer und Molly Whittaker*, transl. M. Dibelius, D.-A. Koch, new transl. and ed. A. Lindemann, H. Paulsen, Tübingen 1992, p. 1–21. English translation: *The Didache, or, The Teaching of the Twelve Apostles: an Ancient Church Order of AD 85*, ed. and transl. W. R. McGrath, Millersburg 1986.

<sup>81</sup> *Didache* 9, 1–3.

<sup>82</sup> *Didache* 8, 1.

day.<sup>83</sup> There are also the clues as to who must be elected bishop and deacon and how to try them.<sup>84</sup>

There are many other subjects covered in this writing and in many others similar to it. Other examples are: *Traditio Apostolica S. Hippolyti* (ca. 218),<sup>85</sup> the *Didascalia Apostolorum* (ca. 250),<sup>86</sup> and the *Canones Ecclesiastici Apostolorum* (ca. 300).<sup>87</sup> They all contain clear directions on how to lead life according to faith. In most cases they were not issued by any formal authority. These texts were not a compilation of legal enactments. The earliest form of church discipline was the recorded customs of the believing communities. They were simply written and compiled ways of dealing with some problems in the field of practices of faith. The traditions of communities were written down as accepted practices. They were also a pattern for other communities that accepted them as their law.

What is common to these positions is that the author of these laws observed the life of the community carefully and with a great deal of attention. They were describing and prescribing reliable and proven customs as a rule for community and other communities. Sometimes they were trying to correct the custom and added new norms according to their imagination. By doing all these they tried to solve problems and demonstrate the best way to practice faith.<sup>88</sup> What is important is that they were trying to regulate with norms all of the Christian life. All this must serve as an important clue for present the legislator in the Church.

In the shaping of church law, one must consider what is called nowadays pseudo-apostolic literature that includes ethical teaching, liturgical prescriptions and disciplinary rules. The teaching was supportive to missionary work.<sup>89</sup>

A good summary of this point would be a citation: "All that can be stated beyond a peradventure, in view of the numerous fixed regulations on the subject of office and of church life which are recorded in the Pastorals, is this: canon law has arrived and, what is more, is regarded as entirely legitimate.

<sup>83</sup> *Didache* 8, 3.

<sup>84</sup> *Didache* 15, 1–2.

<sup>85</sup> *La Tradition Apostolique de saint Hippolyte. Essai de reconstitution*, B. Botte, Liturgiewissenschaftliche Quellen und Forschungen 39, ed. A. Gerhards, Münster 1989. English translation: *The Apostolic tradition of Hippolytus*, transl. and ed. B. S. Easton, Cambridge 1934.

<sup>86</sup> *The Didascalia apostolorum in Syriac*, ed. A. Vööbus, Louvain 1979. English translation: *The Didascalia Apostolorum in English*, transl. M. D. Gibson, London 1903.

<sup>87</sup> *The Apostolic Church Order: the Greek Text with Introduction, Translation and Annotation*, introduction, transl. and ed. A. Stewart-Sykes, Strathfield 2006.

<sup>88</sup> M. Michalski, *Antologia literatury patrystycznej*, vol. 1, Warszawa 1975, p. 301.

<sup>89</sup> J. Gaudemet, *Les sources du droit de l'Église en Occident du 11e au 17e siècle*, Paris 1985, p. 16 ff.

The Pastoral Epistles do not bear witness to a canon law which is only just beginning, but to one which is already fairly well developed; and they see that law as an integral part of the spiritual nature of the Church and its offices.<sup>90</sup> As it could be seen, in the first three centuries Christians built their rules and norms to regulate the life of faith. They provided guidance for various aspects of Christian life. It has been observed that the primitive and ancient Church from its inception was both spiritual communion and corporate society with a sacramental and juridical life. Christians developed that sacramental and juridical nature of their community out of their life.<sup>91</sup>

### 1.3. Some Characteristics of the Phenomenon of Law in the Church

As it has been demonstrated, law belongs to the genesis of the Church. It can be said that it also belongs to the reality of it.<sup>92</sup> Law comes from inside the Church and is a product of Church's life. It does not come into the Church from outside but it rather reflects foundation, life and purpose of the Church. It means that church law cannot be separated from the Church. It belongs to the nature of the Church and fully accords with it and reflects it.<sup>93</sup>

The phenomenon of the law in the Church ought to be seen primarily as a religious phenomenon and only later as a sociological phenomenon, cultural phenomenon, psychological phenomenon, or legal phenomenon, etc.<sup>94</sup> Of course, it is possible to look at law of the Church only as a phenomenon of non-religious occurrences, but it would be an unjustifiable reduction.<sup>95</sup> In norms, laws, institutions a reality of the Church must be seen.<sup>96</sup> By them the Church is expressing itself to the world. Law is one of the forms of its instruction and realization of the Church's mission.<sup>97</sup>

This is a reason why this law understood as a phenomenon of life of the community has its peculiar characteristics. The awareness of them is of essence

<sup>90</sup> H. von Campenhausen, *Ecclesiastical Authority and Spiritual Power in the Church of the First Three Centuries*, transl. J. A. Baker, Stanford 1969, p. 118.

<sup>91</sup> S. Kuttner, *Some Considerations on the Role of Secular Law and Institutions in the History of Canon Law*, [in:] *Studies in the History of Medieval Canon Law*, ed. S. Kuttner, Hampshire 1990, p. 351, p. 356–357.

<sup>92</sup> R. Sobański, *Grundlagenproblematik...*, p. 141.

<sup>93</sup> *Sacrae disciplinae leges*, p. xi.

<sup>94</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 19. See more: R. Sobański, *O teologicznych i socjologicznych przesłankach teorii prawa kościelnego*, *Analecta Cracoviensia* 10 (1978), p. 369–386.

<sup>95</sup> Cf. R. Sobański, *Teoria prawa kościelnego...*, p. 27, ft. 6.

<sup>96</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 25.

<sup>97</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 32.

for the legislator. He has to bear in mind the characteristics, which make the law fit the Church.

### 1.3.1. Essence of Faith for Law

The factor that is shaping the life of the Church in the first place is faith. In the Church, awareness of importance of the rules for faith shaped the style of living and, reversely, the positive feedback can be seen between the way of living and regulations. It can be said that faith bears fruit in *lex disciplinae*. There is an opinion that law as a phenomenon would still exist in the community of believers even if canon law did not have a legal form known from jurisprudence.<sup>98</sup>

#### 1.3.1.1. Attitude Seen in Names

The expression *disciplina* was taken into the Church from Roman law where it had many meanings.<sup>99</sup> It could mean, for instance, the rules affecting orderly conduct, primarily in military service (*discipline militaris*),<sup>100</sup> public order (*disciplina publica*).<sup>101</sup> It also meant discipline, order, regulation (*disciplina iuris*)<sup>102</sup> or norm, precept, guideline (*disciplina legum*).<sup>103</sup> Later on the word *disciplina* began to mean loyalty or obedience to the law of God, and conduct in accordance to this.<sup>104</sup> The most important thing is that in the early Church the *lex disciplinae* were taken not from civil systems of law but from divine Revelation. Of course, sometimes the first Christians reached out to other law systems and received rules from other societies but the reason for it was exactly the same as in formulating their own specific law: to fulfill the obligation of faith. They incorporated rules but not the civil way of thinking about law. That is why a distinction between *leges* and *canones* was made and is still in force today.

*Leges* were used to name rules given by Caesar or generally speaking any civil authority. So the term was designated exclusively for civil law.<sup>105</sup> But *canones* were rules of Christian life given by the Church, especially by church synod

<sup>98</sup> R. Sobański, *Duch i funkcja prawa kościelnego*, Prawo Kanoniczne 27 (1984) no. 1–2, p. 32–33.

<sup>99</sup> Entry: *disciplina*, [in:] A. Berger, *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953, p. 438.

<sup>100</sup> *Dig.* 2. 12. 9.

<sup>101</sup> *Dig.* 1. 11.

<sup>102</sup> *Cod.* 4. 32. 22.

<sup>103</sup> *Cod.* 4. 6. 8.

<sup>104</sup> Entry: *disciplina*, [in:] A. Souter, *A Glossary of Later Latin to 600 A. D.*, Oxford 1957, col. 106b.

<sup>105</sup> Entry: *leges*, [in:] J. Sondel, *Słownik łacińsko-polski dla prawników i historyków*, Kraków 1997, p. 570–572.



or council.<sup>106</sup> For the first time the word *canon* is used in some of the letters of St. Paul. For instance, in Gal 6, 16 he says that who will obey the canon shall live in peace. Canon is *principium normativum*.<sup>107</sup> In the fourth century the term *canon* was applied to the ordinances of the Church Councils. The word *canon* comes from Greek: κανών (*kanon*), Hebrew: קנה (*kaneh*). The words means: rule, standard, measure, or practical direction.<sup>108</sup>

It must be mentioned that later on, probably from 1<sup>st</sup> part of 7<sup>th</sup> century, the term *nomocanon* was in use. It was given to Church's collections or compilations of different kinds of regulations, in which laws were formulated by both the civil and the ecclesiastical authorities on ecclesiastical matters.<sup>109</sup> Before the twelfth century the body of ecclesiastical legislation was in the process of formation and the term *canon* was used as a norm for ecclesiastical community: symbol of faith, norms on worship and moral standards, rules for organization of structure community and discipline but also as collection of Christian scriptures. As it is seen, the range of topics was wide. Gratian wrote about the word in question: "Porro canonum alii sunt decreta Pontificum, alii statuta conciliorum. Conciliorum vero alia sunt universalialia, alia provincialialia. Provincialialia alia celebrantur auctoritate Romani Pontificis, presente videlicet legato sanctae Romanae ecclesiae; alia vero auctoritate patriarcharum, vel primatum, vel metropolitanorum eiusdem provinciae. Hec quidem de generalibus regulis intelligenda sunt."<sup>110</sup>

The expression canon law (*ius canonicum*) as opposed to civil law (*ius civile*) became current only about the beginning of the twelfth century. Later there comes into existence the *corpus iuris canonici* corresponding with the *corpus iuris civilis*.

To sum up, it must be underlined that the difference in names shows the difference in attitude. *Lex* was more like one-directional norm that one must obey. The will of rules was *lex*. As it was formulated in Roman law: "Quod principi placuit legis habet vigorem."<sup>111</sup> *Canon* was something good, right, and accurate. It was a rule to which one should cling by will and heart, not only

<sup>106</sup> Entry: *canon*, [in:] A. Souter, *A Glossary of...*, col. 37b.

<sup>107</sup> In 2 Cor 10, 13. 15. 16; Gal 6, 16; Phil 3, 16; see: J. Urbański, *KANON w 2 Kor 10, 13–16 i w Ga 6, 16. Etymologia i myśl ezegetyczno-teologiczna*, Bielsko-Żywieckie Studia Teologiczne 11 (2010), p. 205.

<sup>108</sup> Cf. D. III, c. 1.

<sup>109</sup> Entry: *nomocanon*, [in:] J. Sondel, *Słownik łacińsko-polski...*, p. 660; R. Potz, entry: *nomocanon*, [in:] *Lexikon des Kirchenrechts*, ed. S. Haering, H. Schmitz, Freiburg-Basel-Wien 2004, col. 679–680. There is an interesting opinion that even today church legislator can rely on civil law and treat its rules as *nomocanons*, see: Ch. Donahue, *A Crisis of Law? Reflections on the Church and the Law Over the Centuries*, *The Jurist* 65 (2005), p. 30.

<sup>110</sup> D. III, c. 2.

<sup>111</sup> *Dig.* 1, 4, 1; cf. *Inst.* 1, 2, 6.

in external actions. The source of canons was not a will of head of community but the requirements of faith. Everything written by the competent ecclesiastical authorities, even when the subject of norm was an earthly one, for instance, a material issue, was required by faith. The authorities ordered it being aware of their responsibilities to lead people to salvation and not simply because they just wanted to organize the life of the faithful. The source of *canon* goes far deeper than *lex*. It shows pattern of righteous living (*norma recte vivendi*).<sup>112</sup> The reason behind the difference was visible also in translation. *Canon* was hardly ever translated to Latin by *lex*, but by *regula*.<sup>113</sup>

### 1.3.1.2. *Ordinatio fidei* and *ordinatio rationis*

As it has been demonstrated, in the beginning, the church lawgiving activity as writing of the separate acts was not clearly visible. Christianity did not start as associations or states do, that is, from the written law. It does not mean at all that there was no law in the primitive Church. The beginning of law was in rules of faith and the life according to faith was a law. There was a mutual connection between faith and rules of life, which is church law.<sup>114</sup>

Taking into consideration the way of the presence of law in the primitive Church, it can be seen that St. Thomas Aquinas' definition of law: *lex est ordinatio rationis*<sup>115</sup> is not enough to define law in the Church. From the starting point, it was proposed to define law as *ordinatio fidei*.<sup>116</sup> According to this point of view, canon law must be defined in this way, because it is not produced by any human legislator but by the Church itself and Church decisive epistemological criterion is faith and not reason.<sup>117</sup> Canon law is produced by the Church and participates in the nature of the Church and it means that faith and its rules play central role.

The critics of the position say that the proposal in question goes too far. They accuse it of wrongly stressing supernatural aspects of the Church and neglecting or discounting its humanness. Opponents say that it is important

<sup>112</sup> J. H. Burns, *The Cambridge History of Medieval Political Thought c. 350–c. 1450*, Cambridge 1995, p. 266, and p. 266, ft. 110.

<sup>113</sup> D. III, c. 1: *Canon grece, regula latine noncupatur*. See more about *canon* as rule in the Church: R. Sobański, *Teoria prawa kościelnego...*, p. 190–193.

<sup>114</sup> Peter Archbishop of Orthodox Diocese of New York and Jersey, *Making of Written Law in the Church*, *Studia Canonica* 31 (1997), p. 117.

<sup>115</sup> ST, I–II, q. 90, a. 4 co: “Et sic ex quatuor praedictis potest colligi definitio legis, quae nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata.”

<sup>116</sup> E. Corecco, *Ordinatio rationis o ordinatio fidei? Appunti sulla definizione della legge canonica*, *Communio* 36 (1977), p. 48–69.

<sup>117</sup> E. Corecco, *The Theology of Canon Law: a Methodological Question*, transl. F. Turvasi, Pittsburg 1992, p. 147.

to pay attention to the need of creating a harmony between divine gifts and human limitations in the Church.<sup>118</sup>

It is reason that allows the legislator to be oriented in situation of Christians, their conditions, needs, and circumstances. Reason is that power which allows one to get to know and to remain in contact with reality. The main object of canon law is the Church in its earthly conditions.

The Church is a unique societal association that was established by God out of His creation. From the first moment of its existence the Church had mixed human-God nature. God wishes to maintain it in a specific way due to its supernatural aim. It requires a specific order. It means that the juridical nature is inalienable from the Church.

The juridical nature existed from the very beginning but it was developed and elaborated by the practice of faith into the system of law (cf. Acts 15, 28). As a result the law of the Church is different but not completely different from law as it is produced by human beings outside the Church, in civil communities, for instance.<sup>119</sup> The law of the Church provides the legal structures for institutions, juridic persons, and norms for acting.

It is true that the Church to protect and promote faith defines dogmas and truths of faith. For the same reasons the same Church makes law.<sup>120</sup> There is no act of the Church that would not come from the faith, but at the same time the faith calls for the use of reason. Activity of the Church is inspired by faith but it is done by people who use their God given talents. The very important talent is their reason. The Church creates law because of the main aim, which is salvation. The motivation for making law and obeying it is supernatural. The possibility of making law is a divine gift granted to the Church by the Holy Spirit. It can be said, that canon law is ordination of faith and also ordination of reason. Because of faith, the reason is in service. The very beginning is always the faith.

It is right to say that the Church is One, Holy, Catholic and Apostolic, but it is also legal. As the Church is grace-filled, charismatic, infallible, and eschatological, it is also juridical.<sup>121</sup> One can say that Church is juridical because it is an institution of salvation.

The opinion that canon law is a creation of both faith and reason is a more balanced statement. In such thinking, the Church is not only a charismatic community but also an institution that needs some laws. It makes canon

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<sup>118</sup> L. Örsy, *Corecco's Theology of Canon Law: a Critical Appraisal*, *The Jurist* 53 (1993), p. 193.

<sup>119</sup> Cf. R. Coertzen, "Decently and in Order": a Theological Reflection on the Order for, and the Order in the Church, *Leuve-Dudley* 2004, p. 51.

<sup>120</sup> Cf. R. Sobański, *Ustawa Kościelna – "ordinatio rationis" czy "ordinatio fidei"?*, *Collectanea Theologica* 48 (1978) fascicle 1, p. 34.

<sup>121</sup> L. Örsy, *Corecco's Theology of Canon Law...*, p. 191.

law not only immersed into a divine reality, with some remote resemblance to the man-made norms by which the community lives, but rather immersed in divine reality while remaining a genuine law.<sup>122</sup>

Canon law cannot be over-exalted in the Church. It cannot be given the same standing that is due to the revealed doctrine. This is true that some canons contain doctrine, which makes them as important as doctrine they include, but many of canons are just human inventions. Not to every norm the response of the faithful must be *oboedientia fidei*.<sup>123</sup> It means that canon law refers to the earthly system of norms that the Church creates on its pilgrim way. Relating it all to the legislator, although he is inspired by faith, he has to turn to human beings and their way of thinking. It means taking into consideration the earthly circumstances.

Law in the Church is *ordinatio fidei* directed and intended to help to grow *communio* and it is always shaped by reason.<sup>124</sup> To sum up, it is not good to say that *lex ecclesiae* is only *ordinatio fidei*. Canon law is necessarily inspired by faith and the reason and justification of its existence is faith. But it must be added at the same time that *lex ecclesiae* is, indeed, *ordinatio rationis*. It is inspired by the doctrinal content of faith and the inner dynamism of faith. *Ordinatio rationis* is rooted in doctrinal knowledge, explained and articulated by theology, may carry a proper manifestation of the truth concerning the Church, and, thus, enter the realm of faith.<sup>125</sup>

Faith is necessary to create, understand and obey canonical rules. They have deep sense only in optic of *credo*.<sup>126</sup> Reason alone never becomes capable of apprehending mysteries as it apprehends those truths, which constitute its proper object. It absolutely needs faith when it seeks earnestly, piously, and calmly to attain by a gift from God some understanding of mysteries.<sup>127</sup>

### 1.3.1.3. Faith as Boundary for Church Law

Legislation activity of the Church aims to regulate reality of the Church, that is, a community united by the Holy Spirit in faith. The object of the regulations is life of the community as a whole but at the same time also an individual life of every faithful. Of course, the Church's legislator writes

<sup>122</sup> L. Örsy, *Corecco's Theology of Canon Law...*, p. 194.

<sup>123</sup> Cf. L. Örsy, *Theology and Canon law: an Inquiry into Their Relationship*, [in:] *Theology and Canon Law: New Horizons for Legislation and Interpretation*, Collegeville 1992, p. 177.

<sup>124</sup> Cf. W. Aymans, *Lex Canonica, Erwägungen zum kanonistischen Gesetzesbegriff*, Archiv für katholisches Kirchenrecht 153 (1984), p. 353.

<sup>125</sup> J. M. R. Tillard, *Ecclesiology of Communion and Canon Law. The Theological Task of Canon Law: a Theologian's Perspective*, CLSA Proceedings 58 (1996), p. 28.

<sup>126</sup> R. Sobański, *Prawo w prawie kościelnym*, Prawo Kanoniczne 36 (1993) no. 1–2, p. 12.

<sup>127</sup> Concilium Oecumenicum Vaticanum I, Constitutio dogmatica *Dei Filius* de fide catholica, Sessio III, 24.04.1870 (DS 3016).

laws that are general and universal but he must be interested in reality of life of the faithful. The legislator does not make law above heads of the people. He cannot concentrate only on the community as an object, but must see the community in terms of individuals. How far may the regulations interfere with the life of the Church?

The limits are in faith itself but the limits are conditioned by historical circumstances.<sup>128</sup> The faith is itself the limit. Since the law in the Church has the deep source in faith, the regulations should be always connected with faith. The connection would have different measure. Sometimes that would be very close relation, like in canon about sacraments, sometimes the connection would be weak, e.g., in procedural law. But always the limit is faith, not only in the sense that nothing in norms can be against the faith, but also in the sense that norms without any connection with faith are unjustified in the Church. They are simply unwanted and unneeded. If the norms are in no relation to faith they are unnecessary for the community of faith, that is, the Church. The limit is historically conditioned, that is, law is given to community as a help to practice faith in certain historical circumstances. The change of the circumstances causes change of needs for the law.

The legislator must be aware of the limits of his competency not only on practical level, that is, his legislative competency, but he must abstain himself from the temptation to regulate what must not be regulated by canon law. The system of canonical law must be complete but only in the realm of faith. Any extra norm, that is, not in any way demanded to regulate practice of faith is harmful.

### 1.3.2. Descriptive Definition of the Phenomenon of Law

First of all, the legislator must be aware of what he does. The question: "What is law?" is a very old one. An attempt to formulate the universally valid definition has been so far unsuccessful.<sup>129</sup> Already I. Kant ironically said that the lawyers were still searching for a definition of the object of their interest and could not find it.<sup>130</sup>

Knowing all this, and being aware that *omnis definitio in iure periculosa est*,<sup>131</sup> this section will offer not a definition but an overview of church law. To be closer to understanding of the matter, two ways will be proposed, one

<sup>128</sup> Cf. R. Sobański, *Kościół – prawo...*, p. 279–281.

<sup>129</sup> About the efforts see: J. Stone, *Legal System and Lawyers' Reasoning*, London 1964, p. 165–185; R. Sobański, *Epistemologiczne problemy pojęcia prawa kościelnego*, *Prawo Kanoniczne* 33 (1990) no. 3–4, p. 47–48.

<sup>130</sup> I. Kant, *Kritik der reinen Vernunft*, Leipzig 1838, p. 565: "Noch suchen die Juristen eine Definition zu ihrem Begriffe vom Recht."

<sup>131</sup> Cf. *Dig.* 50.17.202.

according to *via negativa*<sup>132</sup> and the other to *via positiva*. The proper picture of church law would be probably in between them.<sup>133</sup>

Church law is not a sacred text, that is, normative and authoritative ancient text intellectually interesting for certain community.<sup>134</sup> Canon law is not like the Bible. Church law is not like constitutions are for civil communities. It can be said, that church law brings normative message to community and in this sense it has authority, but church law is not constitutive for Church like the Bible is. When instead of the Bible another sacred book would be presented to the community, the people's faith would be completely different. When the constitution would be changed for a constitution of another state, the state in question would not be the same. But if most regulations from church law were changed, the Church would still remain the same. Of course, church law is inseparable from the Church.<sup>135</sup> There is no Church without church law and *vice versa*. It is true but only when church law is understood as a phenomenon of the Church, not a collection of regulations.

Church law is not sacred Tradition in the sense in which St. Vincent of Lérins understood it as something universal, antique and constant.<sup>136</sup> Church law can be changed in its merely positive character through the legislative authority of the Church. On the other hand, church law flows from sacred Tradition. Law is more open to the future than it is concerned with trying to conserve the past but it is still based on sacred Tradition and is open to custom as a source of law.

Church law is not a dogma or summary of doctrinal statements. No one has to believe in what is written in canon law unless it cites the dogmas. To refer to the Church official teachings one should consult not the code but the documents of the Church. On the other hand, there exist in church law many doctrinal laws that contain specific doctrinal points drawn from, for instance, the Bible or Councils. Of course, in a certain sense law could be understood as a great effort to translate the Bible, conciliar doctrine and ecclesiology into canonical language. Law in the Church is like *magnus nismus transferendi*.<sup>137</sup> As it was said: "Non pochi canoni, specialmente in materia sacramentaria o ecclesiologica, offrono delle sintesi teologiche di notevole precisione ed alcuni, quando l'argomento lo permette, riproducono quasi

<sup>132</sup> *Via negativa* is the method in use in theology from the late fifth century.

<sup>133</sup> The idea of such type approach to definition of canon law are taken from: J. J. Coughlin, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, Oxford 2010.

<sup>134</sup> Cf. J. Pelikan, *Interpreting the Bible and the Constitution*, Yale 2004, p. 9.

<sup>135</sup> R. Sobański, *Grundlagenproblematik ...*, p. 141; cf. Giovanni Paolo II, Messaggio *Il ruolo dei canonisti nella vita della Chiesa*, 10.08.1984, *Communicationes* 16 (1984), p. 126.

<sup>136</sup> Vincentius Lirinensis, *Commonitorium primum* [ex Editione Baluziana], *PL* 50, col. 640.

<sup>137</sup> *Sacrae disciplinae leges*, p. XI.

ad litteram le formulazioni stesse del Concilio Vaticano II.<sup>138</sup> It is true that there is a difference in proclaiming doctrine and promulgating commands, but not as big as one of the opinions claims it to be: "It cannot be stressed enough that there is a great difference between the two actions in question."<sup>139</sup> It must be noticed and underlined that all commands are given for the sake of doctrine and without doctrine or outside the doctrine existence of law would be incomprehensible.

Church law must be distinguished from moral theology, although both have had a long common history and an intimate bond.<sup>140</sup> This part of theology focuses on human acting according to God's will. Moral theology tries to give concrete and binding answers as to what is good or wrong in the eyes of God.<sup>141</sup> It is true that law in the Church preserves and defends values that for moral theology are important. There is no church law that would be in contradiction to morals. In law, moral duty is to be made a legal obligation (cf. can. 492–502). Law is not a collection of such answers and legislator's main goal is not like the one of his moral theology colleagues to determine how man should live.

Canon law is not pastoral theology. This branch of practical theology concentrates on self-realization of the Church as God's acting in the world. It gives clues for practical application of the Church teaching in the context of Church ministry.<sup>142</sup> Although in *CIC* 1983 there are many mentions about the importance of pastoral dimension of the life of the Church (can. 242 § 1, can. 252 § 1, can. 255, can. 258), examples of pastoral actions (can. 1676, can. 1695), and orders to carry the action properly (can. 528, can. 529), law is not only to serve pastoral mission of the Church, in the sense of solving the problems in the Community treating them as challenges to be overcome in tactical and strategic way.<sup>143</sup>

Church law is not a regular positive law as laws given by a secular legislator are. There are institutions in church law not known to other systems of laws such as, e.g., *aequitas canonica*, *privilegium*, *dispesatio*, *epikia*. In making

<sup>138</sup> R. C. Lara, *Discorso*, 3.2.1983, *Communicationes* 15 (1983), p. 32 ("Numerous are the canons, especially in matters of sacraments or ecclesiology, which offer very precise theological syntheses, and some, if the matter allows it, reproduce almost literally the very wording of the Second Vatican Council"). For further reference, see: L. Örsy, *From Vision to Legislation: from the Council to a Code of Laws*, Milwaukee 1985.

<sup>139</sup> L. Örsy, *The Reception of Laws by the People of God: a Theological and Canonical Inquiry in the Light of Vatican Council II*, *The Jurist* 55 (1995), p. 516.

<sup>140</sup> C. van de Wiel, *History of Canon Law*, Louvain 1991, p. 127–129.

<sup>141</sup> Entry: *teologia moralna*, [in:] K. Rahner, H. Vorgrimler, *Mały słownik teologiczny*, transl. T. Mieszkowski, P. Pachciarek, Warszawa 1987, col. 569–570.

<sup>142</sup> Entry: *teologia pastoralna*, [in:] K. Rahner, H. Vorgrimler, *Mały słownik...*, col. 571.

<sup>143</sup> Cf. Giovanni Paolo II, *Messaggio Il ruolo dei canonisti nella vita della Chiesa*, 10.08.1984, *Communicationes* 16 (1984), p. 127.

church law more natural law and divine positive law are involved, which is not the case in making of the state law. In state law much more depends on legislator's will.

On the other hand, Church creates legal order. It is independent from other legal orders, made, for instance, by state.<sup>144</sup> Canon law, like any other law, contains norms to regulate life of the community. Church law is not for the sake of information; it is not just prescribing options or giving pieces of advice. The law requires to be obeyed like any other law. It is arguable that church law roughly measures up to procedural requirements of law stated by civil jurisprudence. According to it law must be: 1) general, 2) publicized, 3) prospective, not retroactive, 4) clear, 5) logical, 6) capable of obedience in practice, 7) stable and not subject to too frequent change and 8) administered in a way that is congruent with the rule as announced<sup>145</sup> and also 9) independent judiciary, fair hearings which are open to publics, 10) review of elected officials, 11) limitations on the police power of the state.<sup>146</sup> It means that church law is a genuine law.

Trying to sum up the positive and negative way to approach the definition of church law, the idea of Pope John Paul II can be used. He has envisioned that three books make an ideal triangle (*un ideale triangolo*). The top is, of course, Sacred Scripture, the eternal book of the Word of God, and the center and heart of it is gospel. But the two lower books are the acts of the Second Vatican Council on one side, and the 1983 code on the other side. These two books are a very valid and significant combination.<sup>147</sup> In such combination, law is seen as a necessary supplement for the Church in fulfilling mission in the world.

### 1.3.3. Aims of Law

Entering into discussion about the aim of canon law, it should be said that the Church makes law for itself. It means that goals of law are inside the community of the faithful. There is no goal for the canon law outside the Church. The aim of the law is within the Church, and it can be said that it is the Church itself.<sup>148</sup> The Church is making law for itself thinking about itself and its own aim.

<sup>144</sup> It was an achievement of the Italian school of canon law. It claimed that canon law is law in the same sense as civil law. However this approach is deficient because the theory detaches canon law from the religious soil and from the transcendental scope, can be in the same measure used. See more about the school: R. Sobański, *Szkoły kanonistyczne*, Warszawa 2009, p. 72–85.

<sup>145</sup> L. Fuller, *The Morality of Law*, New Haven 1967, p. 39.

<sup>146</sup> J. Raz, *The Authority of Law. Essays on Law and Morality*, Oxford 1979, p. 216–217.

<sup>147</sup> Joannes Paulus PP. II, Allocutio a Summo Pontifice in aula supra porticum Vaticanae basilicae habita, ad novum Codicem Iuris Canonici, paucis ante diebus promulgatum, publice exhibendum, 3.02.1983, *AAS* 75 (1983) I, p. 455–463, especially p. 463.

<sup>148</sup> R. Sobański, *Kościół – prawo...*, p. 241.



Having this in mind, it should be taken into consideration that the Second Vatican Council teaches that “*Ecclesia sit in Christo veluti sacramentum seu signum et instrumentum intimae cum Deo unionis totiusque generis humani unitatis, naturam missionemque suam universalem, praecedentium Conciliorum argumento instans, pressius fidelibus suis et mundo universo declarare intendit*” (LG 1).<sup>149</sup> The aim of unifying people in Church is to lead them to salvation. The salvation is only given in the community of Church. It is becoming clear that two main aims of law in the Church are obvious: salvation of souls and building of community. They are, of course, in the Church always together. Christ is the bridge between an individual and society in the sense that He is the principle of unity. In Christ, one receives baptism, becomes a member of community and in the community of the faithful one can foster one’s faith; in community one moves toward salvation.<sup>150</sup>

### 1.3.3.1. *Salus animarum*

Although Cicero wrote: “*Ollis salus populi suprema lex esto*,”<sup>151</sup> the context of this sentence indicates that he did not think about spiritual connection of this rule. Romans saw the principle of law rather in a man and the word: “*Hominum causa omne ius constitutum est*.”<sup>152</sup>

Christianity came with completely new idea of the principle of law: law was for faith, and faith was for salvation. That was intuitively recognized by Christians.<sup>153</sup> The way of thinking went like this – God indeed wants the salvation of the soul of every human being and the Church is the medium through which God wants to grant grace to the people. Thus the task of the Church implies that God’s salvific action has to come through the organs and operations of the Church: liturgy, laws, and pastoral care. All ecclesial action therefore must be understood as salvific action, that is, the *salus animarum* is its supreme purpose.<sup>154</sup> And the principle in question has in history of law of the Church a very rich tradition.<sup>155</sup>

<sup>149</sup> LG 1: “the Church is in Christ like a sacrament or as sign and instrument of both a very closely knit union with God and of the unity of the whole human race, it desires now to unfold more fully to the faithful of the Church and to the whole world its own inner nature and universal mission.”

<sup>150</sup> R. Sobański, *Nauki podstawowe prawa...*, vol. II, p. 126.

<sup>151</sup> Cicero, *De Legibus*, Liber III, § 3, <http://www.thelatinlibrary.com/cicero/leg3.shtml> (access: 13.05.2009).

<sup>152</sup> *Dig.* 1.5.2.

<sup>153</sup> Cf. R. Sobański, *Kościół – prawo...*, p. 23.

<sup>154</sup> M. Wijlens, “*Salus animarum suprema lex*”: Mercy as a Legal Principle in the Application of Canon Law?, *The Jurist* 54 (1994), p. 562.

<sup>155</sup> See more: L. S. Marczuk, *The Use of „salus animarum est suprema lex” as a Principle for the Interpretation of Canon Law*, Washington 1989, p. 4–51.

The first one to start discussing aims of canon law was St. Ivo of Chartres. He was a zealot of the Gregorian reform. Underlying the necessity of uniformity in making of law, he said that all institutions of church law must serve the salvation of souls: “Cum ergo omnis institutio ecclesiasticarum legum ad salutem referenda sit animarum.”<sup>156</sup> St. Thomas Aquinas seemingly: “Finis autem legis divinae est perducere hominem ad finem felicitatis aeternae”<sup>157</sup> and “Finis autem iuris canonici tendit in quietem Ecclesiae, et salutem animarum.”<sup>158</sup> The Church’s legislator is to follow God as legislator and he must focus on salvation of souls. Likewise F. A. Reiffenstuel for whom *finis ultimatius* of church law was *salus aeterna homini*.<sup>159</sup> Pope Pius XII in particular called attention to the close connection between the salvation of the souls and ecclesial praxis. The Pope stressed the importance of *salus animarum* for canon law under three aspects: 1) *salus animarum* is rooted in an ecclesiology that understands the Church as existing for the salvation of people; 2) *salus animarum* is the ultimate and highest goal of ecclesial action, and 3) for *salus animarum* to become a legal reality, it ought to be applied by those who implement the law.<sup>160</sup> The Second Vatican Council reaffirmed the unbroken tradition that the Church is not an end in itself but it and all its institutions, including canon law, stand in service of the *salus animarum*.

Now the principle “*salus animarum suprema lex*” is recognized as aim, sense and motive of law in the Church and is cited in can. 1752. But it determines the direction of the realization of all law in the Church. Every legal action should take place in light of this principle. So the order in the Church appears in the accessibility of the best means for the faithful to obtain *salus animarum*, which is the ultimate end of ecclesial activity.<sup>161</sup>

It seems that it is better to speak rather about the person not the souls when the principle in question is cited.<sup>162</sup> Today’s theology prefers to speak of the

<sup>156</sup> Ivo Carnotensis, *Epistola* 60, *PL* 162, col. 74.

<sup>157</sup> *ST*, I–II, q. 98, a. 1 co.

<sup>158</sup> St. Thomas Aquinas, *Quaestiones de quolibet XII*, q. 16, a. 2 co.

<sup>159</sup> A. Reiffenstuel, *Ius canonicum universum*, vol. I, Parisiis 1864, § III, no. 41.

<sup>160</sup> Pope Pius XII addressed the rotal officials several times discussing this principle. See, for instance: Pius PP. XII, *Allocutio ad praelatos auditores ceterosque officiales et administros tribunalis S. Romanae Rotae necnon eiusdem tribunalis advocatos et procuratores*, 2.10.1944, *AAS* 36 (1944), p. 281–290; Pius PP. XII, *Allocutio ad praelatos auditores ceterosque Officiales et Administros Tribunalis Sacrae Romanae Rotae necnon eiusdem Tribunalis Advocatos et Procuratores*, 29.10.1947, *AAS* 39 (1947), p. 493–498, and Pius PP. XII, *Allocutio Adstantibus Emo P. D. Cardinali Magno Cancellario, Revmis Moderatoribus ac Doctoribus Decurialibus Pontificiae Gregoriana Studiorum Universitatis ceterisque praeclaris viris atque olim alumnis, qui convenerant ad celebrandum quartum expletum saeculum ab eadem Universitate condita*, 17.10.1953, *AAS* 45 (1953), p. 682–690.

<sup>161</sup> L. de Echevarria, *The Theology of Canon Law*, transl. P. Burns, *Concilium* 8 (1967), p. 7.

<sup>162</sup> M. Wijlens, “*Salus animarum suprema lex*”..., p. 589–590.

whole person rather than of the soul of someone. The Second Vatican Council in *Constitutio pastoralis Gaudium et spes* restated the ancient doctrine that body and soul together form the person (*GS* 3). The first chapter of the first part of the pastoral constitution is even entitled *De humanae personae dignitate*.

### 1.3.3.2. *Communio*

Living according to faith and taking care of one's own salvation means building *communio*, because salvation is given only in the Church of Christ as confirmed by St. Cyprian's of Carthage: "nemini salus esse nisi in Ecclesia possit."<sup>163</sup>

During the Second Vatican Council the Church described itself as a *communio*.<sup>164</sup> The Church is communion of life, love and truth (*LG* 9). *Nota explicativa praevia* to *LG* explains how to understand the expression. It is not understood as some kind of vague disposition but as an organic reality, which requires a juridical form and is animated by charity (no. 2). The key expression is still in the centre of many documents of the Church.<sup>165</sup> It designates the bond between God and His people and between the people themselves.<sup>166</sup>

The concept of *communio* is at the formal and at the constitutional level of canon law.<sup>167</sup> The notion of *communio* in reference to the Church can

<sup>163</sup> Cyprianus Carthaginensis, *Epistola* 62, *PL* 4, col. 371. It is also known as formula: *extra Ecclesiam nulla salus*. It was included in teaching of the Church: Concilium Oecumenicum Latenarese IV, *Constitutio* 1: *De fide catholica*, 11–30.11.1215, [in:] *Dokumenty Soborów Powszechnych. Tekst grecki, łaciński, polski*, ed. A. Baron, H. Pietras, vol. II (869–1312), Kraków 2002, p. 222 (DS 802): "Una vero est fidelium universalis ecclesia, extra quam nullus omnino salvatur"; Bulla *Unam Sanctam* Ecclesiam catholicam et ipsam aposolicam urgente fide credere cogimur et tenere, 18.11.1302 (DS 870); Concilium Oecumenicum Florentinum, Bulla *Cantate Domino* unionis Coptorum, 4.02.1442 (vel. 1441), [in:] *Dokumenty Soborów Powszechnych. Tekst grecki, łaciński, arabski, ormiański, polski*, ed. A. Baron, H. Pietras, vol. III (1414–1445), Kraków 2007, p. 602 and p. 604, no. 16 (DS 1351): "Firmiter credit, profitetur et predicat nullos extra ecclesiam catholicam existentes, non solum paganos, sed nec Iudeos aut hereticos atque scismaticos. eterne vite fieri posse participes, sed in ignem eternum ituros, qui paratus est dyabolo et angelis eius, nisi ante finem vite eide fuerint aggregati." For clarification of the formula, refer to the document issued by Congregatio pro Doctrina Fidei, *Declaratio Dominus Iesus* de Iesu Christi atque Ecclesiae unitate et universalitate salvifica, 6.08.2000, *AAS* 92 (2000), p. 742–765.

<sup>164</sup> Commentary to term *communio* see, e.g., J. Ratzinger, *Erläuternde Vorbemerkung*, [in:] *Lexikon für Theologie und Kirche, Das Zweite Vatikanische Konzil*, vol. 1, ed. J. Höfer, K. Rahner, Freiburg-Basel-Wien 1966, col. 350–359.

<sup>165</sup> J. A. Renken identifies some of the principal themes put forth about *communio* ecclesiology in recent magisterial sources. See: A. Renken, „*Duc in altum!*” *Communio: Source and Summit of Church Law*, *The Jurist* 63 (2003), p. 22–69, specially: p. 24–36.

<sup>166</sup> J. H. Provost, *Structuring the Church as a Communio*, *The Jurist* 36 (1976), p. 191–245.

<sup>167</sup> R. Sobański, *Inspiracje dla zagadnienia rozwoju wyływające z kanonicznego pojęcia communio*, *Śląskie Studia Historyczno-Teologiczne* 8 (1975), p. 259–269; R. Sobański, *W sprawie zasady formalnej prawa kościelnego*, *Prawo Kanoniczne* 30 (1987) no. 1–2, p. 3–30.

be found in many contexts in the canon law.<sup>168</sup> For instance, in *CIC* 1983 can. 204 § 2 says, that the Church, established and ordered in this world as a society, subsists in the Catholic Church, governed by the successor of Peter and the Bishops in communion with him. Christ's faithful are obliged to preserve their *communio* bonds with the Church at all times (cf. can. 209 § 1). One can lose *communio* by defecting from the Church by, for instance, heresy, apostasy or schism (can. 751). As it could be seen in the ecclesiology of the Second Vatican Council, law in the Church appears as an aim of community.<sup>169</sup> It must be underscored in full that ecclesiastical *communio* is both the source and summit of church law. Ecclesiastical law finds its origin in the Church, which is *communio*, and ecclesiastical law serves to build up the same *communio*.<sup>170</sup>

It is important to add that *communio* must not be understood only in the sociological way because it is a theological term. It assumes that all humans are anchored in God. Of course, the Church continues to display features of an earthly society. They are not eliminated.<sup>171</sup> As it was rightly noticed, it would indeed be too schematic and simplistic to play *communio* and *societas* against one another.<sup>172</sup>

In summary, it can be said that the aim of law in the Church is to take care of *communio* in both of its dimensions, that is, *communio* of believers<sup>173</sup> and *communio* of God and men (cf. *LG* 8). Law as *ordinatio fidei* is directed to help the life of the Church to blossom and to support growth of *communio*. It is to guard and defend the Church's endurance as *communio* of love.<sup>174</sup> Again, the main purpose of canon law is to save souls in *communio*.

<sup>168</sup> J. M. R. Tillard, *Ecclesiology of Communion and Canon Law*, CLSA Proceedings 58 (1996), p. 24–34.

<sup>169</sup> L. Gerosa, *Prawo Kościoła*, transl. I. Pękalski, Poznań 1999, p. 61

<sup>170</sup> J. A. Renken, „*Duc in altum!*” *Communio: Source...*, p. 23.

<sup>171</sup> R. Sobański, *Ustawa Kościelna – „ordinatio rationis”...*, p. 28.

<sup>172</sup> P. Krämer, *Theologische Grundlagen des kirchlichen Rechts nach dem CIC/1983*, Archiv für katholisches Kirchenrecht 153 (1984), p. 392–394.

<sup>173</sup> *Communio* of believers can be divided into: *communio fidelium*, *communio ministeriorum*, *communio hierarchica* and *communio Ecclesiarum* (which also includes the relationship between the Catholic Church and the separated churches and ecclesial communities); cf. W. Aymans, K. Mörsdorf, *Kanonisches Recht: Lehrbuch aufgrund des Codex Iuris Canonici*, vol. I (founded by E. Eichmann, continued by K. Mörsdorf, reworked by W. Aymans), Paderborn-München-Wien-Zürich 1991, p. 23; E. Corecco, *Canon Law and Communio. Writings on the Constitutional Law of the Church*, ed. G. Borgonovo, A. Cattaneo, transl. L. Feingold, Città del Vaticano 1999, p. 177.

<sup>174</sup> Cf. L. Gerosa, *Prawo Kościoła*, transl. I. Pękalski, Poznań 1999, p. 9, and bibliography on p. 9, ft. 4.

### 1.3.4. Functions of Law

In the theory of law the issue of the meaning of the term “function of law” has its significant place. Unfortunately, the analysis of the usage of the term leads to the conclusion that the term in question is ambiguous.<sup>175</sup> One of the meanings could be identical with result of law, that is, with an effect of norms in system of law.<sup>176</sup> Stating it in another way, one can say that function of law in Church is a result of application of norms in life of society for which the law was issued.

The question about the function of law in the Church does not belong only to philosophy of law or theology of law, but it also has ecclesiological as well as practical relevance.<sup>177</sup> The functions of canon law should not be shown from the society perspective and an individual perspective but both of them, simultaneously. The antinomy between society and individual for reasons presented above, is in some measure, overcome when one recalls that it refers in the context of canon law to the realm designated by the term “Christian.” The baptism, by which one becomes a Christian, creates such an important common ground for individual and society that what is good for an individual is also good for society and *vice versa*. The functions of church law go as follows.<sup>178</sup>

#### 1.3.4.1. Realization of Aims of Law

The first function of law in the Church is to aid individuals in society and society, as a whole, in the realization of its goals. The main internal goal of the individual faithful and community of the faithful is to fulfill Christ’s will and through this try to reach sainthood and gain salvation.<sup>179</sup> Church law must help in this realm and guide by giving clear clues and facilitate being in accordance with the will of Jesus Christ. In this sense, law is to serve the People of God by helping to fulfill the will of Church’s creator. The main external goal both of individual and of community is to proclaim the gospel to the world. Realization of that goal is done, first of all, by: Word and Sacrament.<sup>180</sup> Canon law should always be built on the two pillars.

<sup>175</sup> I. Bogucka, *Funkcje prawa. Analiza pojęcia*, Kraków 2000, p. 7 ff.

<sup>176</sup> Cf. T. Zieliński, *Prawo pracy. Zarys systemu*, vol. I, Warszawa-Kraków 1986, p. 37.

<sup>177</sup> H. Hallermann, *Die Funktion des Rechts in der Communio*, Archiv für katholisches Kirchenrecht 166 (1997), p. 453.

<sup>178</sup> Cf. J. A. Coriden, *Law in Service to the People of God*, The Jurist 41 (1981), p. 8–10; cf. J. A. Coriden, *Introduction to Canon Law*, New York 1990, p. 5–6.

<sup>179</sup> R. Sobański, *Zbawcza funkcja prawa kościelnego*, Śląskie Studia Historyczno-Teologiczne 6 (1973), p. 157–169.

<sup>180</sup> See more: K. Mörsdorf, *Wort und Sakrament als Bauelemente der Kirchenverfassung*, Archiv für katholisches Kirchenrecht 134 (1965), p. 72–79.

### 1.3.4.2. Protection of Religious Freedom

The next function of law in the Church is to help in realization of the right to religious freedom. It is important to underline that law does not restrict freedom but it creates it.<sup>181</sup> This is based on a famous sentence of St. Augustine: “credere non potest nisi volens.”<sup>182</sup> The Second Vatican Council fostered and developed the idea that the act of faith is of its very nature a free act. “Caput est ex praecipuis doctrinae catholicae, in verbo Dei contentum et a Patribus constanter praedicatum, hominem debere Deo voluntarie respondere credendo; invitum proinde neminem esse cogendum ad amplectendam fidem. Etenim actus fidei ipsa sua natura voluntarius est [...]. Ac proinde ratio libertatis religiosae haud parum confert ad illum rerum statum fovendum, in quo homines expedite possint invitari ad fidem christianam, illam sponte amplecti atque eam in tota vitae ratione actuose confiteri” (DH 10).<sup>183</sup> It means that law in the Church is legitimate only by realization of the right in question.

### 1.3.4.3. Working for the Unity of Faith

It is justly said that canon law contributes very much to faith. The contribution is expressed, not only but also, by working for the unity of faith and it means generally two things: building unity and defending it.

Law must also build unity of faith in the community. The bond of faith and the bond of sacrament of baptism join people with Christ in His visible body that is Christ’s Church (can. 205). There are many ways in which canon law does it. For instance, by order that before taking canonical possession of some offices, he, who has been promoted, is to make the profession of faith (*Professio fidei*, can. 380, can. 833) and take the oath of fidelity to the Apostolic See (*Iusiurandum fidelitatis*), in accordance with the formula approved by the same Apostolic See.<sup>184</sup> Other instruments helpful in building unity are different

<sup>181</sup> G. Robinson, *Law in the Life of the Church*, CLSA Proceedings 44 (1982), p. 145

<sup>182</sup> Cf. Augustinus, *In Evangelium Joannis Tractatus CXXIV*, PL 35, col. 1607.

<sup>183</sup> “It is one of the major tenets of Catholic doctrine that man’s response to God in faith must be free: no one therefore is to be forced to embrace the Christian faith against his own will. This doctrine is contained in the word of God and it was constantly proclaimed by the Fathers of the Church. The act of faith is of its very nature a free act. [...] In consequence, the principle of religious freedom makes no small contribution to the creation of an environment in which men can without hindrance be invited to the Christian faith, embrace it of their own free will, and profess it effectively in their whole manner of life” (DH 10). Translations of the Second Vatican Council documents are taken from: *Documents of Vatican II*, in a new and definitive translation, with commentaries and notes by Catholic, Protestant, and Orthodox authorities, gen. ed. W. M. Abbott, New York 1966.

<sup>184</sup> See: Congregatio pro Doctrina Fidei, *Professio fidei et iusiurandum fidelitatis in suscipiendo officio nomine Ecclesiae exercendo*, 9.01.1989, AAS 81 (1989), p. 104–10. The two forms were accepted by Pope John Paul II, see: Congregatio de Doctrina Fidei, *Rescriptum ex Audientia*

types of certificates for those who are to teach theological discipline. The first is *nihil obstat*. It is issued by the Apostolic See or Ordinary to certify that there is no impediment for an academic teacher to be permitted to teach.<sup>185</sup> The next is *mandatum* to certify that the academic teacher is in unity with the Catholic Church and his teaching is in accord with the teaching of the Church (cf. can. 812). The last one, *missio canonica*, is ambiguous.<sup>186</sup> Roughly it could be said that it is given to those who are to hold office entrusted by Hierarchy (cf. AA 24).

Law's next function is to defend the unity of the Catholic faith in the Church community. Law places as the first duty maintaining c o m m u n i o n with the Church (can. 209 § 1). This is quite right, because communion is the expression of belonging to the Catholic Church (can. 206). To reach the goal, law orders to use canonical penalties, but "cum mansuetudine rigor, cum misericordia iudicium, cum lenitate severitas (CIC 1917 can. 2214 § 2).<sup>187</sup>

Other instruments helping protect unity are: Church censorship and process of theological doctrine. The censorship is to safeguard the integrity of faith and morals. The responsible ones are pastors of the Church who have the duty and the right to ensure that in writings or in the use of the means of social communication there should be no ill effect on the faith and morals of Christ's faithful (cf. can. 823 § 2). It is done by two institutions in law (can. 824 § 1). The first is permission (*licentia*) when the competent ecclesiastical authority allows to publish something without issuing any opinion on the matter. The next is approval (*approbatio*) which is required by law in publishing certain books dealing with matters concerning Sacred Scripture, theology, canon law, church history, or religious or moral subjects when they are to be used as textbooks on which the instruction is based, in elementary, intermediate or higher schools. The books or other written material dealing with religion or morals may not be displayed, sold or given away in churches or oratories, unless they are published with the permission of the competent ecclesiastical authority or are subsequently approved by that authority (cf. can. 827 § 2 and § 4).

The examination of theological doctrines is also the way to defend the truth of faith of the Church. This is a process that should be held according to *Agendi ratio in doctrinarum examine* issued by Congregation for the Doctrine

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ss.mi *Quod attinet*, Formulas professionis fidei et iuris iurandi fidelitatis contingens foras datur, 19.09.1989, AAS 81 (1989), p. 1169. For commentary on the forms, see: J. Adamczyk, "Wyznanie wiary" i "przysięga wierności" w świetle obowiązujących przepisów, *Annales Canonici* 5 (2009), p. 101–123; cf. H. Schmitz, *Professio fidei und Iusiurandum fidelitatis. Glaubensbekenntnis und Treueid. Wiederbelebung des Antimodernisteneides?*, *Archiv für katholisches Kirchenrecht* 157 (1988), p. 353–429.

<sup>185</sup> H. Schmitz, *Studien zum kirchlichen Hochschulrecht*, Würzburg 1990, p. 134–145.

<sup>186</sup> L. Gerosa, *Interpretacja prawa w Kościele...*, p. 116.

<sup>187</sup> CIC 1917 can. 2214 § 2: "rigor to be tempered with gentleness, judgment with mercy, and severity with clemency."

of the Faith.<sup>188</sup> The aim is to examine by the Congregation with respect for an author of publication his/her freedom to research matters (cf. can. 218), and give opinion on theological correctness of it and in case of necessity to punish the author.<sup>189</sup>

#### 1.3.4.4. Providing Order, Justice, and Stability

Law is also to provide good order in community. The clear, reliable and fair procedures established by authorities with understandable vision of procedures can help to provide resolution of potential conflicts. Members of community have a right to expect reasonable, appropriate and predictable ways of working of law in their lives.

It cannot be done without justice. St. Thomas Aquinas linked closely justice and law: “*Ius dictum est quia est iustum.*”<sup>190</sup> In the Church justice is specific. The Church justice, of course, is not of the world. It is Christian justice.<sup>191</sup> Justice is mutually connected with Christian love. They are not identical, there are differences between them, but in the Church they have to be seen as working always together.<sup>192</sup> Love determines justice. Because of love man is just. Christian love is necessary and sufficient for Christian justice and justice is practice of love.<sup>193</sup> In the Church, which is a *communio* there is a requirement that all procedures be held with full respect for formal principles. After all, it is *ordinatio ad bonum commune*. It can be justly said that the foundation of the life of the Church is love and respect for law.<sup>194</sup>

With good order and justice linked, there is stability in the Church. It is the outcome of the two. Law has to assure members that order is predictable. Church needs tranquility of order in its life even more than state, because Church builds its authority also on faithfulness to the ideals of the past and not on searching for novelty as the world does. Stability can be called “healthy inertia of order.”

<sup>188</sup> Congregatio pro Doctrina Fidei, Agendi ratio in doctrinarum examine, 29.06.1997, AAS 89 (1997), p. 830–835.

<sup>189</sup> Joannes Paulus PP. II, Constitutio Apostolica *Pastor Bonus* de Romana Curia, 28.06.1988, AAS 80 (1988), p. 841–930, art. 52.

<sup>190</sup> *ST*, II–II, q. 57, a.1, s. c.

<sup>191</sup> R. Sobański, *Kościół – prawo...*, p. 133.

<sup>192</sup> It can be noticed that there is some kind of gradation between *iustitia* and *caritas*, see: can. 1148 § 3.

<sup>193</sup> R. Sobański, *Kościół – prawo...*, p. 135.

<sup>194</sup> Cf. Giovanni Paolo II, Allocuzione *Fondamenti nella vita della Chiesa l'amore e il rispetto per la legge*, 23.09.1983, *Communicationes* 15 (1983), p. 120–123.



### 1.3.4.5. Protection of Personal Rights

Law is to protect personal rights. It must not be forgotten that creation is the first stage of God's will to save the world. The personal rights have their foundations and source in the dignity of creation.<sup>195</sup> It was uplifted by divine grace and enriched by vocation to sainthood and to unity with God. The first step is baptism (cf. can. 96).<sup>196</sup>

Law procedures should be ready for a situation in which personal rights of individual (human rights and rights as a faithful) would be threatened by community or another individual. Function of law should be to take care of every person because only respected and protected individual can strengthen the entire community. Law should provide resourceful avenues for redress of grievance.

Stating that the Church is a communion also means that all its members have a place in it and a role to play in its life. To express this, the code does not hesitate to insist on the basic rights of all Christians, rights (can. 208–223) which are so fundamental that without respecting them one would disfigure the Church.<sup>197</sup>

Protection of rights is realized in circumstances shaped by two factors: legal culture and legal awareness. The term "legal culture" is widely recognized as useful phrase to label the complex attitude of members of a society to law in general.<sup>198</sup> The development of legal culture means better understanding and bigger appreciation of law in the social order. This stand translates into the rise of awareness of significance of law and its functions. If law is more respected, the authority of law is higher.<sup>199</sup> Exactly the same process can be noticed in the Church. The higher the culture of canonical law is the better position law has in community.<sup>200</sup>

Legal culture in acts and behaviors of persons translates into legal awareness. Legal awareness is shaped by two factors: knowledge of law and its positive

<sup>195</sup> M. Żurowski, *Podstawy uprawnień wiernych we wspólnocie kościelnej*, Roczniki Teologiczno-Kanoniczne 28 (1981) no. 5, p. 81.

<sup>196</sup> Cf. J. Krukowski, *Kanon 215*, [in:] J. Dyduch, W. Góralski, E. Górecki, J. Krukowski, M. Sitarz, *Komentarz do Kodeksu Prawa Kanonicznego*, ed. J. Krukowski, Poznań 2005, vol. II, part 1, p. 32; M. Żurowski, *Współuczestnictwo kościelne. Ius ad communionem*, Kraków 1984<sup>2</sup>, p. 61–81; J. Dyduch, *Obowiązki i prawa wiernych świeckich w prawodawstwie soborowym*, Kraków 1985, p. 93.

<sup>197</sup> M. Lejeune, *Demythologizing Canon Law*, *Studia Canonica* 21 (1987), p. 8.

<sup>198</sup> R. Sobański, *Kultura prawna Europy*, [in:] *Europa. Drogi integracji*, ed. A. Dylus, Warszawa 1999, p. 73–84; R. Tokarczyk, *Kultura prawa europejskiego*, *Studia Europejskie* 1 (2000), p. 11–26. About legal culture as manifestation and result of human activity and culture, see: T. Gałkowski, *Il "quid ius" nella realtà umana e nella Chiesa*, Roma 1996, p. 11–19.

<sup>199</sup> K. Opalek, *Zagadnienia teorii prawa i teorii polityki*, Warszawa 1986, p. 273–296.

<sup>200</sup> R. Sobański, *Prawo kanoniczne a kultura prawna*, *Prawo Kanoniczne* 35 (1992) no. 1–2, p. 31.

evaluation.<sup>201</sup> This leads to an understanding that law is a useful tool, which plays an important part in life. When members of the society are aware of the legal dimension of their life, they do not treat law as something remote and distant. Contrary, they want to know law, interpret it, and apply it.<sup>202</sup>

#### 1.3.4.6. Education of Members

Law is considered as a medium of passing on knowledge. The Church spreads knowledge about foundations of faith by legislation. Of course, it is done in correlation with other means like sacred power, authority, counsel, exhortations, example (*LG 27*).<sup>203</sup> Important function of church law is to impose duties. Law must also assist in education of members of the community giving them a clear lesson of Christian values and standards. Of course, it is not the first function of canon law but canons can help to organize the teaching task of the Church.<sup>204</sup> The corollary of its educational function consists in the fact that canon law is *locus theologicus*,<sup>205</sup> that is, the place where data for theological reflections can be found, and it points out well the need for theological correctness of law.

Education by law means also instruction given to members of community to act according to faith. The Church expects that members of it will live in divine grace and respect Church order. Law expresses the Church's expectation in orders of law. Law helps Catholics to answer the Christian vocation and give a testimony of the vitality of the community.<sup>206</sup>

#### 1.3.4.7. Organizing the Structure of the Church and Its Activity

Law expresses and organizes the structure of the Church. It concretizes its internal model into offices, institutions and functions, describing their rights and duties and realm of activity basing it on the divine law and on the will of the Founder of the Church, Jesus Christ. It is so in case of the Roman Pontiff, the successor of Peter, and the Bishops, the successors of the Apostles

<sup>201</sup> A. Pieniżek, M. Stefaniuk, *Socjologia prawa. Zarys wykładu*, Kraków 2003, p. 176; about the model of developing legal awareness, see: p. 185–189.

<sup>202</sup> About expressions of legal awareness in the primitive Church, see: M. Żurowski, *Współuczestnictwo kościelne. Ius ad communionem*, Kraków 1984<sup>2</sup>, p. 82–128.

<sup>203</sup> R. Sobański, *Metodologia prawa...*, p. 156.

<sup>204</sup> Book III of *CIC* 1983 is titled: *De Ecclesiae munere docendi*.

<sup>205</sup> *Loci theologici* or *loci communes*, are the common topics of discussion in theology. The first who used this term in Catholic theology was M. Cano, see: M. Cano, *De locis theologicis*, [in:] M. Cano, *Opera*, Venetiis 1759, p. 1–364. He applied the term in a treatise on the fundamental principles or sources of theological science. See also: B. Stattler, *De locis theologicis*, Weissenburg 1775.

<sup>206</sup> R. Sobański, *Metodologia prawa...*, p. 29.

(can. 330). Law also gives rights and duties to offices, institutions and functions on the basis of the Church's legislator's will, as it is in case of pastors (can. 519).

The structure of the Church has influence on activity of the Church both inside the community of Christ's faithful and outside toward the world. Law takes care of distribution of sacraments (e.g., can. 850–860) and pastoral care of the faithful (e.g., can. 1063–1064). It also deals with ecumenical dialogue (can. 755 § 1) or exhortation to non believers (can. 748 § 1).<sup>207</sup>

### 1.3.5. Motives to Observe Law

Some motives to observe law, that is, motives to agree to be under law and to realize law, are the same for civil law and canon law.<sup>208</sup> But there are some specific for canon law motives to observe it. They belong to its characteristics.

#### 1.3.5.1. Faith

Foremost church law binds the faithful on the level of faith. Church law is not given only by reason but far more by faith. Law in the Church is *ordinatio fidei* (of course, it still is *ordinatio rationis*), which means that the ultimate criterion of its usage is faith. Canon law not only creates legal obligation, as generally law does, but due to its connection to faith canonical norms bind also in conscience.<sup>209</sup> It means, in short, that who does not observe canon law commits a sin.<sup>210</sup> This is, of course, *forum internum*. But breaking the rules can cause possibility of punishment on *forum externum*, as well. Law ordered by the Church is given in the name of the Lord. Having faith in Him, gives the most serious motive to observe canon law.

In a situation of a user of canon law possessing a perfect faith, any talk about other motives to observe law would be rather unjustified. The motivations that come from faith would be enough to respect law. Unfortunately, the situation in question is impossible. The consequences of the original sin diminish strength of human faith, and motives must be taken from other elements.

<sup>207</sup> R. Sobański, *Metodologia prawa...*, p. 28–29.

<sup>208</sup> Briefly on the theme from civil jurisprudence point of view, see: M. B. E. Smith, *The Duty to Obey the Law*, [in:] *A Companion to Philosophy of Law and Legal Theory*, ed. D. Patterson, Maldem-Oxford 1999, p. 465–474.

<sup>209</sup> R. Sobański, *Teoria prawa kanonicznego*, Warszawa 1992, p. 187–188.

<sup>210</sup> With provision of *epikeia* and other typical for the canonical system of law institutions and means.

### 1.3.5.2. Good and Values

The next argument to follow rules of law is the good and the values that norm promotes or protects. Of course, law itself is a value,<sup>211</sup> mainly because it holds and preserves other values important for members of society. This is especially important for canon law, because it gives clear norms for proper behavior in God's eyes. Moral theology speaks of the values by which a Christian person must live, and law binds people to pursue some values.<sup>212</sup> The legislators of the Church are mostly at the same time teachers of morals.

In a situation when law and values are separated or law does not protect and promote values in proper way, authority of law is diminished. Law disappoints community and in dimension of values is useless for them. Law that lacks values can be, of course, worshiped but only as a law, as a phenomenon as it is. That would be despite its emptiness. It can also happen that valueless law would be rejected as a whole. Such situation leads to anarchy.<sup>213</sup>

To be a Christian has always meant to be someone who is subject to the law of Christ, who freely subjects himself to the law of Christ. A Christian is not to be free from law but to be freed by law: Christ's Law.

### 1.3.5.3. Penal Sanctions

Christ's faithful who commit offences can be punished by the Church (can. 1311). But it is not so unproblematic in the canonical system of law. One of the principles, which served as guidelines during the process of revising the *CIC* 1983 said, that "Circa ius coactivum, cui Ecclesia tamquam societas externa, visibilis et independens renuntiare nequit, poenae sint generatim ferendae sententiae, et in solo foro externo irrogentur et remittantur. Poenae latae sententiae ad paucos casus reducantur, tantum contra gravissima delicta irrogandae."<sup>214</sup> Canon law, although it is a genuine law, should be full of charity, temperance, humaneness and moderation: "Ad curam pastoralem animarum quam maxime fovendam, in novo iure, praeter virtutem iustitiae, ratio habeatur etiam caritatis, temperantiae, humanitatis, moderationis, quibus aequitati studeatur non solum in applicatione legum ab animarum pastoribus facienda, sed in ipsa legislatione, ac proinde normae nimis rigidae seponantur, immo ad exhortationes et suasiones potius recurratur, ubi non adsit necessitas

<sup>211</sup> R. Sobański, *Prawo jako wartość*, *Prawo Kanoniczne* 42 (1999) no. 3–4, p. 11–26.

<sup>212</sup> L. Örsy, *Moral Theology and Canon Law: the Quest for a Sound Relationship*, [in:] *Theology and Canon Law...*, p. 125. Slightly contrary to this: J. A. Selling, *Laws and Values: Clarifying the Relationship between Canon Law and Moral Theology*, *The Jurist* 56 (1996), p. 92–110.

<sup>213</sup> L. Örsy, *Relation between Values and Laws*, *The Jurist* 47 (1987), p. 477–478.

<sup>214</sup> *Praefatio*, principium 9, p. xxiii.

stricti iuris servandi propter bonum publicum et disciplinam ecclesiasticam generalem.”<sup>215</sup> In one word equitas canonica is to be pursued in the legislation.

Of course, whoever has legislative power can also make penal laws. The legislator can, by law of his own, reinforce with a fitting penalty divine law or ecclesiastical law of a higher authority (can. 1315 § 1). A particular law can also add other penalties to those laid down in a universal law. This can be done for the gravest necessity (can. 1315 § 3). When sanctions are added to law, the respect for law is greater. The faithful are afraid of acting against law. No one wants to be liable to penal sanctions.

#### 1.3.5.4. Respect for Community

Another reason to observe the law is to do it because of community to which one belongs (catholic) or because of having legal proceedings in the Church (in case of non catholic). One can share its goals, functions or just respect the community and public order. Respect for community can be at play when someone feels moral obligation to follow rules important for others. Subject of law can find motivation to observe law in will to avoid scandal (Rom 14, 2; 1 Cor 8, 13).<sup>216</sup>

Also, respect for community must be seen in supernatural terms. Common good of community must be seen in perspective of faith of its members. First because the beginning of community is common faith in Jesus Christ, next because the ultimate aim of community is seen only in faith.

#### 1.3.5.5. Authority of Lawgiver

One can follow rules of law because of authority of lawgiver.<sup>217</sup> In the person of the legislator, who is responsible for the community, users of law can see Christ himself. In the name of the Founder of the Church, the legislator has sacred power, that is, a special mission to act *in persona Christi* (cf. LG 11, can. 212 § 2). Law is a product of his ecclesiastical power entrusted to him. It must express itself in integrating activity of Christ for community.<sup>218</sup> When the author of law is well respected, and it is when the power he exercises and knowledge he has is well recognized as valuable,<sup>219</sup> the law he drafts will be held in high esteem. In this sense, authority of the legislator also has a great

<sup>215</sup> *Praefatio*, principium 3, p. XXI.

<sup>216</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 233–235.

<sup>217</sup> More see: Chapter 2.

<sup>218</sup> R. Sobański, *Kościół jako podmiot prawa...*, p. 165.

<sup>219</sup> J. M. Bocheński, *Co to jest autorytet?*, [in:] *Logika i filozofia. Wybór pism*, transl. J. Parys, Warszawa 1993, p. 187–324.

influence on effectiveness of law.<sup>220</sup> Attitude of the users of law to law depends on their image of the legislator.

### 1.3.5.6. Authority of Law

It can be said that a person is ready to follow rules when they have authority, that is, in this case – special meaning, sense or importance to individual. Every law claims such authority.<sup>221</sup> It is a problem discussed in civil jurisprudence. It is an important factor contributing to effectiveness of law, that is, the success in ruling people. Many factors depend on authority of law.<sup>222</sup>

Because of a special place and role of law in the Church, authority of canonical law must be treated in a different way than secular jurisprudence instructs. A necessity that comes from faith is inseparable plays a major role in proper obeying of canonical law and holding it in esteem. The authority of law, due to the fact that today the majority of law in the Church comes not from legally binding custom but from written acts of law, is a very important subject to church legislator to be understood in rather particular manner.

It would be advisable for everyone who has legislative power in the Church to be familiar with the issue in question so as to work better for the sake of community. Law's authority is a helpful factor in carrying out the mission of canon law.

In case of canon law such a claim for authority among users of law must be viewed with optimism.<sup>223</sup> It is possible to achieve it. It is obvious that authority does not come *ex nihilo*. It must be worked out by all in community, but especially by lawmakers. Moreover, authority is not achieved forever. There must be a constant care not to allow the authority in question to be damaged.

## 1.4. Power in the Church

The problem of power in the Church goes back to the very beginning of the Church or at least to the episode with the sons of Zebedee (Mk 10, 35–45). The problem is very complex. It influences the understanding of the role and position of the legislator.

<sup>220</sup> P. KroczeK, *Kiedy prawo kanoniczne jest efektywne?*, *Annales Canonici* 2 (2006), p. 165–167.

<sup>221</sup> J. Raz, *The Authority of Law. Essays on Law and Morality*, Oxford 1979, p. v.

<sup>222</sup> P. KroczeK, *Authority of Canon Law*, *Theologos* 2 (2010), p. 9–20.

<sup>223</sup> About this problem in civil law, see: V. A. Wellman, *Authority of Law*, [in:] *A Companion to Philosophy of Law and Legal Theory*, ed. D. Patterson, Maldem-Oxford 1999, p. 581.

### 1.4.1. Secular Thoughts on the Power

It is useful to look briefly at the theory of power to first situate the problem of power in secular thought. Power has been successfully defined by M. Weber. According to him "Macht bedeutet jede Chance, innerhalb einer sozialen Beziehung den eigenen Willen auch gegen Widerstreben durchzusetzen, gleichviel worauf diese Chance beruht."<sup>224</sup> In this definition, power is a person's capacity to get what he wants, even with resistance from others.<sup>225</sup> It can be said, that power is an ability to produce an effect in community independently from the community.

Three different sources of power can be listed. The first one is personality or leadership and refers to any attribute of a person that gives access to a form of power. It can happen through physical strength, mind, moral certainty, charisma, and persuasion. The second source is property or wealth. Its possession gives access to the most common exercise of power, which is the bending of the will of one person by another through straightforward purchase. And the last source of power is an organization. It is the most important source of power in modern societies. It is taken for granted that when an exercise of power is sought or needed, organization is required.<sup>226</sup>

All these sources refer not only to civil communities, they also can be applied to the Church. In earliest Christian days, power originated with the compelling, divinely sanctioned, personality of Jesus Christ. His Apostles also were bearers of such personal power because of their unique personal relationship with the Lord. In time, the Church as an organization became influential. Not the least of its sources of power was the Church's property and the income. All these components, beginning with the personality of the Heavenly Presence and religious leaders, and reaching all the way to the Church's property, and, above all, the unique organization, constituted the religious power.<sup>227</sup>

An important achievement of secular thought is the widely recognized tripartite separation of the power in the modern state: legislative, executive and judicial power. The idea was born gradually. Precursors were Aristotle, Marsilius of Padua, and John Lock but the most influential and well-known is Ch. Montesquieu.<sup>228</sup> In that theory, three powers are separated and have special duties on which neither of the other branches can encroach. The

<sup>224</sup> M. Weber, *Grundriss der Sozialökonomik*, vol. III, *Wirtschaft und Gesellschaft*, Tübingen 1922, p. 28.

<sup>225</sup> See more: J. A. Hughes, P. J. Martin, W. W. Sharrock, *Understanding Classical Sociology. Marx, Weber, Durkheim*, London-Thousand Oaks-New Delhi 1995, p. 107–108.

<sup>226</sup> J. K. Galbraith, *The Anatomy of Power...*, p. 38–71.

<sup>227</sup> Cf. J. K. Galbraith, *The Anatomy of Power*, Boston 1983, p. 7.

<sup>228</sup> For bibliography, see: J. Krukowski, *Administracja w Kościele. Zarys kościelnego prawa administracyjnego*, Lublin 1985, p. 41.

doctrine was not to promote efficiency but to preclude the exercise of arbitrary power and to protect citizens. The problem is that it is extraordinarily difficult to define precisely each particular power.<sup>229</sup> For instance, the executive branch develops the rules for the administration and the judicial branch may have binding force of law by authentic interpretation.

Of course, the secular ideas may be only of help for shedding light on the issue. They are not enough to deeply understand and describe power in the Church. First of all, it does not include probably the main factor of the reality of the Church that is faith. For this reason, the search for the description and source and form of power must be continued.

### 1.4.2. Source of Power According to the New Testament

Trying to find out the roots of the issue of power in the Church, it seems to be enough to consult the New Testament. There the sources of power derived from God are manifested historically through Jesus Christ and through the Holy Spirit. It must be remembered that the proclamation of the Disciples of Christ: "Jesus is the Lord" is the first formula of faith. One of its consequences is that Jesus creates, sustains and empowers the Church through the Holy Spirit at work in the preaching of the gospel and the administration of the sacraments.

Two different words are used in the New Testament for power: *exousia* (ἐξουσία), meaning power, freedom of choice, authority, or government,<sup>230</sup> and *dynamis* (δύναμις), meaning power, ability, capability, or force.<sup>231</sup> Their shades of meaning are close, and their usage is almost interchangeable. Christ's power is described in these terms (Mt 28, 18; 1 Cor 1, 18. 24). Jesus Christ is acknowledged to be the source of all authority in the church. He calls, authorizes and empowers the Church to do His will and He promises to be with it to the end of time (cf. Mt 28, 16–20; Mk 16, 15; Lk 24, 45–48; Jn 20, 21–23).<sup>232</sup>

It can be summarized with the statement that all power in the community of believers comes from one source. The source is Jesus Christ. As the power of Christ is only one, so also is the power of the Church.<sup>233</sup>

<sup>229</sup> G. W. Paton, *A Textbook of Jurisprudence*, ed. G. W. Paton, D. P. Derham, 1972<sup>4</sup>, p. 330.

<sup>230</sup> Entry: ἐξουσία, [in:] *A Greek-English Lexicon of the New Testament...*, p. 352, col. b – p. 353, col. b.

<sup>231</sup> Entry: δύναμις, [in:] *A Greek-English Lexicon of the New Testament...*, p. 262, col. a – p. 263, col. b.

<sup>232</sup> See more: Entries: *exousia* and *dynamis*, [in:] *Theological Dictionary of the New Testament*, ed. G. Kittel, G. Friedrich, abridged in one volume by G. W. Bromiley, Grand Rapids 1985, p. 238–240 and p. 186–191.

<sup>233</sup> M. Kaiser, *Die Einheit der Kirchengewalt nach des Neuen Testaments und der Apostolischen Vater*, München 1956, p. 140.



### 1.4.3. Passing Power to the Church

All power in the Church is derived from Christ the Lord. It can be said that the Church received power from Christ because He possessed “all power in heaven and on earth” (Mt 28, 18). The power is made active and operative in the life of the Church through the Holy Spirit. After Jesus had been taken up to heaven, there was a sort of transition of authority, a transfer of power. The Spirit, whom Jesus had repeatedly promised, was sent down upon his disciples. “But you will receive power when the Holy Spirit comes upon you, and you will be my witnesses in Jerusalem, throughout Judea and Samaria, and to the ends of the earth” (Acts 1, 8). Jesus sent the Apostles first to the children of Israel and then to all nations, so that as sharers in His power they might make all peoples His disciples, and sanctify and govern them, and thus spread His Church, and by ministering to it under the guidance of the Lord, direct it all days even to the consummation of the world (cf. *LG* 19). The constant and dynamic presence of Christ as Lord is the source of power in the Church.

This is a sacred power (*potestas sacra*) due to its origin and destiny. It covers all earthly life of the Church. It must be held in the manner of Christ: “The son of man has come to serve not to be served” (Mk 10, 45). It means that everyone who has authority in the Church fulfills his duty by filling in for Christ (*in persona Christi*, cf. *LG* 11, can. 212 § 2), and is called to build *communio*. The work was initiated by Christ Himself by establishing the Apostles as main ministers in the Church, passing on to them the power “to bind and loose” (Mt 16, 17–19; Mt 18, 18), and by giving authority to admit or expel members.

Knowing that the power comes from Christ is just the beginning of the issue. What comes next is the way of passing the power to the faithful. It is still the unsolved problem. The issue is very complex and is significant for the understanding of the Church itself. The issue can be approached by tidying up the views into three positions competing with one another.<sup>234</sup>

The first position is that of an institutional emphasis, which continues to derive all jurisdiction from the Pope through canonical mission (*missio canonica*).<sup>235</sup> Orders and jurisdiction are separate powers, but the unity of the powers in the Church is the main end because these powers come from Christ through the mediation of the sacrament of orders and the granting of hierarchical communion by the Pope.

The second approach attempts to locate the source of power in Christ and to relate more immediately the one who holds power with Christ. That

<sup>234</sup> J. H. Provost, *The Participation of the Laity in the Governance of the Church*, *Studia Canonica* 17 (1983), p. 445–446.

<sup>235</sup> For an ample analysis of the matter, see: J. Krzywda, *Funkcja i znaczenie misji kanonicznej w strukturze władzy kościelnej w świetle Vaticanum II. Studium teologiczno-prawne*, Kraków 1996.

relationship is assured through sacramental ordination, and there is no power in the Church except that sacred power which comes through ordination.

The last approach criticizes the first as failing to take seriously the teaching of the Second Vatican Council on the essentially religious nature of the Church and its power. It also criticizes the second view for being so focused on Christ that it loses the perspective of the action of the Spirit through charisma and grace. It calls for a more Trinitarian view of God's action in the Church, and locates the contact with the Lord in more than the sacrament of orders.

Whether any of these approaches is adequate to explaining power in the Church can be questioned. A good summary is given in a position that "We are dealing here with a mystery, the mystery of the Church and the mystery of God's action in our midst."<sup>236</sup>

#### 1.4.4. Power in Teaching of the Church

The key problem in understanding the position of the legislator in the community of the Church is a proper understanding of co-existence in the Church of the phenomena of unity of power and the multiplicity and diversity of organs of power. To enlighten that correctly, it must remain clear that the power can be understood in two ways.

Firstly, the power in the Church can be discussed from the point of view of its object. In that case power is a factor in fostering the community of believers for achieving the goals settled by Jesus Christ. From that point of view, no one can speak about the division of the power in the Church but rather about distinction of it into fields like jurisdictions, teaching and sanctifying. They all participate in the *munus Christi*. The second understanding of the power is in terms of subjects, that is, authorities or executioners of power.<sup>237</sup>

##### 1.4.4.1. Before the Second Vatican Council

The canonical doctrine before the Second Vatican Council recognized two powers: orders (*potestas ordinis*) and jurisdiction (*potestas iurisdictionis*). The two powers were *realiter distincta*. In the Church "existit duplex hierarchia sive potestas – ordinis et iurisdictionis a Christo instituta."<sup>238</sup> But the only way to receive power of jurisdiction in the Church was through sacred orders. "Etenim ex iure communi soli clerici ordinati sunt capaces iurisdictionis ecclesiasticae

<sup>236</sup> J. H. Provost, *The Participation of the Laity in the Governance of the Church*, *Studia Canonica* 17 (1983), p. 446.

<sup>237</sup> J. Krukowski, *Administracja w Kościele. Zarys kościelnego prawa administracyjnego*, Lublin 1985, p. 44–45.

<sup>238</sup> F. X. Wrenz, P. Vidal, *Ius Canonicum*, vol. II, *De personis*, Romae 1928<sup>2</sup>, no. 48, I, p. 48.

adipiscendae,” and also “hierarchia ordinis et hierachia iurisdictionis intime est connexa et unita.”<sup>239</sup>

Sometimes the three kinds of power were listed as *differentias inter utramque potestatem, ordinis nempe et iurisdictionis*. It was the power of teaching (*potestas magisterii*).<sup>240</sup> It was mentioned in the First Vatican Council’s *Constitutio dogmatica Pastor aeternus*: “Ipso autem Apostolico primatu, quem Romanus Pontifex tamquam Petri principis Apostolorum successor in universam Ecclesiam obtinet, supremam quoque magisterii potestatem comprehendit, haec Sancta Sedes semper tenuit perpetuus Ecclesiae usus comprobatur, ipsaque Oecumenica Concilia, ea imprimis, in quibus Oriens cum Occidente in fidei caritatisque unionem conveniebat, declaraverunt.”<sup>241</sup> About the power in question one of the authors said that the power is *nova* and comes from *triplici munera Christi*.<sup>242</sup>

*Potestas iurisdictionis* (or *regiminis*) one of the authors divided into: 1) *ius leges ferendi* (*potestas legifera*), 2) *ius controversias* (or *lites solvendi*) that is *potestas iudicialis*, and 3) *ius administrandi bona* (*potestas administrativa*) and also 4) *ius vim adhibendi* (*potestas coactiva*).<sup>243</sup> The important point is that “*Iurisdictionis vero Ecclesiae propria imprimis evidenter continent potestatem legifera.*”<sup>244</sup> Jurisdiction was a power whose origin was not Episcopal ordination (by ordination one gained only *potestas ordinis*), but canonical mission, the election or appointment to an office. In the former code, the supreme legislator outlined the powers proper to the diocesan bishop, and said about: 1) *potestas legislativa*, 2) *potestas iudiciaria*, 3) *potestas coactiva* (CIC 1917 can. 335 § 1).<sup>245</sup>

As it can be seen, in the Church teaching power has been a very complicated problem.<sup>246</sup> The power of legislation, which is of special interest, appears as a part of power of jurisdiction. It could be granted only together with ordination and appointment to the office.

<sup>239</sup> F. X. Wrenz, P. Vidal, *Ius...*, vol. II, no. 48, III, p. 51.

<sup>240</sup> M. Coronata, *Institutiones iuris canonici ad usum utriusque cleri et scholarum*, vol. I, Taurini 1939, no. 276.

<sup>241</sup> Concilium Oecumenicum Vaticanum I, *Constitutio dogmatica Pastor aeternus* de Ecclesia Christi, Sessio IV, 18.07.1870 (DS 3065).

<sup>242</sup> F. X. Wrenz, P. Vidal, *Ius...*, vol. II, no. 48, III, p. 52.

<sup>243</sup> M. Coronata, *Institutiones iuris...*, vol. I, no. 275.

<sup>244</sup> F. X. Wrenz, P. Vidal, *Ius...*, vol. II, no. 48, II, p. 50.

<sup>245</sup> Likewise in CIC 1983 in can. 391 § 1: “Episcopi dioecesei est Ecclesiam particularem sibi commissam cum potestate legislativa, executiva et iudiciali regere.”

<sup>246</sup> See more: H. J. Pottmeyer, *The plena et suprema potestas iurisdictionis of the Pope at the First Vatican Council and Reception*, *The Jurist* 57 (1997), p. 216–234.

#### 1.4.4.2. After the Second Vatican Council

The Catholic Church in decrees of the Second Vatican Council expressed itself to the world as unified. The Fathers gave up old distinctions in power concluding that there is only “one sacred power” (see: *LG 10, LG 18, LG 27, PO 2*).

The power is defined in the following way: “episcopali consecratione plenitudinem conferri sacramenti Ordinis, quae nimirum et liturgica Ecclesiae consuetudine et voce Sanctorum Patrum summum sacerdotium, sacri ministerii summa nuncupatur. Episcopalis autem consecratio, cum munere sanctificandi, munera quoque confert docendi et regendi, quae tamen natura sua nonnisi in hierarchica communione cum Collegii Capite et membris exerceri possunt” (*LG 21*).<sup>247</sup> It is clear that the teaching is based on two pillars: 1) the power in the Church comes from the sacrament of Episcopal ordination, and 2) the power in Church can be exercised only in hierarchical communion, so it is inseparable from power of communio.<sup>248</sup> But the power is one in the Church. It is *potestas sacra*, which Jesus Christ has given to the Church, to exercise in His name in discharge of ministries he has established in his Church in such a way that they have to be carried out by special authorities.<sup>249</sup>

The unity of sacred power is not disturbed by traditional distinction into power of orders and power of governance (jurisdiction). It is not objective division but only a formal one.<sup>250</sup> There are not two powers but two ways of exercising the same power. This understanding is in can. 129 § 1, which says that those who have sacred orders are, in accordance with the provisions of law, capable of taking the power of governance, which belongs to the Church by divine institution. This power is also called the power of jurisdiction. But § 2 of the same canon allows lay members of Christ’s faithful to cooperate in the exercise of this power in accordance with the law.<sup>251</sup> Sacred power and power

<sup>247</sup> *LG 21*: “by Episcopal consecration the fullness of the sacrament of Orders is conferred, that fullness of power, namely, which both in the Church’s liturgical practice and in the language of the Fathers of the Church is called the high priesthood, the supreme power of the sacred ministry. But Episcopal consecration, together with the office of sanctifying, also confers the office of teaching and of governing, which, however, of its very nature, can be exercised only in hierarchical communion with the head and the members of the college.”

<sup>248</sup> L. Gerosa, *Interpretacja prawa w Kościele...*, Kraków 2003, p. 184.

<sup>249</sup> See: K. Mörsdorf, *Ecclesiastical Authority*, [in:] *Sacramentum Mundi: an Encyclopedia of Theology*, ed. K. Rahner, New York 1968, vol. II, p. 133–139, here p. 133.

<sup>250</sup> R. Sobański, *Kościół jako podmiot prawa...*, p. 134–165. Contrary to this opinion, see: J. J. Cuneo, *The power of Jurisdiction: Empowerment for Church Functioning and Mission Distinct from the Power of Orders*, *The Jurist* 39 (1979), p. 183–219. The author demonstrates that the distinction is real, valid and operative. For commentary, see: J. M. Huels, *Another Look at Lay Jurisdiction*, *The Jurist* 41 (1981), p. 59–80.

<sup>251</sup> See two very informative articles: J. P. Beal, *The Exercise of the Power of Governance by Lay People: State of the Question*, *The Jurist* 55 (1995), p. 1–92, and J. M. Huels, *Power of Governance and Its Exercise by Lay Persons: a Juridical Approach*, *Studia Canonica* 35 (2001), p. 59–96.

of governance are, of course, closely related. But the power of governance is more fundamental legal concept and it should be properly understood and not confused with sacred power which ought to be understood more widely.

The Second Vatican Council seemingly expressed preference for term *munus*, instead of *potestas*. Following the lead of it, the activities of the one power in the Church may be classified according to three functions: teaching (*munus docendi*), sanctifying (*munus sanctificandi*), and ruling (*munus regendi*). For the examples of the *munera* in documents one can refer to *LG* 9–17; *LG* 20; *LG* 32; *PO* 4–6; and *AA* 2.<sup>252</sup>

*Nota explicativa praevia* (no. 2) to *LG*, explains how to understand the expression “munus,” which is usually translated as: “office” or “function,” depending on sense. “In consecratione datur ontologica participatio sacrorum munerum, ut indubie constat ex Traditione, etiam liturgica. Consulto adhibetur vocabulum munerum, non vero potestatum, quia haec ultima vox de potestate ad actum expedita intelligi posset. Ut vero talis expedita potestas habeatur, accedere debet canonica seu iuridica determinatio per auctoritatem hierarchicam. Quae determinatio potestatis consistere potest in concessione particularis officii vel in assignatione subditorum, et datur iuxta normas a suprema auctoritate adprobatas.”<sup>253</sup>

K. Mörsdorf, trying to work out the relationship between the three *munera* and *potestas sacra* concluded that the polarity of the relationship between the powers of orders and jurisdiction might be compared with the foci of an ellipse, supposing these to be movable. Each of the two powers has its own connections with the three offices, because both the power bestowed by holy orders and that bestowed by canonical mission operate, each in its own way, in the priesthood, the Magisterium of the Church, and government that compose the Church’s work.<sup>254</sup> It is not clear that model of *tria munera* should replace traditional model of power of orders and power of jurisdiction.<sup>255</sup> The fact

<sup>252</sup> More about the relation *munus* to *potestats sacra*, see: K. Mörsdorf, *Schriften zum Kanonischen Recht*, ed. W. Aymans and others, Paderborn 1989, p. 171–240.

<sup>253</sup> *Preliminary Note of Explanation*, no. 2: “In his consecration a person is given an ontological participation in the sacred functions [munera]; this is absolutely clear from Tradition, liturgical tradition included. The word “functions [munera]” is used deliberately instead of the word “powers [potestates],” because the latter word could be understood as a powerfully ready to act. But for this power to be fully ready to act, there must be a further canonical or juridical determination through the hierarchical authority. This determination of power can consist in the granting of a particular office or in the allotment of subjects, and it is done according to the norms approved by the supreme authority.”

<sup>254</sup> K. Mörsdorf, *Ecclesiastical Authority*, [in:] *Sacramentum Mundi: an Encyclopedia of Theology*, ed. K. Rahner and others, New York 1969, vol. II, p. 137. More see: K. Mörsdorf, *Schriften zum Kanonischen Recht*, ed. W. Aymans and others, Paderborn 1989, p. 171–240.

<sup>255</sup> L. Gerosa, *Interpretacja prawa w Kościele...*, Kraków 2003, p. 185.

is that the Second Vatican Council never used the term *potestas iurisdictionis* (power of jurisdiction).<sup>256</sup>

### 1.4.5. Power of Governance

The unity of power of governance is underlined in the current code many times, for instance: can. 331, can. 333 § 1, can. 336, can. 381 § 1, can. 391 § 1, can. 1419 § 1, can. 1441. The expression from can. 135 § 1 that “Potestas regiminis distinguitur in” can be understood only in a functional way. The canon in question divides the power of governance into: legislative, executive and judicial power. What is intended by the division is that it should help in functioning the Church as institution by maintaining law and order in the community of the Church.

Norms of can. 135 § 2 to § 4 prescribe how to carry out and exercise the function. They are concretized by can. 391 § 1: “Episcopi dioecesani est Ecclesiam particularem sibi commissam cum potestate legislativa, exsecutiva et iudiciali regere, ad normam iuris.” On the basis of this, the power of governance can be defined as the lawfully granted, public power necessary for validly performing a juridical act that is legislative, executive, or judicial.<sup>257</sup> It is a canonical definition with no trace of theological content. It is not a weakness but strength of the definition because this definition is practical and juridically precise.

The truth is, that power of governance is very much a reality in the Church. It is in practice closely related to the *munus regendi*, but is not identical with it. This ruling function of the Church is much broader than just the power of governance. The *munus regendi* includes many activities in the areas of pastoral care and works of the apostolate, participation on consultative bodies, and various administrative and pastoral offices, not all of which involve the exercise of the power of governance. The *munus regendi* also involves governance in the wide sense, which corresponds to the traditional notion of jurisdiction – not just power for specific juridical acts but the broad power of the Church leadership over the faithful in administration, oversight, encouragement of apostolic and charitable efforts, vigilance over church discipline, etc. (cf. CD 16–18, can. 383–385, can. 392–394, can. 396–398).

Legislative power in the Church context can be provisionally defined as the power usually connected with ecclesiastical office to make law and to alter it and to force the community to observe it. The power is executed exclusively by the legislator with own or delegated authority to amend or repeal laws.<sup>258</sup>

<sup>256</sup> Entry: *iurisdictionis*, [in:] X. Ochoa, *Index verborum cum documentis Concilii Vaticani Secundi*, Roma 1967, p. 274.

<sup>257</sup> J. M. Huels, *Power of Governance...*, p. 65–66.

<sup>258</sup> Cf. entry: *Legislative Power*, [in:] *Black's Law Dictionary*, ed. B. A. Garner, St. Paul 2004<sup>9</sup>, p. 983.

## 1.5. Legislator in the Church as the Agent of Legislation

Jurisprudence says that anyone who holds or holds and exercises legislative power is a legislator. This name can be given both to a person and to a member of a body authorized to make law.<sup>259</sup> Having this in mind and taking into consideration the Church's reality, one can make list of legislators in church community.<sup>260</sup>

### 1.5.1. Jesus Christ as the Supreme Legislator

The essence of God's plan is to save mankind and Jesus Christ is the deepest truth about God and the salvation of man shines out for our sake in Christ, "qui mediator simul et plenitudo totius revelationis existit" (DV 2).<sup>261</sup> Christ wants to save His people. One of the ways to bring people salvation is by fulfilling one of *tria sacra munera*, that is, governing. As it has been demonstrated, governing is done also as giving rules. In such a view, Jesus Christ is the supreme Legislator. The Trident Council teaches that Jesus is the first legislator in the Church: "Si quis dixerit, Christum Iesum a Deo hominibus datum fuisse ut redemptorem, cui fidant, non etiam ut legislatorem, cui obediunt: anathema sit."<sup>262</sup> The rules established by Christ are the highest and overrule all other laws. Every rule established by man must be coherent with Christ's rules.

The Church has been established by the Lord. Its activity is the realization of Christ's mission and will. It is also done by concretization of the message in rules, that is, in church law. The Church, while imposing norms on the faithful, is aware that it is passing on Christ's will concerning the community of believers. The Church as a *communio* is the legislator for itself under the power of Christ as the supreme Legislator. Here the question is: Who is taking Christ's position in Church as a legislator on the earth? The answer is given by a set of designates of the name a church law maker.

<sup>259</sup> Entry: *Legislator*, [in:] *Black's Law Dictionary...*, p. 983.

<sup>260</sup> The legislator not "in" but "for" Church community can be justly called any legislator to whom canon law refers in accordance to can. 22.

<sup>261</sup> DV 2: "who is the Mediator and at the same time the fullness of all revelation."

<sup>262</sup> Concilium Oecumenicum Tridentinum, Sessio VI, 13.01.1547, *Decretum de iustificatione*, can. 21 (DS 1571).

### 1.5.2. Bearers of Legislative Power

First of all, one should focus on the author of the law. It is clear, that only bearer of the power of legislation can issue acts of legislation (can. 135 § 2). But this criterion, of course, is not sufficient. Subjects who have legislative power can execute other powers as well, for instance, Pope and colleges of bishops for the universal Church and diocesan bishop for particular Church. They can be in their own competences legislators, executioners or judges. Both the executive power and legislative power give competence to issue acts.<sup>263</sup> In fact, it is not a power of a different kind, but is contained in the legislative power itself. In the Church, mostly legislators possess likewise the power of execution. The reverse, however, is not true. The matter is more obscure because law allows delegating legislative power to other subjects usually involved in execution power like, for instance, the Vatican Curia Congregations. All this leads to the conclusion that legislation act cannot be explicitly recognized or indicated only by its author. The list of bearers of legislative power, that is, legislators must be made.

In canon law, there is no institution like a legislative body or organ.<sup>264</sup> But in *CIC* 1983 there are many canons about who is a legislator (see, e.g., can. 132 § 2, can. 336–337, can. 338, can. 381 § 2, can. 391 § 2, can. 441, can. 455, can. 596 § 2). On the basis of this, it can be said that church legislator is a person or a group of people entitled to make the law for certain community, in special matter, or for a concrete territory on which that law is binding. Being entitled means being competent.<sup>265</sup>

The lawmakers with ordinary legislative power in the Universal Church that is the universal legislators, are numbered:

1. The Roman Pontiff. He holds full and supreme power in the Church and is entitled to make, alter or repeal every merely ecclesiastical law (cf. can. 11). The limits of his legislative power come only from the divine law (natural and positive, can. 331, can. 333 § 1). All documents issued by the Bishop of Rome are to be received with special respect.
2. The College of Bishops with the Roman Pontiff as the head of the College of Bishops also possesses full and supreme power in the Church (can. 331, can. 336). The college is working fully collectively at a council.
3. The function of the synod of Bishops is not to settle matters or to draw up decrees, unless the Roman Pontiff has given it deliberative power

<sup>263</sup> F. J. Urrutia, *Administrative Power in the Church according to the Code of Canon Law*, *Studia Canonica* 20 (1986), p. 269–270.

<sup>264</sup> R. Sobański, *Metodologia prawa...*, p. 65.

<sup>265</sup> F. Bączkiewicz, *Prawo kościelne. Podręcznik dla duchowieństwa*, vol. 1, prepared for printing and supplemented by J. Baron and W. Stawinoga, Opole 1957, p. 190.



in certain cases (can. 343). That is the very unique situation of delegation of power of legislation.

4. Normally the Roman dicasteries cannot issue laws or general decrees having the force of law or derogate from the prescriptions of current universal law, unless in individual cases and with the specific approval of the Supreme Pontiff.<sup>266</sup> The papal authorization is given by delegation to issue law in special way and it is signed by formula that leaves no doubt about the decree's legislative force, for example: "vigore specialis facultatis sibi a Suprema Ecclesia auctoritae tributae (can. 30), decrevit: [...]"<sup>267</sup> The approval can be done also by consequent confirmation post factum given in special (*confirmatio in forma specifica*) or in ordinary way (*confirmatio in forma communi*). It is of the utmost importance that nothing grave and extraordinary be transacted unless the Supreme Pontiff previously has been informed by the moderators of the dicasteries. The approval in special cases by which the act of law written by a dicastery becomes act of law of Pope cannot be changed or revoked unless by Pope himself. Authorization can be granted to entire document,<sup>268</sup> or to a part of it.<sup>269</sup> If the authorization is given in a regular way, act of law remains as written by a dicastery. Distinguishing if the authorization was special or regular is difficult and can cause problems.<sup>270</sup> Some expressions can be of help.<sup>271</sup>

<sup>266</sup> *Pastor Bonus*, art. 18; *Secretaria Status, Regolamento generale della Curia Romana*, 4.02.1992, *AAS* 84 (1992), p. 201–267, art. 110.

<sup>267</sup> *Congregatio pro Doctrina Fidei, Congregatio decretum quo ad Poenitentiae sacramentum tuendum, excommunicatio latae sententiae illi quicumque ea quae a confessario et a poenitente dicuntur vel per instrumenta technica captat vel per communicationis socialis instrumenta evulgat, infertur*, 23.09.1988, *AAS* 80 (1988), p. 1367.

<sup>268</sup> See: *Congregatio pro Clericis, Decretum Mos iugiter quoad stipendia a sacerdotibus pro Missis celebrandis accipienda, regulae quaedam dantur*, 22.02.1991, *AAS* 83 (1991), p. 443–446, that derogated part of can. 948. See p. 446: "Summus Pontifex Ioannes Paulus II, relati Decreti normas in forma specifica die 22 ianuarii 1991 approbavit, easque promulgare et vigere iussit." See also: *Congregatio pro Clericis et aliae, Instructio Ecclesiae de mysterio de quibusdam quaestionibus circa fidelium laicorum cooperationem sacerdotum ministerium spectantem*, 15.08.1997, *AAS* 89 (1997), p. 852–877, p. 877: "Summus Pontifex in forma specifica hanc Instructionem approbavit atque promulgari publice iussit."

<sup>269</sup> *Congregatio pro Doctrina Fidei, Agendi ratio in doctrinarum examine*, 29.06.1997, *AAS* 89 (1997), p. 830–835, from the document where in special way were approved art. 28 and art. 29; see on p. 835: "Has normas Sessione Ordinaria huius Congregationis statutas, Summus Pontifex Ioannes Paulus II, in Audientia infrascripto Cardinali Praefecto die 30 maii 1997 concessa, ratas habuit et confirmavit, simul art. 28–29 in forma specifica approbando, contrariis quibuslibet non obstantibus, easque publici iuris fieri iussit."

<sup>270</sup> R. Sobański, *Metodologia prawa...*, p. 68.

<sup>271</sup> Expression like: "certa scientia atque suprema Nostra auctoritate approbamus" or "has normas Papa speciali modo approbaviti" give certainty that approval was special. Expressions: "de speciali mandato Summi Pontificis" is dubious and can be used in regular and special approval. Expressions like: "audientia die [...], Papa praefatas normas benigne confirmare et ratas

Among Roman dicasteries that can issue a law a special place has the Pontifical Council for Legislative Texts (*Pontificium Consilium de Legum Textibus*).<sup>272</sup> It can interpret law of the Latin Church and East Churches as well.<sup>273</sup> To have a force of law, authentic interpretation must be given to users of law *per modum legis* after *pontificia auctoritate armata*.<sup>274</sup> It means that it requires *promulgatio* (can. 16 § 2) and *vacatio legis* (can. 8). After this, interpretation is a part of law itself, it has the same force as the interpreted law and can be interpreted as the law.

Lawmakers with ordinary legislative power in the Universal Church are able to issue a law not only for the whole Church. They may also pass laws, which pertain only to certain territories or specific groups of Catholics. *The American Procedural Norms*<sup>275</sup> are an example. The document had been drafted by CLSA and National Conference of Catholic Bishops in the mid to late 1960s and proposed for Roman approval shortly thereafter. Absent Roman authorization, the document in question would have remained a speculative academic exercise. After Roman approval *The American Procedural Norms* became binding law in tribunals in the USA.<sup>276</sup>

The particular legislators are:

1. Episcopal conferences. They can make general decrees but are more restricted in doing so (can. 455 § 1). It is legitimate only in cases where the universal law has so prescribed, or by special *motu proprio* mandate

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habere dignatus est” or “Papa praesens decretum approbavit et auctoritate sua confirmavit” or “facto verbo cum Sanctissimo” are used in normal authorization, see more: R. Sobański, *Metodologia prawa...*, p. 68.

<sup>272</sup> It was established by Joannes Paulus PP. II, Litterae apostolicae motu proprio *Recognitio Iuris Canonici* Pontificia Commissio Codici Iuris Canonici authentice interpretando constituitur, 2.1.1984, AAS 76 (1984), p. 433–434. It was reorganized by *Pastor Bonus*, art. 154–158. Renamed in 1999 from *Pontificium Consilium de Legum Textibus Interpretandis*. Its predecessor was Pontificia Commissio ad Codicis Canones authentice interpretandos established by Benedictus PP. XV, Motu proprio *Cum iuris canonici* Commissio instituitur ad Codicis canones authentice interpretandos, 15.09.1917, AAS 9 (1917) I, p. 483–484. More about the history of interpretation of church law, see: P. Kroczyk, *Zasada „clara non sunt interpretanda”...*, p. 10–24.

<sup>273</sup> More about its competences, see: F. J. Urrutia, *De Pontificio Consilio de legum textibus interpretandis*, *Periodica* 78 (1989), p. 503–521; E. Sztafrowski, *Kuria Rzymska Jana Pawła II*, *Prawo Kanoniczne* 33 (1990) no. 1–2, p. 71–72; J. Krukowski, *Kompetencje Papieskiej Rady do Spraw Interpretacji Tekstów Prawnych*, *Analecta Cracoviensia* 26 (1994), p. 545–555; A. Kaczor, *Papieska Rada do Spraw Interpretacji Tekstów Prawnych*, [in:] *Plenitudo legis dilectio. Księga pamiątkowa dedykowana prof. dr. hab. Bronisławowi W. Zubertowi OFM z okazji 65. rocznicy urodzin*, ed. A. Dębiński, E. Szczot, Lublin 2000, p. 403–420.

<sup>274</sup> *Pastor Bonus*, art. 155.

<sup>275</sup> The document took effect on 1.06.1970 first for an experimental three year period. Finally, it was in force in the USA to 26.11.983. It can be found in: *The Jurist* 30 (1970), p. 363–368; see more: T. Green, *The American Procedural Norms: an Assessment*, *Studia Canonica* 8 (1974), 317–347.

<sup>276</sup> Later on extended also to: Australia, England, Canada, and France.

from the Apostolic See, either on its own initiative or at the request of the Conference itself. For the decrees to be validly enacted at a plenary meeting, they must pass by two thirds of the votes of those who belong to the Conference with a deliberative vote. The decrees do not oblige until they have been reviewed by the Apostolic See and lawfully promulgated. Analysis of the code entitles one to say that Conference can issue law widely.<sup>277</sup>

2. Councils of bishops are also legislators in the Church. They can make law on regional (national) councils (can. 439 § 1) or provincial councils (can. 440 § 1). In such councils all of the bishops who vote legislate collegially: diocesan bishops, coadjutor bishops, auxiliary bishops, and other active titular bishops. Retired bishops may also be called to council and vote (can. 443). The decrees of the councils of bishops must be reviewed and recognized by Rome (can. 446).
3. The diocesan bishop possesses legislative authority for the portion of God's people committed to his care (can. 391). Even when laws are formulated in a synod, the diocesan bishop is considered the sole legislator (can. 466).
4. All who are equivalent in law to diocesan bishop, that is, those who are the heads of particular churches like: a territorial prelature, a territorial abbacy, a vicariate apostolic, a prefecture apostolic and permanently established apostolic administration (can. 381 § 2, can. 368).
5. The major Superiors of clerical religious institutes of pontifical right and of clerical societies of apostolic life, the general chapters of the institute of clerical life according to their own constitutions (can. 134 § 1, can. 586 § 1, can. 593, can. 596 § 1).

There is also another special type of legislators. The type can be called the *statute legislator*. The legislator can make law for the very specific groups of people:

1. The chapters of Canons, whether cathedral or collegiate,
2. Religious institutes,
3. Associations of Christ's faithful,
4. Universities and other institutes of higher studies.

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<sup>277</sup> For the list of possible matters regulated by law made by Episcopal conference, see: J. Listl, *Die Einzelkompetenzen der Bischofskonferenz*, [in:] *Handbuch des Katholischen Kirchenrechts*, ed. J. Listl, H. Schmitz, Regensburg 1999<sup>2</sup>, p. 408–411.

Some authors claim that it is better to speak about widely understood *normative activity* of Episcopal conferences than about *legislative activity*, because among many documents issued by *Episcopal Conference* a small part is a typical act of law, see: T. J. Green, *The Normative Role of Episcopal Conferences in the 1983 Code*, [in:] *Episcopal Conferences: Historical, Canonical & Theological Studies*, ed. T. J. Reese, Washington 1989, p. 141, ft. 6.

The laws made by them usually are taking effect after act of acceptance from its major superior. The acceptance is not changing the type of law. They are still an internal issue of the group of people.<sup>278</sup>

### 1.5.3. Types of Legislators

The analysis of the list of subjects of legislative power in the Church allows to make some other distinctions and to present some types of lawmakers.

#### 1.5.3.1. Universal and Particular

There can be made a distinction between the *strict sense* of canon law as the law enacted by the Pope for the universal Church, and the *wide sense* of canon law as the law which Bishops and other inferior legislators are empowered to make for the government of their own territory.<sup>279</sup> On the basis of this one can distinguish between a legislator in *strict sense*, that is, the supreme legislator, who can be called universal legislator, and a legislator in *wide sense*, that is, every lower than the supreme legislator; in other words, particular legislator.

#### 1.5.3.2. Single and Collective

Depending on how many persons are involved in the legislation body, the lawmaker can be *single* or *collective*. Single one makes his own decisions and takes responsibility individually. Still he can have advisors and experts, but their role in making law is officially shadowed.

In case of collective legislator that can be also called *institutional legislator* or *legislative body*, decision is made according to a rule of voting or acclamation. A law is enacted usually by majority. This kind of legislator has its own internal, frequently complicated, organizational structure, like commissions, teams of experts that take part in the lawmaking process.

#### 1.5.3.3. Ordinary and Delegated

Normally legislative power cannot be delegated. It is prohibited by can. 135 § 2 for any legislator lower than the supreme authority, the Roman Pontiff (can. 331), and the college of bishops (can. 336) to delegate his power to anyone, unless the law explicitly provides otherwise as it is can. 30. The delegation can be given to the synod of Bishops (can. 343) or to Rome congregations.<sup>280</sup>

<sup>278</sup> R. Sobański, *Normy ogólne Kodeksu Prawa Kanonicznego*, Warszawa 1969, p. 43.

<sup>279</sup> A. G. Cicognani, *Canon Law*, Westminster 1934<sup>2</sup>, p. 43.

<sup>280</sup> *Pastor Bonus*, art. 18.

#### 1.5.3.4. Dogmatic and Real

Theory of law makes another distinction. There is a difference between dogmatic legislator and real one.<sup>281</sup> The first one is a subject, who is officially by law recognized as a legislator. He holds legislative power and takes responsibility for law. He can authentically interpret law.

Real legislator is a legislator in the sociological meaning. It is a subject or a group of subjects that are engaged in the process of preparation of a law. They are involved in steps of drafting a law and have a real impact on the shape of a law. They exert real influence on the final content. Their role is to give their opinion, advice or juridical solution and also prepare and edit a law.

#### 1.5.4. Authority of Legislator

The term “authority” must not be exclusively understood, as it often is in jurisprudence,<sup>282</sup> as a direct substitute of a word “power.” Here it should be understood as it is in field of sociology, namely, as a special relation that exists between individuals. A relation of authority exists when one individual does, as indicated by another individual, what he or she would not do in the absence of such indication.<sup>283</sup> It is standing, reputation or prestige of bearer of authority over the subjects of it.

Although the Church as place of exercising such authority is a very unique society – it is not community as many others due to its own specificity,<sup>284</sup> which requires that its problems, also the problem of authority, be treated in a special way – it is still good to call philosophy for help and its analysis in order to understand the authority.

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<sup>281</sup> S. Wronkowska, *The Rational Legislator as a Model for the Real Lawmaker*, [in:] *Polish Contributions to the Theory and Philosophy of Law*, ed. Z. Ziemiński, Amsterdam 1987, p. 148. Sometimes an act of law takes its informal name after the dogmatic author – the Code from 1983 is sometimes called: “the code of John Paul II”, see: T. Pawluk, *Prawo kanoniczne według kodeksu Jana Pawła II*, vol. II, Olsztyn 1986, p. 21, or real author – Polish the Penal Code from 1932, that is Rozporządzenie Prezydenta Rzeczypospolitej z dnia 11 lipca 1932 r. Kodeks karny (Dz.U. of 1932 No. 60, item 571, as amended) was called in polish jurisprudence „Kodeks Makarewicz” („Makarewicz’s Code”) after J. Makarewicz, who was one of its authors, see: S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2005<sup>3</sup>, p. 29.

<sup>282</sup> Entry: *Authority*, [in:] *Black’s Law Dictionary...*, p. 152.

<sup>283</sup> E. Zambrano, *Social Theories of Authority. Essay Prepared for the International Encyclopedia of the Social and Behavioral Sciences*, 29.03.2000, <http://www.calpoly.edu/~ezambran/WebPapers/Authority.PDF>, p. 1 (access: 15.09.2009).

<sup>284</sup> J.-R. Armogathe, O. Chaline, *Między dwiema społecznościami: Kościół Chrystusowy a współczesne państwa*, *Communio* 3 (135) 2003, p. 14.

An in-depth analysis of the term “authority” has been presented by J. M. Bocheński.<sup>285</sup> His findings are well-known and respected.<sup>286</sup> According to him, authority is a triadic relation obtained among three sides: the bearer of authority, the recognizing subject and the field of authority. By application of this schema to the issue at stake it can be observed that the bearer of authority is bishop as legislator, the recognizing subject are the subjects under his law, and the field of authority is the practice of religion.

The author claims that the authority can be reduced to two basic types. One is deontical authority. It is an authority of someone who has power, for instance, a manager, a supervisor or a head of community. The individual in question can direct others and impose his or her will on others. Applying that to the Church, one can see that most legislators in the Church, e.g., diocesan bishops, belong to the ecclesiastical hierarchy and have sacred power. They have the right and duty to regulate the practice of the evangelical counsels by law (*LG* 45). Expression of the power is ability to administer justice to the faithful and to apply the penal sanctions in the Church (can. 1311).<sup>287</sup> This power makes them bearers of deontical authority.

The second type of the authority comes from knowledge. It is epistemological authority. A typical bearer of this authority is a teacher, an educator, an expert; in other words, someone whose authority is based on knowledge or experience. Transferring this to the life of the Church in the optic of the book, it must be noticed that to be a suitable candidate for the episcopate, a person must hold a doctorate or at least a licentiate in Sacred Scripture, theology or canon law, from an institute of higher studies approved by the Apostolic See, or at least be well versed in these disciplines (can. 378 § 1 no. 5). This is not everything, because in the legislation context, a bishop as lawmaker must also have knowledge, competences, and qualities important for taking legislative action. Besides the factual competence that can be presumed by his holding office, he must possess proficiency in the field of jurisprudence. Only in virtue of having these qualities can he be presumed to be a rational legislator.<sup>288</sup> Now, it is clear that bishop as legislator has authority because he has power and knowledge, both proper to hold his ecclesiastical office.

<sup>285</sup> J. M. Bocheński, *Co to jest autorytet?*, [in:] *Logika i filozofia. Wybór pism*, transl. J. Parys, Warszawa 1993, p. 187–324.

<sup>286</sup> O. R. Scholz, *Experts: What They are and how We Recognize Them—a Discussion of Alvin Goldman's Views*, [in:] *Reliable Knowledge and Social Epistemology: Essays on the Philosophy of Alvin Goldman and Replies on Goldman*, ed. G. Schurz, M. Werning, Amsterdam–New York 2007, p. 189–190.

<sup>287</sup> *Nota bene CIC* 1983 uses words authority and power interchangeably, e.g., can. 33 § 2.

<sup>288</sup> S. Wronkowska, *The Rational Legislator as a Model for the Real Lawmaker*, [in:] *Polish Contributions to the Theory...*, p. 147–163.

It seems that J. M. Bocheński's model of authority is insufficient to convey all the aspects of the authority of bishop as lawmaker. It does not explain everything. Taking into consideration genesis of the Church, the beginning and life of the community, it must be noticed that the Church is a reality of faith and any authority in the Church is always preceded by authority of faith.<sup>289</sup> This statement has far reaching consequences.

First of all, in the understanding of people who have faith, the office of bishop is established by divine institution. Every bishop is a successor of the Apostles through the Holy Spirit who was given to him (can. 375 § 1). Catholics consider bishop a legislator who was constituted a Pastor in the Church for the sake of community. His duty and right is to be a teacher of doctrine, a priest of sacred worship, and a minister of governance. It means that he is responsible before God for the Flock's following of God's will and striving for Salvation. Only faith permits one to look at bishop and to understand his office as it has been demonstrated.

In this way, one can add to the previous two kinds of authority the next one that can be attributed to bishop as legislator – *f a i t h a u t h o r i t y*. This kind of authority is brought about by faith and built on it. The authority in question is logically the source of the two kinds of authorities already mentioned. Faith authority is the first one because without faith hardly anyone would recognize bishop as a person who holds an office and would admit that he exercises special power connected with the office. Bishop's chief position in community of believers is unique. Those who are outside the community or do not believe, probably could not find any good argument to accept bishop's position and to obey him as the bearer of deontical authority. Also bishop's knowledge about God and the Church would be for nonbelievers rather useless, that is, without any significance for their life.<sup>290</sup> In a word, bishop's position among the faithful as Head and as Teacher presupposes their faith and, by the same token, due to people's faith bishop has authority of faith and can enjoy two earlier mentioned kinds of authority.

But adding faith authority does not exhaust the topic. As it has been demonstrated, on the one hand, bishop must be the authentic instructor and teacher of the faith for Christ's faithful entrusted to his care (*CD 2*, can. 753), that is, he transmits the authentic content of faith and is recognized as such by the believers. Nevertheless, on the other hand, there has been, so far,

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<sup>289</sup> Cf. R. Sobański, *Kościół jako podmiot prawa...*, Warszawa 1983, p. 169–170.

<sup>290</sup> To be exact, there can be a situation in which even a nonbeliever recognizes bishop's power, for instance, when someone seeks a dispensation (can. 1086 § 1) or permission (cf. can. 1124, can. 1125) to contract marriage validly and licitly (cf. can. 1118, can. 1291, can. 1298). Similarly, a nonbeliever could appreciate bishop's knowledge seeing him as a specialist in Catholic theology or an expert in life and activities of the Church as institution.

no mentioning of bishop's personal faith, that is, authenticity of his personal witness of faith and his other personal qualities in relation to his authority. His trustworthiness and credibility in the eyes of community points to another dimension of authority.

It is clear that people obey someone whose lifestyle is recognized as good, exemplary – in other words – a guiding light. The same is true with bishop as legislator. The Second Vatican Council teaches that bishop must exert good influence on those over whom he presides, refraining from all evil (*LG* 26). He should be a good shepherd who knows his sheep and whose sheep know him. He should be true father who excels in the spirit of love and solicitude for all and to whose divinely conferred authority all gratefully submit themselves (*CD* 16). By the example of his personal faith, morality and spiritual life, but also kindness, gentleness, openness, joy, peace, patience, goodness, faithfulness, and self-control (cf. Gal 5, 22–23) he may successfully attract people to his law. This factor creates a new kind of authority – personal authority. This kind of authority can come only from a genuine witness to the gospel.

In summary, it can be said that only law given by a bishop who possesses these four kinds of authority, namely, faith authority, deontical authority, epistemological authority, and a personal one, has the necessary potential to be received by community in a degree of successfully forming its life. It is desirable that all these kinds of authority meet and combine in a person of bishop. Of course, bishop can only rely on his authority of power, that is, his deontical authority. It is enough to bind someone by law. The fact that law is just and rational,<sup>291</sup> and properly promulgated (can. 7, can. 29),<sup>292</sup> already creates legal obligation. Its binding force does not depend on acceptance of law from the subjects of law. And yet, even though the decision to make law belongs to legislator himself, its acceptance is an act of intelligence and free conscience on the part of the subjects.<sup>293</sup> Looking at the problem in terms of effectiveness of law, other forms of authorities are of essence when it comes to increasing the subjects' acceptance of law.<sup>294</sup> Real and full acceptance means that people feel the unity with their bishop and with community to which they belong (cf. can. 96, can. 107 § 1).<sup>295</sup> As a consequence, they will treat rules as their own and try hard to live according to them.

<sup>291</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 179–180.

<sup>292</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 176–179.

<sup>293</sup> L. Örsy, *Moral Theology and Canon Law: the Quest for a Sound Relationship*, [in:] *Theology and Canon Law...*, p. 124.

<sup>294</sup> R. Sobański, *Kościół jako podmiot prawa...*, p. 172. See more: G. J. King, *The Acceptance of Law by the Community: a Study of The Wittings of Canonists and Theologians*, *The Jurist* 50 (1997), p. 233–256.

<sup>295</sup> Cf. W. Beinert, *The Subjects of Ecclesiae Reception*, *The Jurist* 55 (1995), p. 321.



### 1.5.4.1. Authority and the Freedom of the Faithful

The question that must be posed here is as follows: Is authority of bishop as lawgiver in clash with freedom of users of law? It seems that the answer should be positive. Any bearer of authority seems to suppress freedom according to his will. Word *f r e e d o m* seems to be at odds with word *a u t h o r i t y*.<sup>296</sup> But after analyzing the problem in church context it can be noticed that these words are not so far away from each other. Actually their relationship is completely coherent and must be seen as harmonious unity. They are both needed in the reality of the Church.<sup>297</sup> Christ himself spoke with authority but came to give freedom (cf. Mt 7, 29; Gal 5, 1).

How can it be? First of all, faith is to be accepted freely without any force or imposition. The Second Vatican Council teaches that “omnes homines debent immunes esse a coercitione ex parte sive singulorum sive coetuum socialium et cuiusvis potestatis humanae, et ita quidem ut in re religiosa neque aliquis cogatur ad agendum contra suam conscientiam neque impediatur, quominus iuxta suam conscientiam agat privatim et publice, vel solus vel aliis consociatus, intra debitos limites” (*DH 2*<sup>298</sup>). So, the act of faith is of its very nature a free act (*DH 10*). Faith requires practicing it, which entails submission to the powers exercised in God’s Church.

Only through faith is it possible to accept that any power in the Church is established by God himself and has special authority that comes from its divine origin. As St. Paul said, “Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God” (Rom 13, 1). Thanks to faith, bearer of power has authority to give orders that are to be obeyed.<sup>299</sup> Because of faith one can recognize a bearer of ecclesiastical power as established by God and obey it with divine reverence. Consequently, only in faith can someone carry out with great diligence his responsibilities towards law of the Church (can. 290 § 2). If not he is a rebel against the authority and it means a rebel against what God has instituted (cf. Rom 13, 2). Without faith, it would be rather difficult, if not ridiculous, to respect law made by a bishop.

<sup>296</sup> Cf. J. T. Ford, *Authority, Freedom and Theology*, The American Ecclesiastical Review 1 (1971), p. 8 ff.

<sup>297</sup> Cf. J. P. Mackey, *Tradycja i zmiana w Kościele*, transl. M. Wierzbicka, Warszawa 1974, p. 38 ff.

<sup>298</sup> *DH 2*: “All men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits”.

<sup>299</sup> R. Sobański, *Kościół jako podmiot prawa...*, p. 165–170.

So, authority of lawgiver, that is, relation between bearer of legislative power and individuals, who are the subjects of law, is ultimately based on freedom. There is no contradiction and there should be no tension between authority and freedom. It can be also said that, on the one hand, possession of power and connected with it authority requires from bearer of power an adequate competence. On the other hand, the exercise of power requires from subjects of rights and duties freedom of rational being.<sup>300</sup>

#### 1.5.4.2. What Makes an Impact on Authority?

Bishop who holds office of the sacred Pastors represents Christ. To be a real authority for Christ's faithful, who are conscious of their responsibility and bound to show Christian obedience, requires from bishop awareness of some factors that have an impact on his position in the community.

Due to the four kinds of authority presented above, it is justified to say that many factors have an influence on the authority in question. They are numerous. They are also mutually connected, first of all, because it is impossible to make practical distinction between a legislator as a person and as a bishop. The way in which he is construed as a person influences the way in which he is construed as a bishop. Secondly, although legislative power is only one of three kinds of power that bishop holds, and being a legislator is only one dimension of exercising his office in diocese, the making of distinctions among the activities of bishop is strictly theoretical. Bishops hold one sacred power and exercise *tria munera sacra* as one Shepherd of one Flock (CD 11).

After this clarification, it can be said that authority of church legislator is in vulnerable position. There are very many elements that have positive or negative influence on authority of bishop as legislator. Some situations and also bishop's own actions can become sources of weakening or strengthening of his authority as legislator. It is useful thus to present them here in some detail.

It must be emphasized at the very beginning that bishop should use his legislative power. He cannot simply limit the law in his diocese to universal law and custom. Law gives him certain legislation competences, which he should use in accordance with the rule of subsidiarity to the supreme legislator. There are many fields for exercise of his legislative power and areas intended for diocesan law. Also, bishop must take care that this power be seen as exercised in a strong manner. It must be visible to community. For instance, the situation in which penal law in diocese is putatively forgotten, that is, any penal law that was ever issued is treated as a law without obligation, does not support the authority of bishop at all. Bishop, not forgetting about *equitas canonica*, must demand respect and obedience to universal law and law made by him.

<sup>300</sup> M. A. Żurowski, *Autorytet i wolność w Kościele*, Prawo Kanoniczne 28 (1985) no. 1–2, p. 33.

The second problem concerns bishop's factual competences, both in matters that must be regulated by law, and also in matters of making law and technique of legislative drafting included. Both, the life of the community and jurisprudence are constantly changing. This situation poses a significant challenge for bishop and puts on his shoulders a task to catch up with understanding of reality and achievements of science of law. A good thing is that he does not have to do everything himself. Canon law provides some institutions as the presbyteral council (can. 495–501) and the experts or advisors (can. 228 § 2). They can be of help for a bishop who is acting as a legislator for his diocese. Also, some models of exercising bishop's legislative function are worth mentioning here, for instance: the executive model in form of the episcopal council; the synodal model by way of the diocesan synod; and the conciliar model by means of the presbyteral and pastoral councils.<sup>301</sup> All these can be of assistance to bishop. Making use of these means will not diminish his authority. Quite contrary, bishop would be seen as an open person, who tries to use most of means included in law to make good law for his people.

The next issue is the quality of law made by bishop. When law is unclear, it is very difficult to interpret and to apply it. The first one to be blamed for this situation is, of course, the legislator. The same reaction is expected when law is changed too often or too many acts of law are promulgated in a short period of time. Usually, it results in diminishing respect of users for the law, and will cause reduction of bishop's authority as lawgiver.

Another factor behind the diminishing authority is abuse of legislative power by bishop. Different kinds of situation can fall into this category. The first one is when bishop takes his legislative action according to famous dictum: "Non veritas, sed auctoritas facit legem."<sup>302</sup> Doing this he forgets that church legislation is based on the divine truth and is to bind the faithful by the rules of faith. Being a legislator means being a servant of truth, which in turn means being a teacher of faith. Law must follow the divine truth, protect and promote it, and support its spreading. If not, law would not have any justification for its existence. Consequently, canon law does not have to be theologically barren. Theological statements of belief are present in law and rightly so.<sup>303</sup> Church law is above all *ordinatio fidei*.<sup>304</sup> Of course, it is still *ordinatio rationis*. Bishop as legislator must remember that canon law serves not only to organize the life of the community, but, first of all, it is to lead to salvation, as it is expressed

<sup>301</sup> See more: *A Manual for Bishops. Rights and Responsibilities of Diocesan Bishops in the Revised Code of Canon Law*, rev. ed, Washington 1992, p. 29–31.

<sup>302</sup> T. Hobbes, *Leviathan*, Indianapolis 1994, chapter xxvi, p. 180.

<sup>303</sup> Cf. L. Örsy, *Interpretation. Guiding Principles*, [in:] *Theology and Canon Law...*, p. 53–54.

<sup>304</sup> See more: E. Corecco, *Ordinatio Rationis o Ordinatio Fidei? Appunti sulla definizione della legge canonica*, *Communio* 36 (1977), p. 48–69; R. Sobański, *Ustawa kościelna – "ordinatio rationis"...*, p. 27–53.

in the sentence “*salus animarum suprema lex*”<sup>305</sup> (cf. can. 1752). Canon law has its ultimate goal in the spiritual good of the members by helping them to accomplish God’s will and live according to faith to be saved. Being a legislator for community of believers requires constant reference to faith and remembering the true purpose of church law.

Another case of abuse in reference to legislative power is when bishop makes law without due regard to the users of law. It happens when bishop exercises his legislative power in a despotic or autocratic way.<sup>306</sup>

The decisions of the bearer of church power usually reach very deep into the life of the community. Due to this fact, the situation of misuse of legislative power can have negative impact on the faith and morals of believers. To avoid such situation, bishop must never forget that being a Head of community he is also a Servant of the faithful.<sup>307</sup> The principle of co-responsibility, the dignity and freedom of persons, the rights of Christians, demand the meaningful and active participation of the community in the formulation of laws affecting its life. It can be done by synods, councils, experts, and other already mentioned forms.<sup>308</sup> Of course, it can be done only with provision to the rule that diocesan bishop is the sole legislator in the diocese (cf. can. 466). It should be also mentioned here that faithful have no right to legislation initiative understood as a possibility to put an obligation on a legislator to work on the bill of law prepared by community. Still, Christ’s faithful have a right to make known their needs, and their wishes to the Pastors of the Church (cf. can. 212 § 2). It can be understood as persuading, explaining, making suggestions or preparing projects of law.<sup>309</sup>

The third possible situation of legislative abuse is when bishop forgets that law is not only *norma normans* of human life, but it is *norma normata*, as well. Not only does law shape the life of the community but also life, which is, of course, very changeable, shapes the law. They are mutually dependent processes. The care of the legislator can be seen in looking at the life of the community and taking into consideration, while in process of drafting law such factors in life as: numerical strength of community, its spiritual and

<sup>305</sup> Cf. Ivo Carnotensis, *Epistola 60*, PL 162, col. 74.

<sup>306</sup> Cf. J. L. McKenzie, *Władza w Kościele*, transl. A. Korlińska, Warszawa 1972, p. 136.

<sup>307</sup> P. Kroczeek, *The Theological Foundations of the Reception of Canon Law*, *Annales Canonici* 5 (2009), p. 169–171.

<sup>308</sup> T. F. O’Dea, *Authority and Freedom in the Church: Tension, Balance and Contradiction, a Historico-Sociological View*, [in:] *Who Decides for the Church: Studies in Co-Responsibility*, ed. J. A. Coriden, Hartford 1971, p. 284.

<sup>309</sup> R. Sobański, *Kanon 7*, [in:] J. Krukowski, R. Sobański, *Komentarz do Kodeksu Prawa Kanonicznego*, vol. 1, *Księga 1, Normy ogólne*, ed. J. Krukowski, Poznań 2003, p. 56 (*Komentarz do Kodeksu...*, vol. 1).

moral level, and also economic, political conditions, religious circumstances, etc. The broader the horizons of the legislator, the better the law he makes.<sup>310</sup>

But to be true, not everything depends on bishop's stance. Today it is generally recognized that a severe crisis of authority, which exists within the Roman Catholic Church, is to be related to a crisis of faith.<sup>311</sup> It is hard to blame bishop or his law for the erosion of faith and yet, as is well-known, without faith no canon law would be treated as important and, as a result, obeyed.

### 1.5.5. Popularity of Legislator

One question should be shortly answered here to give a better picture of the authority of lawgiver in eyes of community: Is there any connection between authority of the legislator and his popularity?

Popularity is the state or condition of being liked, admired, or supported by many.<sup>312</sup> So, it is a statement of fact, not a criterion of value. It speaks of an emotional attraction based on factors such as character, appearance, coincidence of interests, and such like, rather than of truth, values, or any deeper awareness of right and wrong. In that sense it is a surface phenomenon.<sup>313</sup>

It is a fact that there is an authority built on popularity. Popularity implies authority in the sense that it confers an ability to sway or influence others. Sometimes it can be very powerful. Authority built on that sometimes holds a controlling attraction for people's minds and hearts. But it is changeable and unstable. It has no solid foundations and it is vulnerable and destructible. It is clearly of a much lower order than authority based on knowledge, power, serious personal qualities or faith. Popularity cannot be named as equivalent of authority. It cannot be put on the same level as the kinds of authority previously mentioned.

Still, popularity can be of help to the legislator. He must take care of it not excessively but reasonably. It poses a challenge for him to gain popularity without becoming a populist. Next to popularity of the person of the legislator will follow popularity of the laws made by him. It is surely much easier to accept norm given by someone who is popular. This way of achieving acceptance of norms by the faithful cannot be, of course, the only way but as a subsidiary should be in the realm of interest of any legislator.

<sup>310</sup> Cf. L. Örsy, *The Interpreter and His Art*, *The Jurist* 40 (1980), p. 50.

<sup>311</sup> Cf. *Statement of Consensus*, [in:] *Who Decides for the Church: Studies in Co-Responsibility*, ed. J. A. Coriden, Hartford 1971, p. 223.

<sup>312</sup> Cf. entrances: *Popular, Popularity, Popularize*, [in:] *Webster's New World Dictionary*, ed. in chief V. Neufeldt, 3<sup>rd</sup> college ed., New York 1994, p. 1051.

<sup>313</sup> C. Burke, *Authority and Freedom in the Church*, San Francisco 1988, p. 231–233.

### 1.5.6. Qualities of Legislator

Jurisprudence offers a list of qualities that any legislator should possess. Users of law simply presume that the legislators have some special features and characteristics to do their job.

Truly speaking, this is some kind of a wish list. A lawmaker from the point of view of this assumption is idealized. It means that against the facts it is presumed that law is made by a legislator who consistently works according to his principles, never changing them.<sup>314</sup> Or he is quasi idealized. It means that a part of the postulates are realized in reality and a lawgiver is as he is in some measure as expected to be.<sup>315</sup>

#### 1.5.6.1. Postulate of Being Rational

First of all, the legislator should be rational.<sup>316</sup> It is essential for process of making law<sup>317</sup> and this is a very basic supposition beneath every act of interpretation of law.<sup>318</sup> If the legislator is rational, it means that law he made is also rational and in rational way can be understood. For the legislator and a user of law, rationality is some kind of language to understand each other. When the legislator acts according to rational way his work produces the most preferable results.

Being rational, in the context of the legislator's work, means several things. Firstly, that he must have a proper knowledge needed for taking a legislative action. There are two main wishes from formal point of view: that the knowledge of the legislator is mutually non-contradictory and that the knowledge of the legislator makes a system in which logical consequences are present. There are two postulates from material point of view. The first one is that the legislator has a proper knowledge regarding the system of law: the existing law, the rules for interpretation, and secondly, that legislator has a proper knowledge of the merits of the case that will be under norms.

The first set, from material point of view, concerns the postulated knowledge about a given legal system. This knowledge concerns the principles of the construction of Church legal system. It means that legislator must have knowledge about his legislative competence and of competences of other

<sup>314</sup> Z. Ziemiński, *Problemy podstawowe prawoznawstwa*, Warszawa 1980, p. 25.

<sup>315</sup> M. Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki*, Warszawa 2002, p. 279, ft. 9.

<sup>316</sup> The term *rationality* is used here to the lawmaker and should not be identified with any characteristic of conduct of a given subject but only as a feature of the subject's in his legislative activity.

<sup>317</sup> E. Kustra, *Racjonalny ustawodawca. Analiza teorioprawna*, Toruń 1980.

<sup>318</sup> L. Nowak, *Interpretacja prawnicza. Studium z metodologii prawoznawstwa*, Warszawa 1973, p. 54–57.

legislators in the Church, about the principles of making law, the principles which determine competences of certain subjects to abrogate or alter binding legal norms, and other substantial norms valid in the system.<sup>319</sup>

The second set of knowledge relates to the sphere of problems, which the legislator intends to influence. Here will be given some characteristics of the knowledge. They correspond to the stages of drafting law. The knowledge of the legislator must allow him to make a diagnosis of the initial state of affairs in the field under consideration, thus it is to include all the data necessary for that. The given knowledge allows formulating means of legal influence admissible in a given state of affairs; it includes data necessary to determine the relationships between behavior indicated in designed norms and its consequences. The knowledge allows to formulate predictions whether, and to what degree, the enactment of particular norms will influence the addressees of these norms in given circumstances in such a way that they will perform behavior indicated in the designed norms; thus, it includes data necessary to determine the relationships between the fact of enactment of certain norms and the influence of this fact on motivation of the addressees. Finally, this knowledge allows formulating predictions concerning the costs, in a broad sense, of every discussed alternative means of legal influence (material, organizational and social costs); thus it includes data necessary to determine the effectiveness of legal means under consideration.<sup>320</sup>

The second type of postulates concerns the preferences of the legislator according to which he decides. And again, there is a formal and material side. The legislator must have preferences, which are asymmetrical (if he prefers A before B, it means that he would never prefer B before A). The preferences must be transitive also (if the legislator prefers A before B and before C, it means that B he prefers before C and A prefers before C).<sup>321</sup>

Material facet of the preferences is connected with axiological values that the legislator has. The values are shown by the goals that the legislator wants to achieve. The aims are called *ratio iuris*. They can be divided into several points: the aims as desired effects; the aims as protection of *status quo*; the aims can be far-reaching and they can be obtaining in the long run, and short range, *ad hoc*; the aim can have negative character to avoid a situation and positive character to create a situation; the aims can be expressed directly in the law or implicitly contained; the aims can be in one law or disjointed in several laws.<sup>322</sup>

<sup>319</sup> Cf. S. Wronkowska, *The Rational Legislator as a Model for the Real Lawmaker*, [in:] *Polish Contributions to the Theory...*, p. 153.

<sup>320</sup> S. Wronkowska, *The Rational Legislator as a Model for the Real Lawmaker*, [in:] *Polish Contributions to the Theory...*, p. 152.

<sup>321</sup> L. Nowak, *Interpretacja prawnicza. Studium z metodologii prawoznawstwa*, Warszawa 1973, p. 39; M. Zieliński, *Wykładnia prawa...*, p. 279.

<sup>322</sup> Cf. T. Gizbert-Studnicki, *Wykładnia celowościowa*, *Studia Prawnicze* 304 (1985), p. 51 ff.

The third element constitutive of the rational legislator is his linguistic competence. It means that lawmaker knows language he uses to write a law and he is able to use it properly to express what he really wants. It creates the situation in which the sense of law would be discovered and understood correctly by user of law and would be, in result, carried out.

The linguistic competence of the lawmaker includes knowledge about syntax rules and vocabulary of the Latin, in case of universal church law, or ethnic language, which is used by the legislator to formulate legal texts, and also knowledge about specific features of the language of legal texts, that is, about its specific vocabulary and about the ways of formulation or encoding norms in legal acts.<sup>323</sup>

A serious criticism of the idea of rational legislator has been done. According to the criticism, it is dangerous for making law and application of laws because by taking without any reservation a legislator as rational, it is too easy to oversee or to justify any error of a legislator.<sup>324</sup> There is an opinion that the idea of rational legislator must be treated charily.<sup>325</sup> A danger in question would take place when the rational legislator were completely identified with a factual one. He is simply not. The rational legislator is an ideal toward which the factual legislator must strive; knowing that achieving it completely would be impossible.

The postulate of being rational consists in the claim that the legislator should be prudent. That is, he is to know a proper way to the appointed goal.<sup>326</sup> Every prudent decision is done following four steps: finding solution, assessing what has been found, and sticking to the best possibility, and putting it into action.<sup>327</sup> Being prudent helps one to avoid a position of administrative idealism. It takes two main mistakes. One is a naive conviction that only by making law it is possible to solve problems, and the next is that making law is enough to achieve goals of law.<sup>328</sup>

The rational legislator knows that making law sometimes is not the best way to affect community and refraining from drafting law is a fully rational decision.<sup>329</sup> Anyway, due to his position in community, he has other means to influence community and reach his goals. He can refrain himself from taking a legislative action “Cui licet quod est plus, licet utique quod est minus.”<sup>330</sup>

<sup>323</sup> Cf. S. Wronkowska, *The Rational Legislator as a Model for the Real Lawmaker*, [in:] *Polish Contributions to the Theory...*, p. 153.

<sup>324</sup> L. Morawski, *Co może dać nauce prawa postmodernizm?*, Toruń 2001, p. 55.

<sup>325</sup> R. Sobański, *Kanon 17*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 70.

<sup>326</sup> Cf. *ST*, II–II, q. 47, a. 2 co.

<sup>327</sup> *ST*, I–II, q. 47, a. 8 co.

<sup>328</sup> Cf. S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki...*, p. 23.

<sup>329</sup> S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, Poznań 1997, p. 134–135.

<sup>330</sup> *RI* 53.



### 1.5.6.2. Postulate of Being a Man of Faith

Although the postulates presented above are useful for any church legislator, even if they are fulfilled to the end they will not create a good legislator of canon law. The theory of law can come up with many expectations from a lawmaker but cannot exhaust them completely.

First of all, the legislator in the Church must have faith.<sup>331</sup> Of course, one can study any religion not being personally involved in that religion. He can treat the object of his interest as a cultural phenomenon.<sup>332</sup> One can study the Bible only from a linguistic point of view, and so on. It leads to the conclusion that a canonical legislator must be, as any professional lawmaker, fully rational; he must be someone who knows his job. But canon law must be considered a product of the Church; canon law is for the Church. It cannot come from outside the Church. The Church is the mystery, a reality of faith, and the law has no justification except its service to faith. Law serves the faithful. Others are not involved and they are generally speaking not users of the law.

For the legislator, faith is useful in determining the subject of law made by him. Faith can give the legislator incentive to work for the community, its moral and spiritual growth. Personal faith is also an important factor of his authority. People more eagerly listen to somebody, who acts as he teaches. The faith modifies the overlook on the reality of life. It points to the main goal, that is, salvation of souls. Also preferences are created by values important for faith. The subject regulated by canon law is being so strongly modified by faith that the outcome of a work of a lawmaker can be completely different depending on whether he operates with or without faith.<sup>333</sup>

There is an opinion that personal faith is not needed for the legislator. It is enough that he will take into consideration the reality of faith and he will put himself in the situation of faith. If he were to do it, the law he makes would be in some kind of relation to the reality of faith. The faith in that situation would be a canonical tool.<sup>334</sup>

Such opinion is problematic. Faith, in general, is not only a knowledge of collection of the divine truths. If it were so making law would be limited to making provisions of law coherent with doctrinal statements. It is a basic step but not sufficient for a duly carried out legislation activity in the Church.

<sup>331</sup> See: R. Sobański, *Szkoły kanonistyczne*, Warszawa 2009, p. 102, ft. 68. The author presents two positions on the subject of faith and canonist. The first one considers faith as a factor that is not needed to be involved in canonist work. On the opposite side is the stance according to which faith not only must be taken as an important factor in shaping behaviors of the community, but canon lawyer himself must operate in situation of faith.

<sup>332</sup> As did, for instance, H. de Lubac, *La rencontre du bouddhisme et de l'Occident*, Paris 2000.

<sup>333</sup> Cf. B. Lonergan, *Method in Theology*, Toronto 1999, p. 82.

<sup>334</sup> R. Sobański, *Kościół jako podmiot prawa...*, p. 357–359.

Faith is an intellectual but also moral and emotional stance involving all of human existence. Only when lived authentically will it truly enlighten the mind protecting it from dangerous urges and impulses, opening it to the inspiration of the Holy Spirit, enabling it to reach beyond mere formal congruence of doctrinal statements and into the true wisdom about God and man which they contain. Faith is personal relation to God, and due to this, putting oneself as if in the situation of faith is impossible.

### 1.5.7. Paradox of Legislator

Trying to present the legislator and his position in any society, it must be noticed that there is a paradox of the legislator. He is the head of people that he has power over and according to his rule people must live, and yet, at the same time, he is a servant of the people for whom he makes law. He makes rules for their sake.

The paradox of the legislator is especially seen in the Church. Any authority in the community of believers must be always understood as an exercise of service, never as absolute dominance. “You know that those who are recognized as rulers over the Gentiles lord it over them, and their great ones make their authority over them felt. But it shall not be so among you. Rather, whoever wishes to be great among you will be your servant; whoever wishes to be first among you will be the slave of all. For the Son of Man did not come to be served but to serve and to give his life as a ransom for many” (Mk 10, 42–45; cf. Lk 22, 26–27; Mt 20, 25–28; Jn 13, 3–16). Those who hold office of legislator must act according to these words. They, at the same time, must be the head and the servant of the community. And in this is expressed the integrating act of Christ. He joined together His disciples and all the faithful. Church office of the legislator must serve the unity of Church community.<sup>335</sup> By acting as a servant, the legislator makes visible an integrating action of Christ.<sup>336</sup>

#### 1.5.7.1. Legislator as Head

As the Second Vatican Council teaches that “Christus Dominus, ad Populum Dei pascendum semperque augendum, in Ecclesia sua varia ministeria instituit, quae ad bonum totius Corporis tendunt” (LG 18).<sup>337</sup> The sacred power is, generally speaking, given for a certain reason – to fulfill duty as an authority, as a head of community. Being the head means having power. The authorities

<sup>335</sup> Cf. R. Sobański, *Kościół jako podmiot prawa...*, p. 158–160.

<sup>336</sup> R. Sobański, *Kościół jako podmiot prawa...*, p. 165.

<sup>337</sup> LG 18: “For the nurturing and constant growth of the People of God, Christ the Lord instituted in His Church a variety of ministries, which work for the good of the whole body.”

exercise their power for the People of God and it is so by the divine institution (cf. can. 129 § 1).

This means that the legislator has a legislative power neither by himself nor for himself. He has no existence for himself as a lawgiver. God placed him in community for the sake of the community. Position of the legislator in the community is essential from the point of view of that very community. He is the head of the body and the body cannot exist without its head.

### 1.5.7.2. Legislator as Servant

The first task of every minister in the Church is to follow Christ the Servant, who did not come to be served but to serve and to give his life as a ransom for many (Mt 20, 28). Those who were endowed with sacred power are to serve their brethren, so that all who are of the People of God working toward a common goal freely and in an orderly way, may arrive at salvation (LG 18). There is a fundamental equality of all members of the Christian faithful and the diversity of offices and functions rooted in the hierarchical order of the Church (can. 208). The exercise of authority appears more clearly as service.<sup>338</sup>

This service, although it makes up only a part of vocation of the Church legislative authority, must be done in full devotion. One of the principles behind the revision of *CIC* 1983 clearly states that the fostering of the pastoral care of souls is also possible by the legislation itself.<sup>339</sup>

The legislator's task of being a servant can be also deduced from the classic definition of law given by St. Thomas Aquinas. A law is "rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata."<sup>340</sup> St. Thomas Aquinas said that the whole job of a legislator is to direct things toward the common good. In other words, the creation of law pertains to those who are entrusted with care of the community.<sup>341</sup>

It is absolutely true that lawgiver, being a superior, has to be open, urged and even driven by needs of the community. The life of his people motivates and inspires his legislative work. So it is in virtue of his being a superior that he must listen to the community. This is a paradoxical situation.<sup>342</sup> Although this service is a service to the people of God, it must be clarified, that ultimately

<sup>338</sup> Y. Congar described the meaning and historical development of the hierarchy as service in: *La hierarchie comme service selon le Nouveau Testament et les documents de la tradition*, [in:] *Lepiscopat et l'eglise universelle*, ed. Y. Congar, B.-D. Dupuy, Paris 1962, p. 67–99.

<sup>339</sup> *Praefatio*, principium 1, p. XXI; cf. *Praefatio*, p. XX: "In allocutione Summi Pontificis quodammodo fundamenta totius laboris iacta sunt ac revera in memoria revocatur Ius Canonicum e natura Ecclesiae manare, eius radicem sitam in potestate iurisdictionis a Christo Ecclesiae tributa, necnon finem in cura animarum ad salutem aeternam consequendam esse ponendum."

<sup>340</sup> *ST*, I–II, q. 90, a. 4 CO.

<sup>341</sup> J. M. Coriden, *The Canonical Doctrine of Reception*, *The Jurist* 50 (1990), p. 75.

<sup>342</sup> L. Örsy, *The Reception of Laws by the People of God...*, p. 512.

and deeply it is a service to Christ himself. The leadership exercised in the community is thus a service to Christ (*LG* 3).

### 1.5.8. Legislative Initiative

The problem of legislative initiative to be discussed here is in some measure connected with customary law, when the faithful can make a norm for themselves. But the key problem of legislative initiative is to make the legislator start legislative procedure that can possibly be finalized with a law on the specific matter. But do Christ's faithful, the lay members and clerics *a fortiori*, have such an influence on the legislator to make him start his legislative activity? Of course, due to the fact that power belongs only to him, the final form of law depends on his will.

The basic point can be that all the faithful are members of the Church and the Church is their common good. Flowing from their rebirth in Christ, there is a genuine equality of dignity and action among all of them. They all contribute, each according to his or her own condition and office, to the building up of the Body of Christ (can. 208). The Second Vatican Council teaches that the legislators who hold sacred power should recognize and promote the dignity as well as the responsibility of the laity in the Church. Further, they should encourage lay people so that they may undertake tasks on their own initiative. Attentively in Christ, they should consider with fatherly love the projects, suggestions and desires proposed by the laity. The laity have the right to openly reveal to them their needs and desires with that freedom and confidence which is fitting for children of God and brothers in Christ (*LG* 37).

There is no term legislative initiative in use, but there is opinion, that the right to it is accepted and plainly expressed by the Council,<sup>343</sup> although it is not one of the basic rights. The means of carrying out legislative initiative can be, for instance, synods, councils, and associations.<sup>344</sup> After initialing legislative process the participation of the faithful can also be significant. It seems that there is plenty of room for them in legislative process, as advisors, experts, and specialists. Hierarchy is to willingly employ their prudent advice. The faithful are, by reason of the knowledge, competence or outstanding ability which they may enjoy, permitted and sometimes even obliged to express their opinion on those things which concern the good of the Church (*LG* 37). In some

<sup>343</sup> R. Sobański, *Kościół – prawo...*, p. 319; cf. R. Sobański, *Kanon 7*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 56.

<sup>344</sup> The possibility of lay faithful taking part in diocesan synod, despite some legal limitations, can be considered a significant step forward comparing to *CIC* 1917; see: F. G. Morrissey, *The Laity in the New Code of Canon Law*, *Studia Canonica* 17 (1983), p. 145.

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measure, from practical and technical points of view, there would be no harm when large numbers of Catholics were to take part in legislative process.

It must never be forgotten that the legislator in the Church is at the same time a teacher of faith. Due to origin of law in the Church and characteristics of the canon law there must not be any division between making law and teaching of faith. The function cannot be divided. There is no possibility in the Church of there being special agendas for legislation different from goals of the teaching office.<sup>345</sup> But in essence the right of legislative initiative creates another duty for the legislator. It is not a coup on his independence, nor does it create a situation that could be dangerous for the faith.

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<sup>345</sup> R. Sobański, *Kościół – prawo...*, p. 181.



## 2. Legislation (as Activity of Legislator)

What is legislation? The term has several meanings. They must be distinguished here. First of all, legislation is the process of making or enacting a positive law in written form, according to some type of formal procedure, by subject of legislative power constituted to perform this process. Other terms for this are: “lawmaking” or “statute-making.”<sup>1</sup> To this definition must be added that process of legislation in the Church concerns norms for general usage.<sup>2</sup> This is why the legislation made by church judge, who passes a sentence, is not a legislation in the main optic of this book. The sense binds only parties of the process. He “*facit ius inter partes*.”<sup>3</sup> Also contracts are excluded, although *omnis conventio ius facit inter partes*. They are a legal solution for particular parties and singular case. The next two meanings of “legislation” are: 1) a single law (act of law) enacted in the way presented above or 2) the whole body of enacted laws.<sup>4</sup>

The one who is responsible for legislation in every meaning is the legislator. Legislation is a product of his professional activity. It must be noticed that legislator’s product is not only legislation in the senses presented above. Someone who has power to make law, his precursors and ancestors, all are responsible for a set of regulations governing society and institutions responsible for enforcing them. The first result of their activity is legal order.<sup>5</sup> The next product of theirs is the system of law, which is coherent and orderly organized collection of law norms.<sup>6</sup> The system of law it is an aggregate of laws, juridical precedents and accepted legal principles.

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<sup>1</sup> Entry: *Legislation*, [in:] *Black’s Law Dictionary...*, p. 982.

<sup>2</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 227.

<sup>3</sup> Cf. *Dig.* 5.2.17.1.

<sup>4</sup> Entry: *Legislation*, [in:] *Black’s Law Dictionary...*, p. 982.

<sup>5</sup> Entry: *Legal Order*, [in:] *Black’s Law Dictionary...*, p. 978.

<sup>6</sup> S. Wronkowska, *Podstawowe pojęcia prawa...*, p. 98.

## 2.1. Change in Canon Law

No human product is perfect, immutable, and perpetual. Nothing of it is in final stage, law included. It can be said that law lives. It is born, undergoes changes, develops, and also dies. This rule is valid not only for civil law but also for church law.<sup>7</sup> In fact, the existence of law in the Christian community is a very vivid process. Canonical norms have kept evolving ever since the beginning of Christian age. Most of the process has been done by legislation but interpretation has played a significant role in the process as well.<sup>8</sup>

The foundation of the need to make changes in canon law comes from two main sources. First is the fact that canon norms are given for the faithful who are situated in the history. The norms are to be applied in certain historical circumstances. Not only does the law shape the life of the community but also life, which is, of course, very changeable, shapes law. It can be called mutual cooperation. Law is changing and it is not an isolated act. The change of law must be understood in a holistic manner as one element in a big stream of changes in the Church and world.<sup>9</sup> It requires from the legislator that he look carefully at the reality of the changing world and not miss the spirit of time.

Another and maybe more important source of change is based on the fact that canon law belongs to reality of the Church and the Church is constantly changing and renewing itself (cf. Mk 4, 31). After all it has a pilgrim character (cf. LG 9). Church is a living organism, it continues to be faced with new problems. The list of them must be constantly updated.<sup>10</sup>

Church law must also be a living law. How could it be otherwise, when its course is bound to the life of the Church?<sup>11</sup> The aphorism *Ecclesia semper reformanda* (cf. LG 8) could perhaps be complemented by another *ius canonicum semper reformandum*. It is good for emphasizing the need for a dynamic, full of life, law. It is essential, to be able to carry out change in law because of its

<sup>7</sup> For instance, the *CIC* 1917 was changed in two canons: 1099 § 2, and can. 2319 § 1, no. 1; *CIC* 1983 in: can. 750, can. 1008, can. 1009, can. 1086, can. 1117, can. 1124, can. 1371; *CCEO* 1990 in: can. 598, can. 1436.

<sup>8</sup> H. Pree, *Die evolutive Interpretation der Rechtsnorm im Kanonischen Recht*, Wien-New York 1980.

<sup>9</sup> Cf. M. D. Place, *The Theologian Looks at the Revised Code of Canon Law*, *The Jurist* 45 (1985), p. 274.

<sup>10</sup> F. G. Morrissey listed the issues with canonists would have to face according to him in the near future: financial reorganization, parish reorganization, issue with implications if the same-sex marriages, the place and role of penal and matrimonial nullity trials, the implications of clerical vocation shortages and seminary formation, changes in diocesan configuration, multi-cultural expectations in the Church and necessary adaptations in higher Catholic education, and Catholic health care, see: F. G. Morrissey, *Some Challenges Canonists would have to Face in the Near Future*, *Studies in Canon Law* 3 (2007), p. 73–94.

<sup>11</sup> R. Metz, *What is Canon Law?*, London 1960, p. 157.



contact with ecclesiastical reality. Canon law must renew itself to adjust to the requirements of time. By doing this, it will serve to fulfill in the best possible way Christ's will and the mission of the Church. It is clear, that without possibility of change law would be useless and even harmful.<sup>12</sup> It is clear that it is impossible to govern a dynamic and evolving community by immovable laws. Either the laws will break the community or the community will break the laws.<sup>13</sup> It follows that a periodical assessment of this change is necessary to see if the law still serves optimally the people in move and the goals and needs.<sup>14</sup>

Change in canon law is a complicated process. Its problematical feature cannot be underestimated. Some important starting points to be considered in the context of the change of church law can be listed. They are so significant that any legislator should be aware of them before he begins his work. First of all, any law is a sort of "memory bank." It means that law carries on the continuity of the Church in a rather unique way and represents the shorthand of pastoral decisions and judgments from the history.<sup>15</sup>

Secondly, canon law represents the element of stability in the Church at a time of flux in both Church and civil society. Some consider this stability to be an obstacle to true renewal in the Church, while others consider it to be a solid foundation from which renewal can proceed. Third, the revision of law carries a special significance in the renewal the institutions of the Church and intentionally would be visible for a long time.<sup>16</sup>

Where is the proper balance between the change and stability in law? Probably only practical wisdom can supply the answer. Both stability and mobility are needed. The right balance is somewhere between the two.<sup>17</sup> This leads to the conclusion that before any change would have to be done, one must first draw the limits of that very change.

### 2.1.1. Unchangeable Part of Law and Canonical Tradition

The distinction between the variable and the immutable parts of the canon law is very clearly drawn by Ivo of Chartres in his *Prologue*. It is based on the distinction between laws, which are held to be of divine origin and those which

<sup>12</sup> L. de Echevarria, *The Theology of Canon Law*, transl. P. Burns, Concilium 8 (1967), p. 7.

<sup>13</sup> L. Örsy, *The Interpretation of Laws: New Variations on an Old Theme*, [in:] *The Art of Interpretation. Selected Studies on the Interpretation of Canon Law*, Washington 1982, p. 66.

<sup>14</sup> M. Wijlens, *For you I am a Bishop, with you I am a Christian: Bishops as Legislator*, *The Jurist* 56 (1996), p. 90.

<sup>15</sup> Cf. P. Kroczyk, *Pamięć i tożsamość w prawie kanonicznym*, [in:] *Lex tua veritas*, ed. P. Majer, A. Wójcik, Kraków 2010, p. 461–466.

<sup>16</sup> J. H. Provost, *Canon Law – True or False Reform in the Church*, *The Jurist* 38 (1978), p. 257–258.

<sup>17</sup> L. Örsy, *The Interpretation of Laws...*, [in:] *The Art of Interpretation...*, p. 66.

are of purely ecclesiastical authority. Here are his words: “Preceptiones immobiles sunt quas lex aeterna sanxit: quae observatae salutem conferunt; non observatae, eamdem auferunt. [...] Mobiles vero sunt, quas lex aeterna non sanxit, sanxit, sed posteriorum diligentia ratione utilitatis invenit non ad salutem principaliter obtinendam, sed ad eam tutius muniendam.”<sup>18</sup> Some laws are changeable, some are not. Unchangeable laws are those, which are sanctioned by eternal law, the observance of which assures salvation. Changeable laws are those which are not sanctioned by eternal law, but which have been invented by man.

But still it does not mean that the legislator can absolutely freely change what was created by his precursors. He must respect tradition. Tradition is present in every aspect of life. In this sense it is an unavoidable fact. It brings some kind of stability. Without this there would be only a confusion and constant move, disorganizing change.<sup>19</sup> In tradition the community can see some kind of guarantee of its identity.<sup>20</sup>

Also, in the realm of law tradition plays a very important role.<sup>21</sup> Canonical tradition offers some kind of stability in law. Stability does not mean that change is not possible but rather that change can occur after a great deal of thinking. Stability is some kind of protection of memory of law.

The section of law gathers heritage of canonical experience accumulated throughout the ages. It concerns rules of legislation or interpretation. A law-giver should express his thoughts in words taken from canonical tradition and in the sense in which they are known in canonical tradition. They are to be understood in that way (can. 6 § 2 and cf. can. 18). Change in this matter would have far reaching consequences. Also, historical sources of the current norms must be known. The future shape of norms depends also on their record, not only on the current view of the legislator. The wisdom of the past must never be put aside.

Of course, the legislator must be aware of negative consequences of tradition. Although tradition is a way of communication between the past and the present time, unfortunately, it can be a source of negative and harmful influences. They can bring about different types of unwanted effects from intellectual tyranny to bad example.<sup>22</sup>

<sup>18</sup> Ivo Carnotensis, *Decretum*, PL 161, col. 50. About the *Prologus of Decretum* and its sources see: Ch. Rolker, *Canon Law and the Letters of Ivo of Chartres*, Oxford 2009, p. 121–122.

<sup>19</sup> J. P. Mackey, *Tradycja i zmiana w Kościele*, transl. M. Wierzbicka, Warszawa 1974, p. 239 and p. 267.

<sup>20</sup> Jan Paweł II, *Pamięć i tożsamość. Rozmowy na przełomie tysiącleci*, Kraków 2005, p. 149.

<sup>21</sup> See more: H. Pree, *Der Stellenwert der Tradition im kanonischen Recht die Auslegungsregel des C. 6 § 2 C1C/1983*, [in:] *Plenitudo legis dilectio...*, p. 544–571.

<sup>22</sup> J. P. Mackey, *Tradycja i zmiana w Kościele*, transl. M. Wierzbicka, Warszawa 1974, p. 270.

## 2.1.2. Modes of Change

The development of canon law can be described using scheme of two modes. The first is a legal mode and the second one is doctrinal.

### 2.1.2.1. Legal

The legal mode of development concerns changes to the merely positive character of canon law (cf. can. 11). The changes are connected usually with procedural and technical matters. For instance, the former code said that the matrimony should be contracted before at least two witnesses (*duobus saltem testibus*, CIC 1917 can. 1094). The present code speaks that it should take place in the presence of two witnesses (can. 1108 § 1). Also, in CIC 1983 there are no limits for delegating the general faculty (can. 1111 § 1). It can be granted to any priest and deacon. In the 1917 code, it could be delegated only to a vicar cooperador for the parish (*de vicariis cooperatoribus pro parocia*, CIC 1917 can. 1096 § 1). The 1983 code contrary to the previous code does not mention the priority of the rector of the bride to celebrate marriage (see: CIC 1917 can. 1097 § 2).

Legal mode can be motivated by urge of the legislator to rewrite law and make it better in terms of the techniques of legislative drafting, that is, law more easy to read and understand, what is, of course, essential for its interpretation and application.<sup>23</sup> Sometimes the changes done in legal mode can emerge from disciplinary matters, like it is in the case of law meant to protect doctrine<sup>24</sup> or in the case of canonical law safeguarding morals.<sup>25</sup>

### 2.1.2.2. Doctrinal

The doctrinal mode of development in canon law reflects the rules for the development of doctrine present in the Church. The process of doctrinal development begins with public divine Revelation, given and closed in a definite

<sup>23</sup> Cf. *Liber Constitutionum et Ordinationum Fratrum Ordinis Praedicatorum*, iussu Fr. Carlos A. Azporiz Costa magistri Ordinis editus, Romae 2010, p. 127, no. 276 § 1.

<sup>24</sup> For instance: Joannes Paulus PP. II, Litterae apostolicae motu proprio *Ad tuendam fidem* quibus normae quaedam inseruntur in Codice Iuris Canonici et in Codice Canonum Ecclesiarum Orientalium, 18.05.1998, AAS 90 (1998), p. 457–461; Congregatio de Doctrina Fidei, *Agendi ratio in doctrinarum examine*, 30.05.1997, AAS 89 (1997), p. 830–835.

<sup>25</sup> For instance: Joannes Paulus PP. II, Litterae apostolicae motu proprio quibus normae de gravioribus delictis Congregationi pro Doctrina Fidei reservatis promulgantur *Sacramentorum sanctitatis tutela*, 30.04.2001, AAS 93 (2001), p. 737–739; Congregatio pro Doctrina Fidei, Epistula *Ad exsequendam* a Congregatione pro Doctrina Fidei missa ad totius Catholicae Ecclesiae Episcopos aliosque Ordinarios et Hierarchas interesse habentes: de delictis gravioribus eidem Congregationi pro Doctrina Fidei reservatis, 18.05.2001, AAS 93 (2001), p. 785–788; Congregatio pro Doctrina Fidei, Modifiche alle “Normae «de gravioribus delictis»,” 15.07.2010, L’Osservatore Romano 150 (2010) no. 161, 16.07.2010, p. 1, 4–5, 8.

epoch. The development of doctrine augments, enlarges, and expands the tradition of the Church.

The doctrinal development itself has solid theological background. In the fifth century, St. Vincent of Lerins defined dogma as “quod ubique, quod semper, quod ab omnibus creditum est,”<sup>26</sup> and he wrote that the development of dogma is possible, but not its substantial change. But whether or not a doctrine would meet such a standard seems hard to say. Any progress requires that the subject itself be enlarged, alternated or transformed into something else; all these while preserving the same doctrine, in the same sense, and in the same meaning.<sup>27</sup>

J. H. Newman held that development is a necessary characteristic of growth of living truth in human society. He described seven characteristics of it: “There is no corruption if it retains one and the same type, the same principles, the same organization, if its beginnings anticipate its subsequent phases, and if later phenomena protect and subserve its earlier, if it has a power of assimilation and revival, and a vigorous action from first to last.”<sup>28</sup> Describing Newman’s theory of the development of doctrine one author said that it is the *locus classicus* on account of its originality, attention to historical detail, and mastery of transcendent principles.<sup>29</sup>

Again, example can be taken from Church marital law. Development of the personalist perspective in this realm of the canon law is visible. When in 1930 Pope Pius XI promulgated *Litterae Encyclicae Casti connubii*,<sup>30</sup> the Holy Father relied heavily on the seminal thought of St. Augustine accepting that “Matrimonii finis primarius est procreatio atque educatio «prolis»”<sup>31</sup> and later: “Habentur enim tam in ipso matrimonio quam in coniugalis iuris usu etiam secundarii fines, ut sunt mutuuum adiutorium mutuusque fovendus amor et concupiscentiae sedatio, quos intendere coniuges minime vetantur, dummodo salva semper sit intrinseca illius actus natura ideoque eius ad primarium finem debita ordinatio.”<sup>32</sup> The 1917 code had also reflected this traditional understanding of the primacy of procreation: “Matrimonii finis primarius est procreatio atque educatio prolis: secundarius mutuuum adiutorium et remedium concupiscentiae” (*CIC* 1917 can. 1013 § 1).<sup>33</sup> That is, marriage has hierarchically ordered aims. At the

<sup>26</sup> Vincentius Lirinensis, *Commonitorium primum* [ex Editione Baluziana], PL 50, col. 640.

<sup>27</sup> Vincentius Lirinensis, *Commonitorium primum...*, col. 667–669.

<sup>28</sup> J. H. Newman, *An Essay on the Development of Christian Doctrine*, Notre Dame 1989, reprint, previously published in 1845, p. 171.

<sup>29</sup> Y. Congar, *Tradition and Traditions: an Historical and Theological Essay*, transl. M. Naseby, T. Rainborough, New York 1967, p. 211.

<sup>30</sup> Pius XI, *Litterae encyclicae Casti connubii*, 31.12.1930, *AAS* 22 (1930), p. 539–592.

<sup>31</sup> Pius XI, *Litterae encyclicae Casti connubii...*, p. 546.

<sup>32</sup> Pius XI, *Litterae encyclicae Casti connubii...*, p. 561.

<sup>33</sup> *CIC* 1917 can. 1013 § 1: “The primary end of marriage is the procreation and education of children; the secondary [end] in mutual support and a remedy for concupiscence.”

Second Vatican Council, development in the understanding of marriage was recognized in the Church's teaching. *Constitutio pastoralis Gaudium et spes* discusses procreation and love between the spouses as the inseparable and co-equal ends of marriage (*Gs* 48). Finally, in *CIC* 1983 the corresponding can. 1055 § 1 states that the marriage covenant is of its own very nature ordered *ad bonum coniugum atque ad prolis generationem et educationem*. The two aims are not prioritized one against the other.

Another example of change of doctrine is can. 1095 no. 3, where the personalist perspective on marriage is clearly visible. The canon renders incapable of consenting to marriage those who lack sufficient use of reason, or suffer from a grave lack of discretion about essential matrimonial rights and obligations that involve the mutual self-gift between the spouses, or experience psychological problems that prevent assumption of the essential obligations of marriage. The canon was added to the current code due to psychological approaches to the capacity for marital consent. It expresses God's law that has not been clearly enough visible in canon law. It can be said that the law is changed in an orthodox way when it defends, protects the truth of faith or contains the norm with the truth of faith.

### 2.1.3. Reordering Law

In jurisprudence, the term "change of law" has been usually understood in two ways. They depend on the level on which change is made. On the first level there is a change of the act of law. On the second level the change is inside the act of law. In the first case alternation is done by: repealing whole act of law, repealing whole act of law while preserving legal binding of some legal articles, repealing some legal articles from act of law, adding some legal articles in act of law. The second set of changes consists in: change of word or words in an article, change in punctuation, change in enumeration without change in enumerated items.<sup>34</sup> Most often a change in text of the law causes the change in norm or norms that are coded in the text of law.<sup>35</sup> Norms rarely remain untouched when the verbal form is changed.

Any change in law (both in the first and in the second way) is in relation to unchanged part of the law and the whole system of law. New part of legislation can be coherent with the former one or it can upset the system of law. Before promulgating, any legislator must be aware of the results in integrity of laws. The change can make the law unclear, it can disintegrate the law, that

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<sup>34</sup> Cf. M. Zieliński, *Wykładnia prawa...*, p. 206–207.

<sup>35</sup> Cf. S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki...*, p. 180.

is, cause dysfunction in action of law.<sup>36</sup> In a word, the legislator is responsible for reordering of entire law when he is changing a law.

Regardless of the two levels mentioned above, change in law can be labeled as “reordering laws.” The term consists of several actions: *abrogare* – total revocation, *derogare* – partial revocation, *obrogare* – the change of a law by a contrary law or *subrogare* – as something added to an existing law.<sup>37</sup> Generally this has been taught in the classical theory of law although some minor differences could be pointed.<sup>38</sup>

Present usage of verbs “derogare,” “abrogare” in *CIC* 1938 is neither consequent nor homogeneous.<sup>39</sup> The 1983 code speaks in can. 20 of abrogation when the revocation is total or complete, that is, when the new law replaces the earlier law. The law should not be understood as a new act, but rather as a new legal article which concerns the same matter. It speaks of derogation when the revocation of a law is partial.<sup>40</sup> However, in the context of can. 6 § 1 no. 4, abrogation and derogation are not always so neatly distinguished. For integral reordering does not require that the entire law be altered, because it can occur even if only one segment of the law is affected, provided it brings about a definite change in the law itself. *Obrogare* concerns administrative acts (can. 53, can. 1739). *Subrogare* is present in *CIC* 1983 on level of singular

<sup>36</sup> Cf. S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki...*, p. 182.

<sup>37</sup> G. Michiels, *Normae generales iuris canonici*, vol. 1, Parisiis-Tornaci-Romae 1949<sup>2</sup>, p. 654–655 and p. 655, ft. 3.

<sup>38</sup> E. Magnin, entry: *Abrogation de la Loi*, [in:] *Dictionnaire de Droit Canonique*, ed. R. Naz, vol. 1, Paris 1935, col. 115 ff.

<sup>39</sup> R. Sobański, *Kanon 20*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 75. About the problem with the terms in canonical jurisprudence, see: J. M. Huels, *Privilege, Faculty, Indult, Derogation: Diverse Uses and Disputed Questions*, *The Jurist* 63 (2003), p. 244–250; and in civil jurisprudence see: I. Bogucka, S. Bogucki, *O derogacji i pojęciach pokrewnych*, *Państwo i Prawo* (1992) no. 6, p. 80–83; B. Kanarek, *Analiza teoretyczna pojęcia „derogacja”*, [in:] *Zmiany społeczne a zmiany w prawie*, ed. L. Leszczyński, Lublin 1999, p. 235–244.

<sup>40</sup> It was a case, for instance, in can. 1037. The ending of the canon was derogated by document issued by Congregatio de Cultu Divino et Disciplina Sacramentorum, *Decretum Ritus ordinatorum* quo editio altera Pontificalis Romani de ritu ordinationis episcopi, presby terorum et diaconorum promulgatur et typica declaratur, 29.06.1989, *AAS* 82 (1990) no. 5, p. 827: “De speciali autem mandato Summi Pontificis Ioannis Pauli II, disciplina mutata est ita ut etiam electi, qui in Instituto religioso vota perpetua emiserunt, posthac teneantur in ipsa Ordinatione diaconorum, derogato praescripto canonis 1037 Codicis Iuris Canonici, sacrum caelibatum amplecti tamquam peculiare propositum Ordinationi de iure coniunctum.”

Also derogation from can. 1117, can. 1086 § 1, and 1124 was done by: *Benedictus pp. XVI, Litterae apostolicae motu proprio Omnium in mentem* quaedam in Codice Iuris Canonici immutantur, 26.10.2009, *AAS* 102 (2010), p. 9: “Auferenda proinde decernimus in eodem Codice verba: ‘neque actu formali ab ea defecerit’ canonis 1117, ‘nec actu formali ab ea defecerit’ canonis 1086 § 1, et ‘quaeque nec ab ea actu formali defecerit’ canonis 1124.”

legal articles by adding a part of a legal article, for instance: can. 750 § 2<sup>41</sup> or can. 1009 § 3.<sup>42</sup> Also, *subrogare* can be called adding to the code *Constitutio Apostolica Pastor Bonus*,<sup>43</sup> which was announced in can. 360.

According to *CIC* 1983, laws may be totally revoked (*abrogation*) or partially revoked (*derogation*) in three ways (can. 20). The first way is explicit and happens when (1) a later law revokes a former law when it expressly states that it is doing so (express revocation, *ab extrinseco*). Express revocation is evident. Sometimes it is the simplest and explicit way to cleanse the system from unwanted laws. The legislator indicates that a certain law is repealed. Although express revocation can occur in several forms, its intent is nonetheless clear. It can be done, for instance, by integral reordering in regard to laws in effect at the time the code came into force (cf. can. 6 § 1) or with help of general revoking expressions like: “*contrariis quibuslibet non obstantibus*.” It rarely results in any doubt about which law is in force. It is clear from the wording of the new law that a former law is revoked.

Two others are implicit revocations. It means that: (2) a new law revokes an old one when the later law is directly contrary to an earlier law (direct contrariety). This kind of revocation is usually apparent when a new law is in direct opposition to a former one. When a new law is directly contrary to a previous law, the legislator’s intent to revoke the old law is evident, or (3) a later law revokes an earlier law by integrally, or completely, reordering the entire subject matter of the previous law (integral reordering of the subject matter of a prior law). The integral reordering of the subject matter of an earlier law by a later one as a means of abrogation or derogation is often not obvious. The integral reordering of law may be understood as its tacit revocation by a later law that treats anew the entire matter of the earlier law, thus resulting in an incompatibility between the two laws.<sup>44</sup>

The revocation of law by the integral reordering of its subject matter in later law is also obvious in some cases, for example, when a new document is entirely revised, replacing a previous document on the same subject. In many cases,

<sup>41</sup> Can. 750 § 2 was introduced by document of Joannes Paulus PP. II, *Litterae apostolicae motu proprio Ad tuendam fidem* quibus normae quaedam inseruntur in Codice Iuris Canonici et in Codice Canonum Ecclesiarum Orientalium, 18.05.1998, AAS 90 (1998) no. 4A, p. 459–460.

<sup>42</sup> Can. 1009 § 3 was introduced by document of Benedictus PP. XVI, *Litterae apostolicae motu proprio Omnium in mentem* quaedam in Codice Iuris Canonici immutantur, 26.10.2009, AAS 102 (2010), art. 2, p. 10.

<sup>43</sup> Joannes Paulus PP. II, *Constitutio Apostolica Pastor Bonus* de Romana Curia, 28.06.1988, AAS 80 (1988), p. 841–930.

<sup>44</sup> P. Smith, *Theoretical and Practical Understanding of the Integral Reordering of Canon Law*, Lewiston-Queenston-Lampeter 2002, p. 33, ft. 98. The author reviews and analyzes the canonical doctrine on integral reordering of law and develops eight principles to guide the scholar and practitioner of the law in determining when a later law has abrogated an earlier law or derogated from it.

however, there is no such clarity. Most canonical commentators cite obvious examples of the integral reordering of law, but they fail to tackle the more difficult problems, in particular, determining when a new text of laws has integrally reordered some of the norms of a previous document, while leaving the rest in force. These questions have been very difficult to answer, even for experts in the law, because objective, scientific criteria and practical tools were lacking for assessing whether a later law integrally reordered an earlier law, particularly in the many cases when certain laws of a document are affected by later law but others are not.<sup>45</sup>

Some other rules from can. 20 must be remembered, namely, that a universal law does not derogate from a particular or from a special law, unless the law expressly provides otherwise. If it is possible to reconcile a universal law with a particular one, the latter is in force. Revoking the particular law must be expressed by legal formula, for instance: “*contrariis quibuslibet etiam speciali mentione dignis non obstantibus.*” Revocation of a law causes revocation of general executory decrees (can. 33 § 2) and instructions (can. 34 § 2) connected with the revoked law.

In *CIC* 1983 there is no mention about revocation caused by external reasons. In case of changed circumstances the law could become useless, pointless, irrational or unjust.<sup>46</sup> When the reason for issuing the law completely and universally disappears, the law also is terminated. When law is abandoned by custom, we speak of *desuetudo*. It means, that the people of God judged it and found it unnecessary.<sup>47</sup>

The canonical tradition also recognizes that a law can sometimes stop binding in a different way. It is called “intrinsic cessation,” or “presumptive revocation” of law. With intrinsic cessation, a law is initially accepted and may well serve a useful purpose, but over the course of time it becomes obsolete or harmful to the community, or to some segment of it, and it falls into *desuetude*.

<sup>45</sup> J. M. Huels, *Preface*, [in:] P. Smith, *Theoretical and Practical Understanding of the Integral Reordering of Canon Law*, Lewiston-Queenston-Lampeter 2002, p. ii.

<sup>46</sup> R. Sobański, *Kanon 20*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 75.

<sup>47</sup> L. Örsy, *Interpretation: the Law and Its Interpreters*, [in:] *Theology and Canon Law...*, p. 42. The Sacred Congregation of the Council said in response from 9.06.1923 that law is in *desuetudinem*, when law has been for ten years not obeyed. It does not matter if the legislator knew about it or not, see: *Sacra Congregatio Concilii, Animadversio de praesentiae choralis Oxomen*, *AAS* 17 (1925), p. 510–511: “*Si legislator scit subditos detrectare legem et dissimulat, videtur silentio eam suo revocare: si id ignorat, lex post decennium procul dubio evanescit: imo si maior et sanior subditorum pars non obtemperat legi, tenendum est legem reipublicae non expedire et praesumendum est legislatorem in sua voluntate minime perseveraturum, si id sciret; atque, ideo cessat.*”



### 2.1.4. Retroactivity and Retrospection of Law

Retroactivity of law happens when a new legislative act looks backward, affecting acts or facts that existed before the act came into effect.<sup>48</sup> It means that one can speak about *retroaction* when newly issued law *ex post* changes legal relationships which have been already formed or completed under previous law, that is, before new law was promulgated.<sup>49</sup>

There is a type of retroactivity called “retrospection”<sup>50</sup> or “quasi-retroactivity.”<sup>51</sup> Sometimes the terms are not properly differentiated and on occasion they are even mixed.<sup>52</sup> *Retrospection* concerns the situation when a new legislative act is applied to the essence of already existing acts, facts or legal relationships which have been started earlier, that is, under previous law, and still continue to hold. The new law is applied only to their legal effects. Retrospective law affects their consequences, results and their evaluation.<sup>53</sup>

Based on Roman law, a well-known principle says “*lex retro non agit*”, what means that law must not bind the past.<sup>54</sup> It means that law is not retroactive

<sup>48</sup> Cf. entry: *Retroactive Law*, [in:] *Black's Law Dictionary...*, p. 983.

<sup>49</sup> E. Łętowska, K. Karasiewicz, J. Luzak, and others, *Prawo intertemporalne w orzecznictwie Trybunału Konstytucyjnego i Sądu Najwyższego*, Warszawa 2008, p. 29; Biuro Trybunału Konstytucyjnego, *Proces prawotwórczy...*, p. 33. Cf. judicial decisions of Trybunał Konstytucyjny (*the Polish Constitutional Tribunal*) from: 31.01.1996, court ref. no. K 9/95, OTK ZU no. 1/1996, item 2 or from: 31.03.1998, court ref. no. K 24/97, OTK ZU no. 2/1998, item 13. They can be found in the official collection of judicial decisions of the Polish Constitutional Tribunal, that is: *Orzecznictwo Trybunału Konstytucyjnego. Zbór Urzędowy (OTK ZU) no. 2/1998, item 3*. All cited judgements and decisions can be obtained at: [www.trybunal.gov.pl](http://www.trybunal.gov.pl) (access: 10.01.2010).

<sup>50</sup> E. Łętowska, K. Karasiewicz, J. Luzak, and others, *Prawo intertemporalne...*, p. 29.

<sup>51</sup> T. C. Hartley, *The Foundations of European Community Law*, Oxford 2007<sup>6</sup>, p. 147.

<sup>52</sup> Although there is an entry titled *Retrospective Law*, [in:] *Black's Law Dictionary...*, p. 983 it is crossreferenced to the entry *Retroactive Law*, [in:] *Black's Law Dictionary...*, p. 983, without differentiating between them and with a note: *Also termed*; the same situation is with entries: *Retroactive and Retrospective*, [in:] *Black's Law Dictionary...*, p. 983. *Nota bene*, the quotation in entry *Retroactive*, taken from T. C. Hartley, *The Foundations of European Community Law*, Oxford 1981, p. 129, includes opinion that: “Retroactivity is a term [...] that is used to cover at least two distinct concepts.” Cf. opinion expressed and examples given by E. Łętowska in: E. Łętowska, K. Karasiewicz, J. Luzak, and others, *Prawo intertemporalne...*, p. 29, and p. 29, ft. 7.

<sup>53</sup> E. Łętowska, K. Karasiewicz, J. Luzak, and others, *Prawo intertemporalne...*, p. 29; T. C. Hartley, *The Foundations of...*, p. 147.

<sup>54</sup> In Roman law the principle was formulated in many ways: “*de tempore futuro legem loqui*” (Aulus Gellius 17.7.1), “*lex praeteritum indulgat, in futurum vetat*” (*Dig.* 1.3.22), “*omnia constituta non praeteritis calumniam faciunt, sed futuris regulam ponunt*” (*C.Th.* 1.1.3), “*omnes leges non ea, quae anteriore tempore acta sunt, damnant, sed in futurum observanda constituunt*” (ad *C.Th.* 1.1.3), “*conveniat leges futuris regulas imponere, non praeteritis calumnae excitare*” (*C.* 19.32), “*leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari*” (*C.* 1.14.7), “*quae in posterum tantummodo observari censemus*” (*C.* 6.23.29.7). In Polish jurisprudence it is formulated as: *lex retro non agit*. See more:

or retrospective and does not operate retroactively, that is, law is not extending in scope or effect to matters that have occurred in the past.

Also today in modern legal systems retroactivity is generally speaking prohibited.<sup>55</sup> It means that the legislator cannot make law that binds the past action.<sup>56</sup> Legal effects cannot be linked with legal acts from the past. The legality of an act must be determined according to the law in force at the time of the act, not a law that went into force after the act had taken place. The reason for this is that law is about planning or innovating so it regulates issues in the future. Law must be predictable and trustworthy. A subject of law must have confidence that his acting is with or against current norms of law. If law would be retroactive, addressees of law would lose their trust in the legislator and law. Predictability is the core aspect of legal security.<sup>57</sup>

However, civil jurisprudence gives some exceptions in the prohibition of the retroactive force of a law, such as, for instance, a kind of law that gives rights or is favorable.<sup>58</sup> Also in the situation of serious reasons and when the interested subjects of law could predict and expect that certain act of law will be enacted soon to bind their actions started in the past.<sup>59</sup> An exception to the rule in question is also possible when it is necessary for protection or realization of the most essential values.<sup>60</sup> These exclusions have been thoroughly discussed by judges and scholars as the subject is well-known to jurisprudence. The point is that the rule in question has no absolute character and the legislator can withdraw from it but only in specific and justified circumstances.<sup>61</sup>

Retrospectivity of law is not so radically rejected by jurisprudence as retroactivity. Mainly because retrospectivity is not so severe to users of law

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A. Kacprzak, J. Krzynówek, W. Wołodkiewicz, *Regulae iuris. Łacińskie inskrypcje na kolumnach Sądu Najwyższego Rzeczypospolitej Polskiej*, ed. W. Wołodkiewicz, Warszawa 2006<sup>2</sup>, p. 110–113.

<sup>55</sup> Entry: *Retroactive Law*, [in:] *Black's Law Dictionary...*, p. 983.

<sup>56</sup> Biuro Trybunału Konstytucyjnego, *Proces prawotwórczy...*, p. 29.

<sup>57</sup> T. C. Hartley, *The Foundations...*, p. 146.

<sup>58</sup> Entry: *Retroactive Law*, [in:] *Black's Law Dictionary...*, p. 983; cf. judicial decision of Trybunał Konstytucyjny from: 31.03.1998, court ref. no. K 24/97.

<sup>59</sup> S. Wronkowska, *Zmiany w systemie prawnym (Z zagadnień techniki i polityki legislacyjnej)*, Państwo i Prawo (1991) no. 8, p. 9. Cf. judicial decision of Trybunał Konstytucyjny from: 27.02.2002, court ref. no. K 47/01, OTK ZU no. 1/A/2002, item 6.

<sup>60</sup> Cf., for instance, judicial decisions of Trybunał Konstytucyjny, from: 18.10.2006, court ref. no. P 27/05, OTK ZU 9/A/2006, OTK item 124; from: 20.01.2009, court ref. no. P 40/07, OTK ZU no. 1/A/2009, item 4; from: 31.01.2001, court ref. no. P 4/99, OTK ZU no. 1/2001, item 5; and from: 7.02.2001, K 27/00, OTK ZU no. 2/2001, item 29; and also from: 10.10.2001, court ref. no. K 28/01, OTK ZU no. 7/2001, item 212.

<sup>61</sup> Cf. judicial decisions of Trybunał Konstytucyjny from 19.10.1993, court ref. no. K 14/92, OTK ZU 2/1993, item 35.

and does not weaken legal certainty. The Roman law quoted above does not concern retrospection.<sup>62</sup>

In canon law, the problem of retroactivity of law is also well worked out.<sup>63</sup> The 1983 code stands on a position that law concerns matters of the future, not those of the past (can. 9), so canon law is not retroactive. Law is not applicable to situations defined by acts or facts, which occurred before it came into force. It must also be noticed that in virtue of the term “nominatim” in can. 9, retroactivity in law had to be expressly stated. However, in case of doubt the presumption is against retroactivity. It seems to be a very good position because retroactivity always tends to dent people’s trust in law.

Also, in canon law the prohibition of retroactivity is not absolute. First, law that is based on God’s law is retroactive.<sup>64</sup> The fundament of such action is that God’s law is never new. It could only be noticed later on. Also, authentic interpretation of such a law binds from the very moment the law is in force, that is, from ever. For example, certain grounds for the invalidity of marriage unmentioned in *CIC* 1917 may be applied to marriages celebrated under the former law because they are based on the divine law, for instance: can. 1095 no. 3, can. 1097 § 2 of the current code.<sup>65</sup>

Due to the fact that laws are authentically interpreted by the legislator and by that person to whom the legislator entrusts the power of authentic interpretation (can. 16 § 1), any legislator must pay attention to the problem of retroactivity in authentic interpretation context. Authentic interpretation after its promulgation is a part of act of law to which it was issued and must be observed with the same respect as the law itself. This kind of interpretation is retroactive, when it brings nothing new to the law. It means, when it explains objectively clear and certain words by clear and certain ones. From that time, objectively unclear and uncertain law is more accessible but its range of meaning is exactly the same. It is called declaratory interpretation. If the authentic interpretation tightens or loosens law, or when it explains something unclear, in such case authentic interpretation is not retroactive (can. 16 § 2).

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<sup>62</sup> E. Łętowska, K. Karasiewicz, J. Luzak, and others, *Prawo intertemporalne w orzecznictwie Trybunału Konstytucyjnego i Sądu Najwyższego*, Warszawa 2008, p. 29.

<sup>63</sup> See, for instance, a very informative monograph: B. M. Frison, *The Retroactivity of Law. An Historical Synopsis and Commentary*, Washington 1964.

<sup>64</sup> See authentic interpretation of can. 1103 done by Pontificia Commissio Codici Iuris Canonici Authentice Interpretando, Responsiones ad proposita dubia, 6.08.1987, *AAS* 79 (1987), p. 1132.

<sup>65</sup> There is a discussion if the rule is applicable to can. 1098. Some authors say that this canon comes from positive church law, some say it comes for natural law; for presentation of the discussion see: W. Góralski, *Qualitas personae jako przedmiot błędu w kan. 1097 § 2 i 1098 KPK*, [in:] *Studia nad małżeństwem i rodziną*, Warszawa 2007, p. 359.

In a doubtful situation as to whether the interpretation is declaratory or not, law may not be applied retroactively.<sup>66</sup>

Penal law is only retroactive, if this is favorable to the delinquent according to rule “*lex severior retro non agit*.” The rule finds its full realization in can. 1313, which includes norm that change in law should not make the situation of delinquent worse.<sup>67</sup> Retroactivity of penal law refers to the effects already caused that, in principle, are not cancelled by a subsequent law.

Retrospection of law is in canonical jurisprudence rather modestly present<sup>68</sup> but it can be seen, of course, in legislation. The legislator makes laws which are to be applied to already existing situations. For instance, in the 1917 code there was a distinction between *parochus inamovibilis* and *parochus amovibilis* (cf. *CIC* 1917 can. 454 § 1–3). His stability was determined by parish he occupied. It means that the pastor had the same degree of stability which parish had. The pastor who had a bigger level of immovability could be removed from the parish only according to administrative procedure (*CIC* 1917 can. 2148–2156). The removable pastor, who had lower level of immovability than the first one, could be removed according to can. 2157–2161) of the previous code. After coming into force of the 1983 code, the both kinds of pastors kept, of course, their offices. But under new law they are treated the same and can be removed or transferred according to the same procedure (can. 1740–1752).

All this leads to the conclusion that retroactive laws in the Church are an exception and must be highly avoided by the legislator. Retroactivity of law is accepted but it is not desirable. The legislator should make retroactive or retrospective law only for pressing reasons or when the benefits are appreciable, especially for the common good, to extend a favor, or to conform obsolete structures and institutes to a new juridical reality.

### 2.1.5. Transitional Law

Transitional law (also termed interim law) is a law that remains in effect for a specific time or until a specified event occurs.<sup>69</sup> It is used to transfer the legal *status quo* created under the previous law to the new order under new law using legal solutions which are temporal. There are

<sup>66</sup> It is not always evident which authentic interpretations are merely declarative. This determination is left to the canonical science, as competent subjects mentioned in can. 16 § 1 do not indicate what kind of interpretation it is making, see: J. M. Huels, *Canon 9*, [in:] *New Commentary...*, ed. J. P. Beal, J. A. Coriden, T. J. Green, New York–Mahwah 2000, p. 61–62.

<sup>67</sup> J. Syryjczyk, *Sankcje w Kościele. Część ogólna. Komentarz*, Warszawa 2008, p. 62.

<sup>68</sup> For instance: B. M. Frison, *The Retroactivity of Law. An Historical Synopsis and Commentary*, Washington 1964, p. 20–27. The author is speaking about “retroactivity improperly so called” which has to be clearly distinguished from retroactivity in the proper sense.

<sup>69</sup> Cf. entry: *Interim Order*, [in:] *Black’s Law Dictionary...*, p. 1206.

some methods that can govern such a transfer. First, it can be ordered that act begun under the previous law must be finished first, before new rules are to be applied. It means that the former law binds some subjects longer than others. It can be also that new law regulates from the very beginning the acts started before, in which case there are two options: new law regulates legal situation comprehensively according to new rule or it regulates it only in some measure leaving some areas under control of old law. The third possibility must be also mentioned: a subject of law can choose whether he wants to follow old or new law. He may choose what is best for him.<sup>70</sup>

History of can. 510 § 1 can be mentioned as an exemplary of transitional law in canon law. The canon says that “Capitulum canonicorum ne amplius uniantur parochiae; quae unitae alicui capitulo exstant, ab Episcopo dioecesano a capitulo separentur.” The 1917 code provided such a possibility (*CIC* 1917: can. 402, can. 415, can. 471 § 1, can. 1409). Paul VI’s *Litterae apostolicae motu proprio Ecclesiae sanctae*,<sup>71</sup> to be precise, in art. 21 § 2 of *Normae ad exsequenda decreta ss. Concilii Vaticani II “Christus Dominus” et “Presbyterorum Ordinis”*,<sup>72</sup> ordered bishop to consult the chapter or the council of priests before separating both a parish and a chapter. There is no such obligation in the current law. The mentioned document was a transitional law.

The legislator changing any law must be aware of problem of *inter-temporality*, that is, problem of possible uncertainty as to which law must be applied to legal situations which have been initiated under old law. It would be a serious error not to try to solve the difficulty. Giving plain answer to the question which law binds in which situation is his duty.<sup>73</sup> As a consequence, the legislator must treat transitional law with respect and take seriously process of making such a law, although its life is rather short. He must use transitional law as often as it is needed. Of course, change in law is sometimes inevitable, but it must not mean that transfer from one legal situation to another should be hard for users of law. The legislator is to do what is possible to assure that changing law would not cause uncertainty.

<sup>70</sup> A. Bator, S. Kaźmierczyk, entry: *Przepisy przejściowe*, [in:] A. Bator, W. Gromski, A. Kozak, S. Kaźmierczyk, Z. Pulka, *Wprowadzenie do nauk prawnych...*, p. 215–216.

<sup>71</sup> Paulus pp. VI, *Litterae apostolicae motu proprio Ecclesiae sanctae* normae ad quaedam exsequenda ss. Concilii Vaticani II Decreta statuuntur, 6.08.1966, *AAS* 58 (1966), p. 757–787.

<sup>72</sup> *AAS* 58 (1966), p. 769.

<sup>73</sup> S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki...*, p. 81.

## 2.2. Determinants of Legislation

Legislation understood as a process of drafting law depends on many determinants, which shape the process of working on law. There are many relations between the current law, interpretation of it and certain circumstances in which addressees of law live. The interaction has circular character and creates environment for legislative activity.<sup>74</sup> It has great influence on the legislator and his acting. Of course, it translates into legislation understood as material outcome of process in question.

### 2.2.1. Importance of the Problem

Numerous factors can be listed as determinants of legislation process. It can be said that the more factors are taken into consideration, the more conscious and intentional the process of drafting law will be, producing as a result a better law. Although the legislator is a specialist in law and the competences he has to have are in the realm of law, there is nothing more dangerous than a specialist who is not referring to other sciences at all.<sup>75</sup> The more achievements of arts and science are taken into consideration in his work, the more probable it becomes that law will realize successfully its aims and that it appropriately answers the needs of the faithful. It is important because law is in fact a very interdisciplinary science. Jurisprudence speaks a lot about benefits that come from the openness of law to achievements of other sciences.<sup>76</sup> It should be also pointed out that the legislator has to accept outcomes of research and include the findings in their cognitions of the reality.<sup>77</sup> The postulates can be summarized by a statement that the broader horizon the legislator has, the better quality of law produced by him.<sup>78</sup>

The same rule is valid in canon law. Collecting and accumulating knowledge, facts, ideas and inspirations from many different arts and sciences, that is, the openness of law to other disciplines of learning can be called interdisciplinarity of canon law. The desire for familiarity of the legislator

<sup>74</sup> L. Gerosa, *Interpretacja prawa w Kościele...*, p. 151.

<sup>75</sup> L. Örsy, *Quantity and Quality of Laws after Vatican II*, *The Jurist* 27 (1967), p. 406–407.

<sup>76</sup> J. B. White, *The Legal Imagination; Studies in the Nature of Legal Thought and Expression*, Boston 1973; K. Opalek, *Interdyscyplinarne związki prawoznawstwa*, *Studia Filozoficzne* 2–3 (1985), p. 17–30; K. Junker, *Law and Science Serving One Master... narrative*, [in:] *Communicating Science: Professional Contexts*, ed. E. Scanlon, R. Hill, K. Junker, London 1999, p. 249–269; J. Gaakeer, *Introduction. Multi and Interdisciplinarity: mere Theory or Just Practice?*, *Erasmus Law Review*, vol. 1, no. 3, 2008, p. 1–2.

<sup>77</sup> J. B. White, *Justice as Translation: an Essay in Cultural and Legal Criticism*, Chicago 1990, p. 14.

<sup>78</sup> Cf. L. Örsy, *The Interpreter...*, p. 50.

with works of other scholars from different fields of knowledge such as: theology, philosophy, jurisprudence, political science, linguistics, sociology, economy, and technology,<sup>79</sup> must not be understood as ambition to keep up with them. Any borrowing from them must be done selectively, because due to specificity of law in the Church not everything fits to the canon law. The criteria are in the nature of canon law and its aim. Interdisciplinary is to help in fostering the care of souls. Every legislator must keep in mind these words from *Dectreales* of Pope Gregory IX: “Ignorantia non excusat praelatum in peccatis subditorum. [...] Non enim potest esse pastoris excusatio, si lupus oves comedit, et partor nescit.”<sup>80</sup>

### 2.2.2. Legal Determinants of Legislation

By legal determinants of legislation here are understood factors of legal character listed in jurisprudence, which the legislator must take into consideration because they influence legislation. Civil and canonical jurisprudence parallel each other in this matter.

#### 2.2.2.1. The System of Canon Law

Law in the Church, as well as in a state, forms the system of law. It is an entire set of norms written or recognized, or acknowledged (in case of a custom) by the competent ecclesiastical authorities.<sup>81</sup> The system of law should have two following characteristics: 1) completeness, that is, no legislation gaps, and 2) cohesion, it means norms are not contradictory and they are connected together.<sup>82</sup> These are formal requirements undependable from the content of norms. The canonical system of law must measure up to these requirements.

It must be remembered that not every pronouncement of the Church has direct juridical implications, nor should the life of the community be reduced to legal categories. Indeed, there are so many other essential dimensions to the life of the Church. Nevertheless, if we are dealing with law it is important to know where we stand, particularly when obligations are defined or rights proclaimed.<sup>83</sup>

<sup>79</sup> See more: P. Kroczek, *Zagadnienie interdyscyplinarności prawa*, *Polonia Sacra* 26 (2010), p. 169–182.

<sup>80</sup> Gregorius pp. IX, *Decretalium compilatio*, 5.09.1234, [in:] *Corpus Iuris Canonici*, vol. II, col. 928.

<sup>81</sup> Cf. T. Pawluk, *Prawo kanoniczne według Jana Pawła II*, vol. I, Olsztyn 1985, p. 28.

<sup>82</sup> See more: S. Wronkowska, *Podstawowe pojęcia prawa...*, p. 104–111; A. Bator, entry: *system prawa*, [in:] A. Bator, W. Gromski, A. Kozak, S. Kaźmierczyk, Z. Pulka, *Wprowadzenie do nauk prawnych...*, p. 194–196.

<sup>83</sup> F. G. Morrisey, *Papal and Curial Pronouncements...*, Ottawa 2001, p. 8.

At times, however, the importance of text is not clear. Sometimes legal or binding language is used, but the document itself is not presented in a legal form. Pope Paul VI noted that there are many documents used by the Church to proclaim its teaching and legislation. In one of his allocutions, he said: "Il Diritto definisce le istituzioni, dispone le esigenze della vita mediante le leggi e decreti, completa i tratti essenziali dei rapporti giuridici fra i fedeli, Pastori e laici, per mezzo delle sue norme, che sono a volta a volta consigli, esortazioni, direttive di perfezione, indicazioni pastorali."<sup>84</sup>

The system of law is a determinant of legislation in the sense that the products of legislation are part of the system. They must fit into the system. If not, they will not work together as a system.

What are the sources of the rules, which make up the Church's canonical system? The answer to this question gives a list of the most common sources of Church norms. It can be said that the factors that are components of canonical system in question are the same as the source of law. Canon lawyers used to divide the source of law to the source of existence of law (*fontes oriundi seu essendi*) and the source of knowing of law (*fontes cognoscendi*).<sup>85</sup> The division is useful to handle the old law.<sup>86</sup> But for current law the division is not needed. The sources become one. Text of legally promulgated law is both the source of existence of law and the source of knowing of law.<sup>87</sup> Presentation of the elements of the system of canon law gives a picture of environment and background for legislative work.

#### 2.2.2.1.1. Divine Law

Divine law may be either natural or positive (cf. can. 199 no. 1).<sup>88</sup> Only the supreme authority of the Church can authentically determine what constitutes

<sup>84</sup> Paolo VI, Allocuzione Vi accogliamo ai partecipanti al secondo congresso internazionale di Diritto Canonico, svoltosi a Milano nella sede dell'Università Cattolica del Sacro Cuore, 17.09.1973, [in:] *Insegnamenti di Paolo VI*, vol. XI (1973), Città del Vaticano 1974, p. 854 ("The law defines the institutions, provides for the necessities of life by means of laws and decrees, and completes the essential features of juridical relations between the faithful, pastors and laity, by means of its rules, which are in turn counsels, exhortations, directives of perfection, pastoral indications").

<sup>85</sup> See, for instance: P. Hempterek, W. Góralski, *Komentarz do Kodeksu Prawa Kanonicznego z 1983 roku*, vol. 1, part 1, *Historia źródeł i nauki prawa kanonicznego*, Lublin 1995, p. 8–9. It must be noticed that some authors distinguish: 1) the material source of law, and 2) the formal source of law. The terms must be used cautiously, because the authors understand them variously; for some examples of the usage in different meanings, see: R. Sobański, *Teoria prawa kościelnego...*, p. 127, ft. 2.

<sup>86</sup> Good presentation of historical sources of knowing of law, see: T. Pawluk, *Wprowadzenie do studiów kanonistycznych*, Warszawa 1979, p. 88–165.

<sup>87</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 83.

<sup>88</sup> The divine positive law has its source in divine Revelation, expressed in sacred Scripture and sacred Tradition; the divine natural law (natural law) is based on the order of creation and



divine law (see: can. 749–750, can. 841). Divine law is the very hard foundation of every man-made law and its ultimate limitations.<sup>89</sup> Any positive human law must always be in harmony with divine law.<sup>90</sup> It is quite unthinkable for a law made by church legislator to be incoherent with the law in question. Due to theological reasons it is also impossible in case of the supreme legislator. Divine law is *norma normans* of the Church's *norma normata*.

There are canons in *CIC* 1983 that, although they do not express their relation to divine positive law, but they are built on it (e.g., can. 208, can. 336, can. 900 § 1). Many times in *CIC* 1983 one can meet expressions like, e.g., *ius divinum* (can. 22, can. 24 § 1, can. 1059, can. 1075 § 1), *lex divina* (can. 98 § 2, can. 199 no. 1, can. 1249), *institutio divina* (can. 129 § 1, can. 207 § 1, can. 1008), or *ordinatio divina* (can. 113 § 1, can. 145 § 1). Sometimes there are expressions like, e.g., *a Domino singulariter* (can. 331), *a Christo Domino evectum est* (can. 1055 § 1), or *a Christo Domino insituta* (can. 840). They all indicate that canon law has its source in the divine positive law and that the law is promulgated by the Church.<sup>91</sup>

It is different with natural law. There is no direct codification of the law in question in *CIC* 1983 as it is with the divine positive law.<sup>92</sup> There are only suppositions regarding the natural law in some canons, like, e.g., can. 1163 § 2, can. 1165 § 2, can. 1299 § 1. Of course, there are canons that are built on the natural law, like, e.g., can. 219–221, or can. 1058. The legislator in the Church is not trying to codify natural law but just to respect it.<sup>93</sup>

Civil law could be against divine law. This possibility is taken into consideration in can. 22. Only those civil laws are to be observed with the same effects in canon law “*quatenus iuri divino non sint contrariae*” (can. 22).

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can be known by human reason.

<sup>89</sup> R. Sobański, *Metodologia prawa...*, p. 60.

<sup>90</sup> See more: H. Pree, *Ius Divinum between Normative Text, Normative Content, and Material Value Structure*, *The Jurist* 56 (1996), p. 41–67; R. Sobański, *Niezmiennosc i historycznosc prawa w Koscielo: Prawo Boze i prawo ludzkie*, *Prawo Kanoniczne* 40 (1997) no. 1–2, p. 23–44.

<sup>91</sup> R. Sobański, *Nauki podstawowe prawa...*, vol. II, p. 69–72; W. Aymans, entry: *Ius Divinum – Ius humanum*, [in:] *Lexikon des Kirchenrechts*, ed. S. Haering, H. Schmitz, Freiburg-Basel-Wien 2004, col. 437.

<sup>92</sup> In *CIC* 1917 there were two statements of natural law: can. 1068 § 1 and can. 1405.

<sup>93</sup> R. Sobański, *Nauki podstawowe prawa...*, vol. II, p. 58.

There is a problem that must be mentioned here. The proclamation that certain norms have origin from natural law depends on the concept of it.<sup>94</sup> Church legislator must take as his own the principal Catholic concept of natural law.<sup>95</sup>

#### 2.2.2.1.2. Legal Custom

It may be seen as paradoxical that the Church should have in the legal system a place for a custom, while modern systems of law suppressed customary law.<sup>96</sup> Indeed during the reform of the code many canonists were against it arguing that written law was more clear and certain.<sup>97</sup> But a custom is befitting the character of the Church and not only does it show unity between members but also must be seen as a gift of Holy Spirit who inspires the faithful to fulfill the mission of the Church (cf. *LG* 4, *LG* 12, *AA* 3; *CCEO* 1990 can. 1506). When the legislator does not act, custom may supply law for the Church.

Generally speaking custom is a long-standing practice within the Church communities. It is a source of norms so it is normative. A more detailed definition of a custom describes it as a normative practice of a community that is adopted by the community itself. Custom is normative, that is, it is a practice that the community wants to be binding; it wants to maintain the practice and observance of it.<sup>98</sup>

There are in can. 23–26 rules for establishing a legal custom, a custom that is binding in the same way a law is. Canon 23 says that a custom introduced by a community of the faithful has the force of law only if it has been approved by the legislator. The legislator must not try to eradicate the custom, for example, through coercive measures or new decrees. Legal customs can be introduced only by a community capable of receiving a law (can. 25). It must be remembered by the legislator that a custom has regained a greater importance today with the ecclesiological recovery of the Second Vatican Council, its stress on the universal Church as a communion of the Churches, and its respect for the adaptation of ecclesiastical practices according to the

<sup>94</sup> For presentation of the difference, see: J. Finnis, *Natural Law: the Classical Tradition*, [in:] *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. J. Coleman, S. Shapiro, Oxford 2004, p. 1–60, and B. H. Bix, *Natural Law: the Modern Tradition*, [in:] *The Oxford Handbook of Jurisprudence...*, p. 61–103

<sup>95</sup> The Catholic point of view is briefly and substantially presented, for instance, in work of Z. Grocholewski, *Refleksje na temat prawa. Prawo naturalne. Filozofia prawa*, transl. K. Stopa, Kraków 2009, or for deeper monography, see: M. A. Krąpiec, *Człowiek i prawo naturalne*, Lublin 2009.

<sup>96</sup> The historical development of customary law, see: M. J. Guilfoyle, *Custom. An Historical Synopsis and Commentary*, Washington 1937.

<sup>97</sup> See: R. Sobański, *Zwyczaj*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 78.

<sup>98</sup> J. M. Huels, *Back to the Future. The Role of Custom in a World of Church*, CLSA Proceedings 59 (1997), p. 6.

needs and cultures of a world Church. Now the customs that arise in the local Churches have a renewed ecclesiological significance.

#### 2.2.2.1.3. Law Made by Church Legislators

Another source of law is law understood as act of law or equal to it general decree (can. 29) made by competent church legislator. To the group belong universal and particular acts of law. Also, there must be included secondary documents, like: general executory decrees (can. 31 § 1) and instruction (can. 34 § 1). Although they are issued by an executive power, keeping in mind the unity of power in the Church, it is clear that the legislator can comprise in the documents in question genuine legal norms and by this formulate the canonical system of law.

#### 2.2.2.1.4. Liturgical Law

Liturgy is the summit toward which the activity of the Church is directed; at the same time it is the font from which all its power flows (*Sacrosanctum Concilium*<sup>99</sup> 10). It is understood as a public cult and it is regulated by liturgical law.

There is *ius stricte liturgicum*. It can be found in liturgical books issued for the whole Church, like: Roman Missal (*Missale Romanum*), Liturgy of the Hours (*Liturgia horarum* or *Breviarium Romanum*), Roman Calendar (*Calendarium Romanum*), and other books on the sacraments, like: *Ordo celebrandi Matrimonium*, *Ordo Confirmationis*, *Ordo Poenitentiae*.<sup>100</sup> It must not be forgotten that there is also a liturgical particular law issued for dioceses or religious orders.<sup>101</sup>

To this must be added *ius in re liturgica*, that is, norms from *CIC* 1983, documents issued by congregations,<sup>102</sup> particular law and legal customs that regulate things like: requirements with regard to people who are involved in liturgy (e.g., can. 835, can. 861, can. 883); requirement for validity of liturgical action (e.g., can. 864, can. 889, can. 912); protection against abuses in ecclesiastical cult (e.g., can. 850, can. 877, can. 961). Both *ius stricte liturgicum* and *ius in re liturgica* create liturgical law and belong to the system of canon law.<sup>103</sup>

<sup>99</sup> Sacrosanctum Concilium Oecumenicum Vaticanum II, *Constitutio Sacrosanctum Concilium* de Sacra Liturgia, 4.12.1963, AAS 56 (1964), p. 97–138.

<sup>100</sup> See: T. Pawluk, *Prawo kanoniczne według Kodeksu Jana Pawła II*, vol. I, Olsztyn 1985, p. 205–209.

<sup>101</sup> T. Pawluk, *Prawo kanoniczne według Kodeksu...*, p. 209.

<sup>102</sup> For instance: Congregatio de Cultu Divino et Disciplina Sacramentorum, *Instructio quinta Liturgiam authenticam* de usu linguarum popularium in libris liturgiae romanae edendis, 28.03.2001, AAS 93 (2001), p. 685–726.

<sup>103</sup> R. Sobański, *Metodologia prawa...*, p. 78–80, especially, p. 79, ft. 127. For a concise monograph on theological and legal view on liturgical law, see: J. Nowak, *Prawo w służbie wydarzeń zbawczych. Zarys prawodawstwa liturgicznego*, Poznań 2004.

### 2.2.2.1.5. Authentic Interpretation

Law in the canon law system does not live its own life. The norms concern practice of faith. That is why the legislator has important duty to take care of the understanding of the law and, in case of necessity, of correcting or explaining its understanding.<sup>104</sup> He does this by authentic interpretation (can. 16). Authentic interpretation contributes to the building of the body of canonical system.<sup>105</sup>

A variety of authentic interpretation can be distinguished. *R e s t r i c t i v e* interpretation narrows the meaning and applicability, of the law but *e x t e n s i v e* interpretation broadens the meaning and applicability of the law beyond what is included in the text of the law. Both *d e c l a r a t i v e* interpretation, that merely affirms the meaning of the wording of the law that was already certain, and *e x p l a n a t o r y* interpretation that explains the meaning of a doubtful law without extending or restricting its original meaning, change rather nothing in the norms.<sup>106</sup>

Nowadays the competences for authentic interpretation of laws belong to the bishop of the Church of Rome and to the College of Bishops with Pope as the head (can. 331, can. 336) and also to Pontifical Council for Legislative Texts. It can interpret all law of the Catholic Church. Roman congregations can also interpret authentically law but only in declaratory way by law acts according to can. 31–34.<sup>107</sup>

### 2.2.2.1.6. Canonized Civil Law

It is not the Church's aim to create the holistic system of law that would include all realms of life. This is what modern states do. The Church by its law articulates its own mission. Some aspects of life better suit the secular state and belong to its law.

*CIC* 1983 in can. 22 recognizes that in some circumstances and under certain conditions canon law in certain matters yields to civil law.<sup>108</sup> This is known as *c a n o n i z a t i o n* of the civil law. *Leges civiles* (can. 22, can. 110, can. 1062 § 2), *ius civile* (can. 98 § 2; can. 105 § 1, can. 231 § 2) or *legislatio civilis* (can.

<sup>104</sup> R. Sobański, *Uwagi o interpretacji prawa kościelnego*, Prawo Kanoniczne 30 (1987) no. 1–2, p. 44.

<sup>105</sup> They are presented in *AAS*.

<sup>106</sup> L. G. Wrenn divides authentic interpretation into eight categories, see: L. G. Wrenn, *Authentic Interpretation on the 1983 Code*, Washington 1993, p. 5, but it seems, it is not necessary, see: J. M. Huels, *Canon 16*, [in:] *New Commentary on the Code...*, p. 72, ft. 98.

<sup>107</sup> R. Sobański, *Kanon 16*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 68; H. Socha, *Münsterischer Kommentar zum Codex Iuris Canonici unter besonderer Berücksichtigung der Rechtslage im Deutschland, Österreich und der Schweiz*, ed. K. Lüdicke, Essen, since 1985, 16/6.

<sup>108</sup> D. Galles, *The Civil Law*, *The Jurist* 49 (1989), p. 241–248 explains that the Anglo-American common law system understands term *civil law* in different ways.

197) are to be understood as all norms in force in state with their origin in civil laws, customs or other source.<sup>109</sup>

Occasionally civil laws are just mentioned without any result on canonical forum (e.g., can. 492 § 1, can. 799, can. 1059, can. 1152 § 2, can. 1344 no. 2, can. 1672. This is not yet canonization. Sometimes canon law recognizes the applicability and effects of the civil laws on a certain matter without canonizing the laws (e.g., can. 105 § 1, can. 110, can. 365 § 1, can. 877 § 3, can. 1059, can. 1062 § 1, can. 1672, can. 1692 § 2, can. 1692 § 3, can. 1071 § 1, 2°, can. 1296, can. 1479, can. 1540 § 2, can. 1558 § 2, can. 1672, can. 1689, can. 1692, can. 1716). In strict sense, by canonization is understood an incorporation of norms into canonical system. This happens, for instance, in: can. 98 § 2, can. 231 § 2, can. 362, can. 668 § 1 and § 4, can. 1062 § 1, can. 1072, can. 1274 § 5, can. 1284 § 2 no. 2 and no. 3, can. 1286 no. 1, can. 1293 § 2, can. 1299 § 2, can. 1500, can. 1715 § 2 where observance of civil norms is ordered or recommended. Also, canonization takes place when civil norms have legal effects in canonical system, e.g., can. 197, can. 1268, can. 1290, can. 1714, can. 1492 as well as their updates, interpretation. By canonizing the civil laws on certain matters, the canon law avoids conflicts with the various laws of the many civil jurisdictions throughout the world.

#### 2.2.2.1.7. International Law

The Holy See as a juridical person with territory of the Vatican City State is a unique entity among other subjects of international law; it nevertheless enjoys sovereignty under international law similar to that of other States.<sup>110</sup> The Holy See has diplomatic relations with states, it participates in various international and regional intergovernmental organizations and bodies and it also has the status of a permanent observer at the United Nations.<sup>111</sup> This position entitles it to have legal relations with other subjects of law and to make agreements.

Formal international agreements between the Holy See and other subjects of international law are a source for canonical norms. The relationship between the canon law and the international law might be generally speaking conceptualized in two ways: concordats and conventions. Both ways proceed from the Holy See's *ius nativum* as a sovereign juridical person.<sup>112</sup>

<sup>109</sup> R. Sobański, *Metodologia prawa...*, p. 81.

<sup>110</sup> R. J. Araujo, *The International Personality and Sovereignty of the Holy See*, Catholic University Law Review 50 (2001), p. 359.

<sup>111</sup> [http://www.vatican.va/roman\\_curia/secretariat\\_state/documents/rc\\_seg-st\\_20010123\\_holy-see-relations\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_20010123_holy-see-relations_en.html) (access: 20.02.2010).

<sup>112</sup> P. G. Magee, *The Canonical and the International: some Reflections on their Relationship*, Periodica 91 (2002), p. 542–545.

### 2.2.2.1.7.1. Concordats

The concordat is exclusively bilateral way of making law agreement. It is a vehicle through the *ius contrahendi* between the Holy See and other sovereign juridical person such as a state. The state can be a nation state<sup>113</sup> or it can be infra-national.<sup>114</sup>

It is articulated in the form of international law known as *ius concordatarium*. Concordats are true instruments of international law, which oblige both parties before the international community. The canonical and the civil legal system meet to defend and promote of both the Church's and a state's rights and freedom. The range of questions dealt with in concordats is very broad, going from the juridical status of the Catholic Church itself in a given state to questions of its territorial structures (dioceses, parishes, etc.), of marriage, education, health, property and financial issues, etc.<sup>115</sup>

### 2.2.2.1.7.2. Conventions

The second conceptualization might be called *de facto* non-contractual. It is both bilateral and multilateral. The international community is here faced with a *factum iuridicum* of a global nature, which, after all, predates considerably the formalization of its own existence. Many countries join some conventions; the Holy See does it too.<sup>116</sup>

This fact is elaborated juridically in canon law, for example, in the chapter *De Legatis Pontificiis* (can. 362–366) and, outside of the code, in *Litterae apostolicae motu proprio Sollicitudo Omnium Ecclesiarum* about the tasks of Papal Legates.<sup>117</sup> These norms, while not themselves norms of international law, exemplify the *de facto*, direct role of canon law in the international context.

<sup>113</sup> For instance: Konkordat między Stolicą Apostolską i Rzeczpospolitą Polską, podpisany w Warszawie dnia 28.07.1993, Dz. U. of 1998 No. 51, item 318. It was published also in *AAS* 90 (1998), p. 310–329.

<sup>114</sup> An example of the latter is the type of concordat signed between the Holy See and individual Länder of the Federal Republic of Germany. For collection of them, see: J. Listl, *Die Konkordate und Kirchenverträge in der Bundesrepublik Deutschland: Textausgabe für Wissenschaft und Praxis*, vol. I–II, Berlin 1997, or *Enchiridion dei concordati: due secoli di storia dei rapporti Chiesa–Stato*, ed. E. Lora, Bologna 2003.

<sup>115</sup> For collection of concordats, see: L. Schöppe, *Konkordate seit 1800. Originaltext und deutsche Übersetzung der geltenden Konkordate*, Frankfurt am Main-Berlin 1964, and supplements to this book: L. Schöppe, *Neue Konkordate und konkordatäre Vereinbarungen: Abschlüsse in den Jahren 1964 bis 1969: Nachtrag zu „Konkordate seit 1800“*, Frankfurt am Main/Berlin 1964, Hamburg 1970; J. Krukowski, *Konkordaty współczesne*, Warszawa 1995.

<sup>116</sup> For instance: *The Vienna Conventions on Diplomatic Relations*, done at Vienna on 18.04.1961, in force from: 24.04.1964, [http://www.ediplomat.com/nd/treaties/diplomatic\\_relations.htm](http://www.ediplomat.com/nd/treaties/diplomatic_relations.htm) (access: 30.06.2010).

<sup>117</sup> Paulus pp. VI, *Litterae apostolicae motu proprio Sollicitudo Omnium Ecclesiarum* de muneribus Legatorum Romani Pontificis, 24.06.1969, *AAS* 61 (1969), p. 473–484.

Norms from both of the forms are part of the canonical system of law and apply as other norms. In a situation of conflict between them and other norms of universal law or particular, the supremacy is given to the norms that come from international law.<sup>118</sup>

#### 2.2.2.2. The Rules of Interpretation

It is important to notice that the rules of drafting law and the rules of interpretation of law have not been developed simultaneously by jurisprudence neither in the Church nor in civil societies.<sup>119</sup> The rules of interpretation are known in the Church from 12<sup>th</sup> century,<sup>120</sup> and the rules of drafting are still unknown for many canonists.

The rules are in mutual correspondence and should not stand in isolation from each other. In fact, rules for making the law should follow the rules of interpreting that very law. There is a postulate in jurisprudence that the legislators draft law while taking into consideration rules of interpretation.<sup>121</sup> As a matter of fact, rule for drafting law must be patterned after rules of interpretation.<sup>122</sup>

Similarly, with the matters presented by the canonist: in the system of canon law the legislator and interpreter not only cooperate but also the legislator himself is the first interpreter.<sup>123</sup> There is a mutual relation between drafting law and its interpretation. Rules of interpretation must be well-known to the legislator.

##### 2.2.2.2.1. Definition of Interpretation

There are many definitions of interpretation in the realm of law. Legal dictionary says that interpretation is the process of determining what something, esp. the law or a legal document, means.<sup>124</sup> The meaning must be already present in the text of law. Interpretation is not to change that true meaning into different sense. It must not be revoking, manipulation or distortion of a law in order to impose upon the law a meaning that is really alien to it. Interpretation is to clarify and to draw out that true meaning, when for one reason or another it is not perfectly clear.<sup>125</sup>

Important from the legislator's point of view are the opinions about the meaning of interpretation; these opinions underline the significance of legislator in the process of interpretation. They say that it is a process of explaining the

<sup>118</sup> R. Sobański, *Metodologia prawa...*, p. 80.

<sup>119</sup> S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki...*, p. 8.

<sup>120</sup> Ch. Lefebvre, entry: *Lois ecclésiastiques. Interprétation*, [in:] *Dictionnaire de Droit Canonique*, ed. R. Naz, vol. VI, Paris 1955, col. 660.

<sup>121</sup> M. Zieliński, *Wykładnia prawa...*, p. 59.

<sup>122</sup> S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, Poznań 1997, p. 134.

<sup>123</sup> L. Gerosa, *Interpretacja prawa w Kościele...*, p. 151.

<sup>124</sup> Entry: *Interpretation*, [in:] *Black's Law Dictionary...*, p. 894.

<sup>125</sup> L. G. Wrenn, *Authentic Interpretation...*, p. 1.

matter of a law according to mind and will of the legislator<sup>126</sup> or establishing the matter included in law in accordance with mind and will of the legislator.<sup>127</sup> Good from users' point of view is the definition, which considers interpretation as a process that aims to give clear answer to what a subject of law is required to do in certain situation and elucidate how any different behavior would result. The two points of view are, of course, mutually connected.

It is important to notice that the word *interpretatio* can have different meanings. It can stand for the way of interpretation, the result of interpretation and a procedure of interpretation.<sup>128</sup>

#### 2.2.2.2.2. Interpretation in CIC 1983

Comparing *CIC* 1983 to *CIC* 1917 the changes in the realm of the norms concerning interpretation are not relevant at all.<sup>129</sup> The theory of interpretation has not been reformed.<sup>130</sup> Therefore an opinion that this situation is intentional. Many critics say that reform must be done soon in order to measure up to the achievements and developments of civil theory of law.<sup>131</sup> In *CIC* 1983 rules of interpretation are listed from can. 16 to can. 19, and in can. 27 but the key canon is can. 17.

Canon 17 is of general character. It is fundamental for understanding all canonical laws. There are two principles in it. The first one: "Leges ecclesiasticae intellegendae sunt secundum propriam verborum significationem in textu et contextu consideratam."<sup>132</sup> And the second one: "Quae si dubia et obscura manserit, ad locos parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum."<sup>133</sup> In Latin version, there is not a period (as English version has) but a semicolon; what can be taken as a suggestion that both principles are linked together. The first principle gives the literal sense

<sup>126</sup> T. Pawluk, *Prawo kanoniczne według Kodeksu Jana Pawła II*, vol. 1, Olsztyn 1985, p. 229.

<sup>127</sup> E. Szafranski, *Podręcznik prawa kanonicznego*, vol. 1, Warszawa 1985, p. 153.

<sup>128</sup> B. Th. Dröbner, *Bemerkungen zur Interpretationstheorie des CIC/83*, Archiv für katholisches Kirchenrecht 153 (1984), p. 5, ft. 6.

<sup>129</sup> J. Listl, H. Müller, H. Schmitz, *Grundriss des nach konziliaren Kirchenrechts*, Regensburg 1980, p. 69.

<sup>130</sup> B. Th. Dröbner, *Bemerkungen zur Interpretationstheorie...*, p. 14.

<sup>131</sup> R. Potz, *Ökumenische Interpretation. Zur gegenwärtigen Situation der kanonistischen Auslegungslehre*, Österreichisches Archiv für Kirchenrecht 35 (1985), p. 74; R. Sobański, *Uwagi o interpretacji prawa kościelnego*, Prawo Kanoniczne 30 (1987) no. 1–2, p. 38 and bibliography given in ft. 39.

<sup>132</sup> Can. 17: "Ecclesiastical laws are to be understood according to the proper meaning of the words considered in their text and context." Translations of *CIC* 1983 are taken from: *Code of Canon Law Annotated*: Prepared under the Responsibility of the Instituto Martín de Azpilcueta, ed. E. Caparros, M. Thériault, J. Thorn, H. Aubé, 2<sup>nd</sup> ed., rev. and updated of the 6<sup>th</sup> Spanish language edition, Montréal 2004.

<sup>133</sup> Can. 17: "If the meaning remains doubtful or obscure, there must be recourse to parallel places, if there be any, to the purpose and circumstances of the law, and to the mind of the legislator."



priority before the meaning in light of text and context. It recalls to grammatical and literal interpretation and they have priority before the systematic, teleological, historical methods from the second principle.<sup>134</sup> It seems that the second principle cannot be used until the rule from the first principle has failed to give any clarity to understanding of the text.<sup>135</sup>

For the legislator especially important is the phrase: “*propriam verborum significationem*” (“the proper meaning of the words”). It can be understood: (a) *sensu vero* – natural meaning of a word, etymologically, (b) *sensu strictiore* – this is a meaning in common use, (c) *sensu strictissimo* – the meaning in law.<sup>136</sup> In drafting of the law, a proper word should be used taking into consideration all three possible meanings. Also, the legislator must be careful about the usage of a word in canonical tradition. He cannot ignore a possible evolution of meaning and the original discipline of science from which the word came.

The meaning of the words and sentences depends also on place in text and context. The meaning of the text is mutually connected with the actual placement of the words in phrase, clause, sentence, and paragraph. It can be modified by capitalization and punctuation. The context is the larger setting for the words, i.e., the article, section or book of the code, the canonical institute, or subject area of the legislation. Obviously the meaning of words often depends on the way and place in which they are used.<sup>137</sup>

The legislator must do a recourse “*ad locos parallelos*” (“to parallel places”), if there be any. The parallel places can be found in other laws, especially laws that regulate the same or similar matter. Parallel text is any church document.

For proper choice of words important are “*legis finem ac circumstantias*” (“the purpose and circumstances of the law”). The legislator should present them for better and reliable interpretation.<sup>138</sup> The purpose of law is the aim of law and the good that is to be achieved. It is also called *ratio legis*. It is determined by the motives for taking the drafting action by the legislator.<sup>139</sup> Of course, *salus animarum* is an ultimate good for canon law, but a more concrete and singular one and not of general or holistic character should also be presented. The present code can give some examples: “a spiritual purpose” (can. 145 § 1), “to promote a common pastoral action” (can. 431 § 1), “to promote greater good which the Church offers to all people” (can. 447), “to promote closer union” (can. 592 § 1).

<sup>134</sup> B. Th. Drößler, *Bemerkungen zur Interpretationstheorie...*, p. 9.

<sup>135</sup> See more: P. Kroczyk, *Zasada „clara non sunt interpretanda”...*, p. 46.

<sup>136</sup> G. Michiels, *Normae generales...*, vol. 1, p. 518–519.

<sup>137</sup> Cf. G. Michiels, *Normae generales...*, vol. 1, p. 519; J. A. Coriden, *Rules for Interpreters*, [in:] *The Art of Interpretation...*, p. 20.

<sup>138</sup> F. Bączkiewicz, *Prawo kościelne...*, vol. 1, p. 209.

<sup>139</sup> R. Sobański, *Kanon 17*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 71.

The “*circumstantias legis*” (“the circumstances of the law”) are the state of affairs or conditions under which law is drafted: religious, cultural, or political.<sup>140</sup> The legislator is not isolated from conditions of life of the Church. All these are factors that create context and background for legislative action. Sometimes in finding the circumstances of the law what is of help are the documented preparations and works during the drafting stages.<sup>141</sup> It was widely done in *CIC* 1983 and is of great help in better and deeper understanding of church law, and in using the code.<sup>142</sup>

Canon 18 of the current code is important for proper choice of words used in legal text. It is built on principle “*Odia restringi, et favores convenit ampliari*” (cf. *CIC* 1917 can. 19).<sup>143</sup> If the legislator wants to enact a law that will put penalty, or suppress right or an exception from general rule, he must be aware that his word would be interpreted strictly. Strict interpretation limits the law’s application to the minimum stated in the law. All other laws would be interpreted broadly. Broad interpretation widens the application of the law to all possible cases that can fall within its meaning. Neither strict nor broad interpretation changes the law’s meaning in any way.<sup>144</sup>

#### 2.2.2.2.3. Other Rules of Interpretation

There are special rules of law necessary in legal reasoning.<sup>145</sup> They are part of legal culture. They have come to modern systems of law from Roman law or they have been created by the legislator itself.

Sometimes they are divided into several groups.<sup>146</sup> There are rules that help to establish the meaning of law, for instance, the rule *clara non sunt interpretanda*. Another group are rules of interference, such as: *per analogiam (a simili)*, *a contrario*, *a fortiori (a maiori ad minus, a minori ad maius)*. They help to establish secondary norms from primary norms, which are interpreted directly from the text of law.

The next group of rules are decision making rules, such as *lex posterior derogat legi priori*,<sup>147</sup> *lex specialis derogat legi generali*, *lex superior derogat legi inferiori* (cf. can. 20). They help to clear the situation of conflict of laws.

<sup>140</sup> See more: D. O’Callaghan, *The Reasonableness of Law: an Historical Perspective*, Irish Theological Quarterly 44 (1977), p. 263–278.

<sup>141</sup> E. Szafranski, *Podręcznik prawa kanonicznego*, vol. I, Warszawa 1985, p. 157.

<sup>142</sup> See: *Praefatio*, p. XIX–XXX.

<sup>143</sup> *RI* 15.

<sup>144</sup> J. M. Huels, *Canon 18*, [in:] *New Commentary on the Code...*, p. 75.

<sup>145</sup> See more: Ch. Perelman, *Logika prawnicza. Nowa retoryka*, transl. T. Pajor, Warszawa 1984, p. 128 ff; R. Sobański, *Metodologia prawa...* p. 107–109.

<sup>146</sup> A. Malec, *Topiki prawnicze jako przedmiot logiki*, [in:] *Komunikaty i argumenty*, ed. E. Żarnecka-Biały, I. Trzcieniecka-Schneider, Kraków 2002, *Dialogikon*, vol. XI, p. 131–132.

<sup>147</sup> Cf. *Dig.* 1.4.4; for commentary, see: A. Kacprzak, J. Krzynówek, W. Wołodkiewicz, *Regulae iuris. Łacińskie inskrypcje...*, p. 137.

It happens when at least two norms are to be applied, but the norms are in contradiction, which makes their realization impossible.

The fourth group are rules for assessment of *status quo*. The example of the group can be the rule: *in dubio pro reo* (*in dubio pro libertate*),<sup>148</sup> which orders, for instance, a presumption of innocence or other legal or factual state (cf. can. 90 § 2).

The last group are procedural rules. They are included in acts of law, for instance: *audi alteram partem* (*audiatur et altera pars*, cf. can. 1507 § 1), or *nemo iudex in causa sua*<sup>149</sup> (cf. can. 1448 § 1).

### 2.2.3. Philosophical and Theological Determinants of Legislation

Legislation is under influence of many elements, not only legal ones. Two factors have especially intensive influence on church law: philosophical and theological.<sup>150</sup>

#### 2.2.3.1. Philosophical

Encyclical *Fides at Ratio* of Pope John Paul II contains the general attitude of the Church to philosophy. One reads that the Church has no philosophy of its own nor does it canonize any one particular philosophy in preference to others. Church has never committed itself to any school of philosophy.<sup>151</sup> Of course, it is the Church's duty to indicate the elements in any philosophical system, which are incompatible with its own faith. Still, the Church's interest in philosophy is significant and the Magisterium of the Church wants to promote and encourage philosophical enquiry.<sup>152</sup>

This position is important to church lawyers. It is also a guideline for legislation activity. Although philosophy and law are autonomous, it does not mean that the disciplines are hermetically isolated from each other. Over the centuries different philosophies have affected the Church's legal heritage. Both sciences are connected together but have their specific realms. Philosophy

<sup>148</sup> Cf. *Dig.* 50.17.125; for commentary, see: A. Kacprzak, J. Krzynówek, W. Wołodkiewicz, *Regulae iuris. Łacińskie inskrypcje...*, p. 118.

<sup>149</sup> Cf. *Cod.* 3.5.1; for commentary, see: A. Kacprzak, J. Krzynówek, W. Wołodkiewicz, *Regulae iuris. Łacińskie inskrypcje...*, p. 116.

<sup>150</sup> Cf. B. Gangoiti, *Teologia e Filosofia del Diritto del Nuovo Codice*, Angelicum 60 (1983), p. 517–518.

<sup>151</sup> Joannes Paulus PP. II, *Litterae encyclicae Fides et ratio* cunctis catholicae Ecclesiae episcopis de necessitudinis natura inter fidem et rationem, 14.09.1998, *AAS* 91 (1999), p. 5–88, especially see: no. 49.

<sup>152</sup> *Fides et ratio*, no. 52.

answers questions about the human process of knowing and deciding, and law answers questions about norms of action proposed by the community through its legitimate agencies, for all members to follow. Of course, the Church does not look at philosophy to establish the origin and the aim of its law. Faith gives the needed answers. Still philosophy can be of great help to canon law.<sup>153</sup>

Two dimensions of help from philosophy can be itemized: general outlook on law, that is, philosophy of law, and philosophical answer on detailed questions and problems, which pose a challenge for the legislator.

Every philosophy of law is part of a particular general philosophy. The philosophy or philosophical system offers philosophical reflections upon the general foundation of law. If the particular philosopher did not develop a philosophy of law, it does not prevent others from applying his philosophy to the law.<sup>154</sup>

Philosophy works out methods of approaching reality, cognition and understanding. It forms a critical outlook on God, man, nature, and society. Philosophers develop and offer systematic analysis of such terms like: justice, equity, penalty, power, authority, and legitimacy. Understanding of these leads to certain legal solutions.

Legislators may invoke different philosophies and use their achievements both in general and particular sense. A full spectrum of opinions is accessible for them. Of course, canon lawyers should have special respect for Thomism. Canonical tradition suggests giving priority to St. Thomas Aquinas (can. 252 § 3) because his teaching helps to acquire a solid and coherent knowledge of man, the world, and of God (cf. *OT* 15). A model can be found in *CIC* 1983. The code contains the spirit of the Second Vatican Council. It is innovative because it contains ideas not present later on in canon law.<sup>155</sup> But still old philosophical approach is present in a large number of canons. Almost all canonical norms concerning knowledge and intentions are based on ancient metaphysical categories.<sup>156</sup> As an example one take can. 1057 § 1. It defines a marital consent. A marriage is brought into being by the lawfully manifested consent of persons who are legally capable. This consent cannot be supplied by any human power. The definition of act of will can be found in Aristotle's works. Sometimes a postulate is raised to revise philosophical statements and ideas, which are basics for legal reasoning, especially in marital canon law.<sup>157</sup>

<sup>153</sup> Cf. *Fides et ratio*, no. 77.

<sup>154</sup> C. J. Friedrich, *The Philosophy of Law in Historical Perspective*, Chicago 1963<sup>2</sup>, p. 3–4.

<sup>155</sup> B. Gangoi, *Teologia e Filosofia del Diritto del Nuovo Codice*, Angelicum 60 (1983), p. 518–519.

<sup>156</sup> L. Örsy, *The Interpreter...*, p. 37.

<sup>157</sup> L. Örsy, *The Interpreter...*, p. 37.

It must be remembered that tacit philosophical knowledge is a necessary assumption for any science, jurisprudence included. It is like a tool necessary to get to know the world and to describe it. The only thing one can do is to replace one philosophical assumption with another. No one can eliminate them completely.

#### 2.2.3.1.1. John Paul II's Anthropology

When addressing the philosophical context out of which law should be made, Pope John Paul II must be acknowledged as the supreme legislator. He was a philosopher and he deserves special attention for the influence of his thought on the faithful.<sup>158</sup> Christian anthropology is at the heart of John Paul II's philosophy.<sup>159</sup> The basic philosophical categories within which John Paul II builds up his anthropology most evidently combine a specific kind of phenomenology, more of the Scheler-than Ingarden-type, with the Christian personalism and the traditional Aristotelian and Thomistic metaphysics of man.<sup>160</sup> For him philosophy and theology of man form the groundwork of other disciplines.<sup>161</sup>

The fundamental building blocks of the *CIC* 1983 were conceived from this point of view. Description of John Paul II's philosophical standing is well visible in the current code is of help for other legislators.<sup>162</sup> First of all, in legislation context it is important that man must not be understood in abstract terms but from within history and culture.<sup>163</sup> As it was said: "hominem dicimus unumquemque, quatenus tota eius neque iterabilis realitas existentiae et actionis, intellectus et voluntatis, conscientiae et cordis consideratur. Homo pro singulari sua realitate (nam est «persona») suas vitae vices habet et praesertim animae suae historiam. [...] Homo totus in plena veritate existentiae suae, eius, quod est ut persona, et vitae suae communitariae et socialis – nempe intra familiam suam, societatem et in tam dissimilibus condicionibus necnon intra nationem

<sup>158</sup> J. M. McDermott, *Introduction*, [in:] *The Thought of John Paul II*, ed. J. M. McDermott, Rome 1993, p. XI.

<sup>159</sup> See works of K. Wojtyła: *The Acting Person*, transl. A. Potocki, Dordrecht 1970; *Osoba: podmiot i wspólnota*, Roczniki Filozoficzne 24 (1976) no. 2, p. 5–39; *Uczestnictwo czy alienacja*, Summarium 7 (1978), p. 7–16.

<sup>160</sup> A. Wójtowicz, *Filozofia osoby ludzkiej*, [in:] *Filozofia i myśl społeczna Jana Pawła II*, ed. K. Adamus-Darczewska, Warszawa 1983, p. 57–86.

<sup>161</sup> Z. Grocholewski, *Refleksje na temat prawa. Prawo naturalne. Filozofia prawa*, transl. K. Stopa, Kraków 2009, p. 61.

<sup>162</sup> R. Barrett, *The Philosophical Presuppositions of the Code*, *Periodica* 89 (2000), p. 524–528; Z. Grocholewski, *Refleksje na temat prawa. Prawo naturalne. Filozofia prawa*, transl. K. Stopa, Kraków 2009, p. 61–78.

<sup>163</sup> R. F. Harvanek, *The Philosophical Foundations of the Thought of John Paul II*, [in:] *The Thought of John Paul II*, ed. J. M. McDermott, Rome 1993, p. 19.

suam vel populum.”<sup>164</sup> This creates for legislative action an obligation of an interest in man, in all dimensions of his life.

Moving to the analysis of the idea, it must be said that the philosophy of the code started from the position that man is a relational being. It means that man has a desire for community and this is an expression of his desire for communion with God.

The next principle is that man is in a state of alienation. It means that an original state of communion with God and with his mate was subsequently broken by original sin. The alienation does not concern only man’s relationship with God and with himself. Alienation also means broken relations with others.

Fortunately, man can be restored in Christ. Jesus has restored man’s original integrity by restoring his relationship with God. In establishing a permanent community dedicated to this restored integrity, the Church becomes the visible sign of communion with God and a sign, therefore, of communion among societies. It stresses dynamic character of man as a being called to fulfillment, particularly by freely committing himself to worthwhile and lasting values. It involves a strong consciousness of personal freedom accompanied by a strong consciousness of personal responsibility.

That leads to understanding of man as a responsible being: “the person realizes himself most adequately in [the fulfillment of] his obligations.”<sup>165</sup> This understanding maintains an awareness of basic personal rights and will defend these from any violation. At the same time, it proposes that whoever is conscious of rights, must be also conscious of duties. John Paul II’s reflections sought to overcome the individualism of the Western approach to justice by emphasizing that rights do not exist without a sense of personal responsibility toward others.

The other principle is that man can know himself. This is a principle taken from the dawn of Greek philosophy and fostered by many other philosophers. This is an outcome of the fact that man is made in the image of God. Christians know from the Bible that there arises an image of man as *imago Dei* (Gn 1, 27). This places emphasis on the dignity of man as the one made in the image of God (GS 12, GS 24). As a result of this, evil stems not from any material deficiency on man’s part but from the disordered exercise of human freedom. In his exercise of human freedom, man experiences self-possessing and self-governing as an essential part of his person. By this, man determines and directs himself towards genuine good. The good must be genuine and

<sup>164</sup> Joannes Paulus PP. II, Litterae apostolicae *Redemptor hominis* Iesus Christus est centrum universi et historiae, 4.03.1979, AAS 71 (1979), p. 257–324, no. 14.

<sup>165</sup> K. Wojtyła, *The Acting Person...*, p. 169.

objective. Freedom is given to men for the purpose of doing good. Freedom itself is a great good, when man can use it for genuine good.<sup>166</sup>

This vision of man is called personalism.<sup>167</sup> The Second Vatican Council concentrating not only on community but also on the person, laid down the basics for human life. As Pope John Paul II largely drew his teaching from a personalist perspective,<sup>168</sup> any legislator in the Church, should take this vision and concept of man as his own or at least respect it with gratitude.

All this leads to the conclusion that man is capable of receiving law. There is no degradation of the person in voluntary response of free obedience to law or to any legitimate authority – ecclesiastical and civil. The Church exhorts Christians in the teaching of the Second Vatican Council that, as citizens, they are to strive to fulfill their earthly duties conscientiously and in response to the gospel spirit (*GS* 43). It means that they have to engage in building up the various groups to which they belong (cf. *GS* 31). They are members of civil society and they have the right to have acknowledged as theirs that freedom which is common to all citizens (cf. can. 227).

In such obedience and faithfulness, an expression of the dignity of the person can be seen. According to John Paul II, law and legal order have to support and promote dignity of every man.<sup>169</sup> The legislator must respect human fundamental subjectivity and every law must protect the good and inalienable rights of man, like freedom. Never must the truth about objective good be neglected.

Special attention is to be paid by any legislator to human activity in relation to the common and social life. All relationships among the faithful must be organized in such way that they be shaped and directed to promoting the spirit of solidarity and love. Laws must be for man, that is, not too hard or impossible to use. Only with respect for these rules can the real progress be made and the faithful be enabled to fulfill their vocation.

#### 2.2.3.1.2. B. Lonergan's Method

B. Lonergan is the author of the well-known cognitional theory.<sup>170</sup> There is an opinion that it can serve jurisprudence. Understanding the human process

<sup>166</sup> *Redemptor hominis*, no. 21.

<sup>167</sup> See more: C. Bruke, *Renewal, Personalism and Law*, Forum 7 (1996), p. 327–340.

<sup>168</sup> K. P. Doran, *Solidarity: a Synthesis of Personalism and Communalism in the Thought of Karol Wojtyła/John Paul II*, New York 1996.

<sup>169</sup> Cf. I. Dec. *Godność człowieka w ujęciu kard. Karola Wojtyły i papieża Jana Pawła II*, [in:] *Jan Paweł II – obrońca godności człowieka*, ed. J. M. Lipniak, Świdnica 2008, p. 9.

<sup>170</sup> Two works of B. J. F. Lonergan are of special importance: *Method in Theology*, Toronto 1999 (first edition, New York 1972), and *Insight. A Study of Human Understanding*, Toronto 2000 (first edition, New York 1957).

of knowing, in general, is beneficial to the science of law, and its findings can enrich the capacity to create new laws and to interpret them in a new way.<sup>171</sup>

The legislator could benefit from the cognitional theory in question.<sup>172</sup> First of all, the theory gives a better understanding of the whole process of knowing and deciding and gives new understanding of what knowledge, error, doubt, ignorance, intention and responsible decisions are. By this it broadens legislator's horizons by bringing to light the process by which human persons reach the truth.

In law, the truth would be perceived as the sense of the legal text. But the textual research is seen now differently. With B. Lonergan's findings, meanings of the text will no longer appear as simply hidden in the text. According to him, the sense is constituted as a result of interaction between text and its reader. The interaction consists of dynamic and connected acts of careful reading, intelligent understanding, and rational judging of what has been understood in the text.

The meaning and understanding of law text depends on many circumstances influencing the interior operations of the human person. It leads to a new understanding of an acceptance of the legal norm by the subject. As a result, it imposes variety duties on the legislator. He must make norms for persons who want to be active and responsible. That makes a difference for the creation of laws. Substantial consultation is indispensable. The act of promulgation may be enough for the purposes of legal presumption, but intelligent communication between the legislator and the members of the group requires much more than that. An adult person must be led to see the intrinsic rationality and goodness of the law. It points to the need for improving the process of lawmaking in the community. Finally, there is a new emphasis on interdisciplinary approach to give to the law of the Church its proper role and dignity. An interdisciplinary approach is favored. The law's relationship to philosophy and theology has already been mentioned, but there are the empirical sciences, such as anthropology, sociology, and psychology. They, too, should play a role in shaping the legal system.

### 2.2.3.2. Theological

It can be said that canon law cannot be properly understood without theology.<sup>173</sup> It is so because canon law as a theological discipline draws from

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<sup>171</sup> L. Örsy, *Lonergan's Cognitional Theory and Foundational Issues in Canon Law. Method, Philosophy and Law, Theology and Canon Law*, *Studia Canonica* 13 (1979), p. 177–243.

<sup>172</sup> P. Kroczyk, *Kiedy prawo kanoniczne jest efektywne?*, *Annales Canonici* 2 (2006), p. 165.

<sup>173</sup> R. Sobański, *Epistemologiczne problemy...*, p. 56.



and interacts with other areas of theological studies.<sup>174</sup> Canonists use theological starting points and reasoning: divine Revelation, sacred Tradition, the Magisterium of the Church, and theology.<sup>175</sup>

In such a way, canon law is dependent upon theology and must operate on the basis of some theological consensus. Otherwise, it falls into the pit of pure positivism, that is, the rule is whatever the rule-maker says it is at any given time. There must be a credible theological position on which to ground the rule.<sup>176</sup> It must be acknowledged that *CIC* 1983 speaks of a significant debt owed to theology.

Theology and canon law are organically united and any disruption of that unity will result in two ways. Firstly, the life of the Church will suffer by unrealistic speculations in theology or empty legalism in canon law. Secondly, it can create the harsh symptoms of an internal indisposition and lack of wholeness of a believer. He will be an inactive dreamer or an irrational doer.<sup>177</sup> It must be stressed that canon law has suffered much through its divorce from theology, and so church legislation should have theological quality.<sup>178</sup>

#### 2.2.3.2.1. Sacred Scripture

Sacred Scripture is a primary source for the knowledge and understanding of God's new and definitive covenant with humankind in Christ (*DV* 4). "Sacra utriusque Testamenti Scriptura veluti speculum sunt in quo Ecclesia in terris peregrinans contemplatur Deum, a quo omnia accipit, usquedum ad Eum videndum facie ad faciem sicuti est perducatur" (*DV* 7).<sup>179</sup> It contains not only the Church's first rule of faith but also the rule of life. Canon law must be based on an understanding of Scripture, which is contemporary and perennial, sophisticated, and prayerful.<sup>180</sup> A canonist needs not only a broad knowledge of Sacred Scripture, but a carefully honed scientific understanding of and a deep familiarity with them.

Generally speaking, the Bible as a fundament for contemporary lawgiving seems to be so important that a postulate has been proposed calling for a new course in the cycle of canon law studies. It might be entitled *Christus et lex*,

<sup>174</sup> J. A. Coriden, *Canon Law as Ministry: Freedom and Good Order for the Church*, New York-Mahwah 2000, p. 139.

<sup>175</sup> P. Kroczek, *Modelowa wizja pracy kanonisty*, Bielsko-Żywieckie Studia Teologiczne 10 (2009), p. 219.

<sup>176</sup> J. A. Coriden, *Canon Law as Ministry...*, p. 143.

<sup>177</sup> L. Örsy, *Interpretation in View of Action: a Quest for Clarity and Simplicity*, *The Jurist* 52 (1992), p. 596.

<sup>178</sup> L. Örsy, *Quantity and Quality of Laws...*, p. 406 ff.

<sup>179</sup> *DV* 7: "Sacred Scripture of both the Old and New Testaments are like a mirror in which the pilgrim Church on earth looks at God, from whom she has received everything, until she is brought finally to see Him as He is, face to face."

<sup>180</sup> J. A. Coriden, *Canon Law as Ministry...*, p. 140.

and it would draw together many of the strands of tradition of the Old and the New Testament. The new course could help to establish Christ as a focus of depth and unity in the understanding and application of law in the life of the Church today.<sup>181</sup>

#### 2.2.3.2.2. Dogmatic Theology

Dogmatic theology is a discipline, which deals with the entire divine Revelation in formal aspect. Its aim is to formulate in a speculative way dogmas, that is, truth sentences *in fides divine et catholica*.<sup>182</sup>

Law and dogmatic theology are very closely connected. Firstly, because *munus docendi* of the Church has the juridical character. The Church, to whom Christ the Lord entrusted the deposit of faith, assisted by the Holy Spirit, might reverently safeguard revealed truth has the innate duty and right to preach the gospel to all peoples (can. 747 § 1). Secondly, because the matter of the *Creed* is to be especially protected by law. In 1983 code there are three levels of truths proposed by the Magisterium of the Church. The first category of truths is *de fide credenda* (can. 750 § 1), next is the category of authentic Magisterium *de fide et moribus* (can. 752), and the last category of truths is *de fide tenenda* (can. 750 § 2). They are juridically safeguarded by canon law, e.g., can. 751, can. 1041 no. 2, can. 1184 § 1 no. 1, can. 1364, can. 1365, can. 1371 no. 1).<sup>183</sup>

The dogmatic findings are well visible in canons. For instance, dogmatic theology says that *aqua vera et naturale* is of necessity for baptism,<sup>184</sup> and *CIC* 1983 in can. 849 states, that baptism is validly conferred only by a washing in real water. Again, even the baptism, which is given by heretics in the name of the Father, and of the Son, and of the Holy Spirit, with the intention of doing what the Church does, is a true baptism and can. 869 § 2 orders that those baptized in a non-Catholic ecclesial community are not to be baptized unless conditionally. There are very many references of such correspondence between law and dogmatic theology.

<sup>181</sup> D. Ryan, *Law in the Church. The Vision of Scripture*, *Studia Canonica* 17 (1983), p. 26.

<sup>182</sup> Entries: *dogmat, dogmatyka*, [in:] K. Rahner, H. Vorgrimler, *Mały słownik teologiczny*, transl. T. Mieszkowski, P. Pachciarek, Warszawa 1987, col. 101–106.

<sup>183</sup> The canonical safeguarding of the Gospel message is done not only by the *CIC* 1983 but also by, e.g., the document of Joannes Paulus PP. II, *Litterae apostolicae motu proprio Ad tuendam fidem* quibus normae quaedam inseruntur in Codice Iuris Canonici et in Codice Canonum Ecclesiarum Orientalium, 18.05.1998, *AAS* 90 (1998), p. 457–461; also by the formula of the *Professio fidei* published by Congregatio pro Doctrina Fidei, *Professio fidei et iusiurandum fidelitatis in suscipiendo officio nomine Ecclesiae exercendo*, 9.01.1989, *AAS* 81 (1989), p. 104–106, by other documents like: Congregatio pro Doctrina Fidei, *Agendi ratio in doctrinarum examine*, 30.05.1997, *AAS* 89 (1997), p. 830–835; Congregatio pro Doctrina Fidei, *Modifiche alle "Normae «de gravioribus delictis»"*, 15.07.2010, *L'Osservatore Romano* 150 (2010) no. 161, 16.07.2010, art. 2 and art. 5.

<sup>184</sup> Concilium Tridentinum, Sessio VII, 3.03.1547, *Decretum de sacramentis*, can. 2 (DS 1602).

## 2.2.3.2.3. Ecclesiology

In the exposition of canon law, attention must be paid to the mystery of the Church (cf. *OT* 16). The law must fully correspond to the nature of the Church, especially as it is proposed by the teaching of the Second Vatican Council. In such a sense, canonical law could be understood as a great effort to translate the conciliar doctrine and ecclesiology into canonical language.<sup>185</sup>

This is transparently evident that canon law must be governed by ecclesiology. It must be referred to the image or model of the Church. The structure, provisions, and interpretation of canon law are most directly related to it. The Church's order and discipline must accurately reflect theological convictions about the Church's nature and mission in the world.<sup>186</sup> On the other hand, it must be remembered that canon law itself together with the development of legal institutions, as well as, the codification of laws are the history of ecclesiology.<sup>187</sup>

## 2.2.3.2.4. Moral Theology

Canon law and moral theology were treated as one theological discipline until the First Vatican Council. After this, canon law has retained its attention on general norms for the Church's communal and individual life in the external forum while moral theology focused rather on *forum internum*. Both these disciplines offer guidance to the members of the Church, but they do this in quite different ways. The moral theology concentrates on the discovery of values and on the obligation to appropriate them. Canon law is promoting the values by stimulating, ordering, or directing members of the Church to reach out for them. By this, law norms aim to protect and support the values in life.<sup>188</sup>

But still canon law must cooperate with moral theology because moral theology defines many of the values that canon law is promoting, and canon law creates obligations, which have far-reaching consequences in the field of morality.<sup>189</sup> The values they both seek for the Church are aligned, for example,

<sup>185</sup> Cf. *Sacrae disciplinae leges*, p. XI; see also: Joannes Paulus pp. II, *Messaggio Il ruolo dei canonisti nella vita della Chiesa*, 10.08.1984, *Communicationes* 16 (1984), p. 125–126.

<sup>186</sup> J. A. Coriden, *Canon Law as Ministry...*, p. 144.

<sup>187</sup> J. A. Komonchak, *Foundations in Ecclesiology*, Boston 1995, p. 50.

<sup>188</sup> There is an opinion that laws designate *goods* not *values*. J. A. Selling considers *value* to be a word that is used appropriately only in connection with a relational process (valuing) and not merely as the product or result of that process. *To value* something is to make an assessment of one's, or a community's, needs and desires and to compare this with the object of one's perception, the qualities of something designated as *good*, in order to judge whether that object (*bonum apprehensum*) constitutes a suitable manner of satisfying the needs or desires of the person(s) involved in the valuing process, see: J. A. Selling, *Laws and Values: Clarifying the Relationship Between Canon Law and Moral Theology*, *The Jurist* 56 (1996), p. 108 ff.

<sup>189</sup> L. Örsy, *Moral Theology and Canon Law: the Quest for a Sound Relationship*, [in:] *Theology and Canon Law...*, p. 119.

the two disciplines together foster loving care within the community.<sup>190</sup> Their mutual cooperation is vital for the life of the Church. The legislator must consult with moral theology.

#### 2.2.3.2.5. Pastoral Theology

Canon law, like everything else in the Church, is totally geared toward the salvation of souls. It must create legal framework to pastoral action and offer advice to sacred administrators and Christ's faithful to help them in the care of souls (see, e.g., can. 242 § 1, can. 252 § 3, can. 258, can. 1676, can. 1695). Any law must take into consideration a pastoral dimension of the Church work. Canon law must open itself to the demands imposed by a renewed pastoral strategy.

A pastoral plan is the well thought-out organization of the apostolate. It envisions a balanced distribution of personnel and fosters a better collaboration through a pastoral program that is based on sound, objective information that must not stifle the Holy Spirit, nor block the freedom of His gifts. This overall pastoral plan must not become a hindrance or a new form of authoritarianism. A pastoral plan is not just a revitalization of apostolic effort through better collaboration. More than that, it is concerned with human beings, who seek the truth, and who are meant to grow in Christ.

#### 2.2.3.2.6. Ecumenism

The purpose of ecumenism is the restoration of unity between all Christians (cf. can. 755 § 1). To strive for unity is an ecumenical principle. It is rooted in the will of Christ (Jn 17, 21). It is reaffirmed especially in documents of the Second Vatican Council: *Decretum Unitatis redintegratio*,<sup>191</sup> *Decretum Orientalium Ecclesiarum*,<sup>192</sup> in *Litterae Encyclicae* of Pope John Paul II *Ut unum sint*,<sup>193</sup> and in the various ecumenical directories.<sup>194</sup>

The law must also be of help in this great work. There is a material connection between church law and the nature and task of the Church. It is also vital to seek and find this material connection between ecumenical theology and

<sup>190</sup> J. A. Coriden, *Canon Law as Ministry...*, p. 146.

<sup>191</sup> Sacrosanctum Concilium Oecumenicum Vaticanum II, *Decretum Unitatis redintegratio* de oecumenismo, 21.11.1964, *AAS* 57 (1965), p. 90–112.

<sup>192</sup> Sacrosanctum Concilium Oecumenicum Vaticanum II, *Decretum Orientalium Ecclesiarum* de Ecclesiis Orientalibus Catholicis, 21.11.1964, *AAS* 57 (1965), p. 76–89.

<sup>193</sup> Joannes Paulus PP. II, *Litterae encyclicae Ut unum sint* de Oecumenico Officio, 25.05.1995, *AAS* 87 (1995), p. 921–982.

<sup>194</sup> Secretariatatus ad Christianorum Unitatem Fovendam, *Directorium Ad totam Ecclesiam* ad ea quae a Concilio Vaticano Secundo de re oecumenica promulgata sunt exsequenda, pars prima, 14.05.1967, *AAS* 59 (1967), p. 574–592; Secretariatatus ad Christianorum Unitatem Fovendam, *Directorium Spiritus Domini* ad ea quae a Concilio Vaticano Secundo de re oecumenica promulgata sunt exsequenda, pars altera, 16.04.1970, *AAS* 62 (1970), p. 705–724.

ecumenical law.<sup>195</sup> By ecumenical work the Church might be seen as relevant to the service of the *salus animarum*.<sup>196</sup>

Through norms, the legislator can begin to build and normalize activity between individuals and groups of people, between Churches and Communities also.<sup>197</sup> Law in the Church must be under the influence of ecumenical principle. It is necessary to normalize the relationships and give them more practical dimension. It is very important to cooperate also on the level of law.<sup>198</sup>

Although the ecumenical principle was not explicitly referred to in the ten principles guiding the revision of the 1983 code,<sup>199</sup> the change in ecumenical policy of the Church is visible in comparing the *CIC* 1917 and *CIC* 1983. There are many changes.<sup>200</sup> Among the elements, which characterize the true and genuine image of the Church, we should emphasize especially the Church's commitments to ecumenism.<sup>201</sup> Indeed, the Church's commitment to ecumenism is clearly seen in the *CIC* 1983. For instance, it orders, that clerics are to be instructed in ecumenical questions (can. 256 § 1). In exercising his pastoral office, the diocesan Bishop should also foster ecumenism as it is understood by the Church (can. 383 § 3). In can. 755 § 1 it says that the College of Bishops and the Apostolic See are to foster and direct among Catholics the ecumenical movement.

Any legislator should take into consideration an ecumenical dimension in his legislation work. That can be done on two levels: theoretical and practical.<sup>202</sup> Strong theological basis for ecumenism provides support for the Church's ecumenical discipline on a practical level.<sup>203</sup>

<sup>195</sup> H. Ammer, *Ecumenical Church Law: Issues and Questions*, *The Jurist* 37 (1977), p. 33.

<sup>196</sup> Cf. M. Wijlens, *That All may be One... (John 17:21). The Lord's Prayer in the Work of Canon Lawyer: a mere Opinion*, *The Jurist* 65 (2005), p. 204

<sup>197</sup> It is good to get to know how Catholic law is seen by other Churches; see: J. O. Duke, *The Code of Canon Law. A Protestant Perspective*, *The Jurist* 46 (1986), p. 347–375; P. L'Huillier, *An Eastern Orthodox Viewpoint on the New Code of Canon Law*, *The Jurist* 46 (1986), p. 376–393; J. R. Wright, *The 1983 Code of Canon Law: an Anglican Evaluation*, *The Jurist* 46 (1986), p. 394–418.

<sup>198</sup> L. Vischer, *Church and the Ecumenical Movement*, *The Jurist* 37 (1977), p. 1–2.

<sup>199</sup> By contrast, see *Paefatio* to *CCEO* 1990, p. 1057: "Inter haec principia, quae, tribus linguis exarata, in actis Commissionis (Nuntia 3), ex integro publici iuris facta sunt, praecipua fuerunt: [...] 3. omnino consonus sit Codex peculiari muneri, Ecclesiis orientalibus catholicis a Concilio Vaticano II concredito, omnium christianorum, orientalium praesertim, unitatem fovendi iuxta principia decreti Concilii «De oecumenismo»."

<sup>200</sup> T. J. Green, *Changing Ecumenical Horizons: Their Impact on the 1983 Code*, *The Jurist* 56 (1996), p. 427–455.

<sup>201</sup> Cf. *Sacrae disciplinae leges*, p. xii.

<sup>202</sup> Cf. Pontificium Consilium ad Unitatem Christianorum Fovendam, *Directoire pour l'application des principes et des normes sur l'oecuménisme*, no. 23, no. 36, no. 91, no. 201.

<sup>203</sup> J. M. Huels, *The 1993 Ecumenical Directory: Theological Values and Juridical Norms*, *The Jurist* 56 (1996), p. 422.

#### 2.2.3.2.6.1. Theoretical Level

In principle, legislators must accept ecumenical thinking as binding on themselves and on our churches and believe that there is a material connection between the Church's order and law and the nature and task of the Church to strive for unity. The legal form of the Churches must be known to the legislator and ecumenical dialogue should include an exchange about the role canonical norms play in the different churches and ecclesial communities. The legislator must know the guidelines of the Church in ecumenism and be aware of the discipline that binds him.

#### 2.2.3.2.6.2. Practical Level

On a practical level it is a matter of urgency to give a more concrete form to ecumenical thinking in practical details. The ecumenical action must have a concrete form. Bishops and, in accordance with the law, Episcopal Conferences, are to promote the unity and, in line with the various needs and opportunities of the circumstances, to issue practical norms which accord with the provisions laid down by the supreme authority of the Church (can. 755 § 2). The present code also gives the local legislators some clues and points of areas where they can normalize in practice.<sup>204</sup>

### 2.2.4. Other Determinants of Legislation

The need for combining information and facts from many fields of human knowledge is well-known. The term "interdisciplinarity" is frequently used in the contexts where such needs are present, for instance, in answering complex questions, addressing broad issues, exploring disciplinary and professional relations; solving problems that are beyond the scope of any one discipline; achieving unity of knowledge, whether on a limited or grand scale.<sup>205</sup>

Law as a regulator of the life of the community must follow the life, as the Latin principle states: *ius sequitur vitam*. A lawmaker to duly fulfill his function must have full understanding of the world and the circumstances collecting and accumulating knowledge, facts, ideas and inspirations from many different arts and sciences. The openness of law to other disciplines of learning can be called interdisciplinarity of law. Anyone who deals with law must also be aware of the issue.<sup>206</sup> Jurisprudence speaks about many benefits to law which come from

<sup>204</sup> See more: O. Garcia, *Ecumenical Aspects of the Revised Code*, CLSA Proceedings 45 (1983), p. 201–220; B. Griffin, *The Challenge of Ecumenism for Canonists*, CLSA Proceedings 55 (1993), p. 17–38.

<sup>205</sup> J. Klein, *Interdisciplinarity – History, Theory and Practice*, Detroit 1990, p. 11.

<sup>206</sup> K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa*, Warszawa 1969, p. 326–341.

opening law to other fields of knowledge.<sup>207</sup> Legislative action must be based on propositions from different fields of knowledge. They must be taken into consideration in appointing aims of law and means to achieve the aims effectively.<sup>208</sup> To realize this postulate, a number of problems is discussed in the conjunction law and... is greater and greater.<sup>209</sup>

Interdisciplinarity is a subject discussed in the realm of canon law as important for church legislator.<sup>210</sup> It means that not only the determinants strictly connected with the Church, like philosophy and theology, must be discussed. There are theological arguments for that. Canon law is a tool of the Church and the Church is in this world (Gs 76). Canon law flows directly from the very nature of the Church – “*Ius canonicum e natura Ecclesiae manare.*”<sup>211</sup> It must show this nature by its openness to the world. The legislator, in fulfilling the Church’s aim, must use tools given by arts and sciences. Science and art can be in this context called *locus canonici*. As it was noticed, by means of canon law the Church can conduct a dialogue with the world.<sup>212</sup> Through canon law the world can get to know the Church and its teaching.

There is also a practical argument for the need of openness on the part of canon lawyer. Canon law cannot be understood as a system entirely isolated from ideas, facts or data.<sup>213</sup> The legislator must keep an eye on other scientific disciplines to keep abreast of the picture of the world they offer. Lawmaker, to duly fulfill his function, must have full understanding of the world and the circumstances by collecting and accumulating knowledge, facts, ideas and inspirations from many different arts and sciences. This is why canon law should be familiar with findings and methods that come from different sciences, especially jurisprudence. By doing this, canon law will measure up to contemporary law culture and develop itself in parallel to it.<sup>214</sup> It can

<sup>207</sup> J. B. White, *The Legal Imagination; Studies in the Nature of Legal Thought and Expression*, Boston 1973, K. Opalek, *Interdyscyplinarne związki prawoznawstwa*, *Studia Filozoficzne* 2–3 (1985), p. 17–30, K. Junker, *Law and Science Serving One Master... narrative*, [in:] *Communicating Science: Professional Contexts*, ed. E. Scanlon, R. Hill, K. Junker, London 1999, p. 249–269. J. Gaakeer, *Introduction. Multi and Interdisciplinarity: mere Theory or Just Practice?*, *Erasmus Law Review* 1 (2008) no. 3, p. 1–2,

<sup>208</sup> A. Pieniążek, M. Stefaniuk, *Socjologia prawa. Zarys wykładu*, Kraków 2003, p. 247.

<sup>209</sup> See: D. Patterson, *A Companion to Philosophy of Law and Legal Theory*, Maldem-Oxford 1999, p. VI–VII.

<sup>210</sup> Cf. R. Sobański, *Teoria prawa kościelnego*, *Prawo Kanoniczne* 31 (1988) no. 1–2, p. 4.

<sup>211</sup> *Praefatio*, p. xx.

<sup>212</sup> M. Stasiak, *Kościół a świat – inspiracje dla prawa kanonicznego*, *Roczniki Teologiczne – Kanoniczne* 30 (1983), p. 101.

<sup>213</sup> J. B. White, *Establishing Relations between Law and Other Forms of Thought and Language*, *Erasmus Law Review* 1 (2008) no. 3, p. 3.

<sup>214</sup> R. Sobański, *Merytoryczne i metodologiczne problemy wykładu podstaw prawa kościelnego*, [in:] *W kierunku chrześcijańskiej kultury*, ed. B. Bejze, Warszawa 1978, p. 165 ff.

guarantee that church law will fulfill its mission in the contemporary world and will be understood by the people.

It can be summarized with the sentence that although the canon lawyer is a specialist of church law and he majors in canon law, there is hardly anyone more dangerous than a specialist, who knows his art well but does not relate it to other fields of knowledge.<sup>215</sup> Interdisciplinarity is absolutely necessary.

#### 2.2.4.1. Sociological

*Ubi societas, ibi ius.*<sup>216</sup> In every society there is a phenomenon of law.<sup>217</sup> The law is not something standing apart from society, nor is it a mechanism that functions independently of its time and place, and its social context. The law and society are linked together very closely. There are numerous interactions between law and society.<sup>218</sup> After all, law has by its nature a relationship with a society over which it is placed. Law cannot be properly made if the legislator has no genuine picture of society to which the law will be given. Law in fact is based on the nature of society and reflects it.<sup>219</sup>

As a matter of fact, the Church is a very specific society. It cannot be understood with detachment from the Holy Spirit.<sup>220</sup> Canon law regulates the life of society which in its essence remains the mystery. It is inseparable from the Holy Spirit.<sup>221</sup> There are, of course, other differences between the Church and state, for example origin and aim. These differences order to treat the Church in a specific way. They also make clear why sociology is not entitled to describe the Church fully accurately. Still, it does not mean that the Church, by being the mystery, would be deprived of sociological character.<sup>222</sup>

<sup>215</sup> L. Örsy, *Quantity and Quality of Laws...*, p. 406–407.

<sup>216</sup> Henrici de Cocceji, *Grotius illustratus seu commentarii ad Hugonis Grotii de jure belli et pacis libros tres*, vol. 1, Wratislaviae 1744, ad Prolegomena § 8: “Generale igitur veteribus principium fuit, ubi societas, ibi jus est.” Cf. Hugo Grotius, *De jure belli ac pacis libri tres*, Amstelaedami 1670, Prologemena, no. 1, 4. The roots of the rule in question can be found in works of Cicero, *De legibus*, Liber 1, § 28 ff., § 42 ff., *De officiis*, Liber 1 § 20–22, Liber 3 § 21–28, *De finibus*, Liber 3 § 66. For more examples see entry: *Ubi societas, ibi jus*, [in:] *Lateinische Rechtsregeln und Rechtssprüche*, zusammengestellt, übersetzt und erläutert von D. Liebs, München 2007, p. 237.

<sup>217</sup> L. Pospisil, *Anthropology of Law: a Comparative Theory*, New York 1971, p. 343; S. F. Moore, *Law and Anthropology*, Biennial Review of Anthropology 6 (1969), p. 252–300. See also: Th. Mayer-Maly, *Gedanken über das Recht*, Wien-Graz-Köln 1985, p. 10 ff.

<sup>218</sup> J. A. Brundage, *Canon Law as an Instrument for Ecclesial Reform: an Historic Perspective*, CLSA Proceedings 45 (1983), p. 2.

<sup>219</sup> C. Regan, *The Church Lawyer – Interpreter of Law*, *The Jurist* 44 (1984), p. 415.

<sup>220</sup> See more: R. Kress, *The Church as Communio: Trinity and Incarnation as the Foundation of Ecclesiology*, *The Jurist* 36 (1976), p. 127–158.

<sup>221</sup> R. Sobański, *Kościół – prawo...*, p. 71.

<sup>222</sup> R. Sobański, *Ustawa kościelna – „ordinatio rationis”...*, p. 28.



The interplay between law and society, also in the Church, consists of two quite opposite but mutually connected processes. First, that law is one of many forces that plays a role in shaping the way in which members of the society behave. A society is subject to change according to norms given by the legislator. On the other hand, there is some kind of feedback. As the law shapes society, the law itself, as it is framed and as it is applied, is molded by the actual and perceived behaviors of the members of the society. Every change in society challenges the law.<sup>223</sup> Law is changed by a society in the sense that law must be changed in response to legitimate needs that emerge in a society.

Indeed the sociology is of assistance to those who make law, to those who participate in the legislative process.<sup>224</sup> First of all, sociology helps in describing features of society and diagnosing its problems, like secularization. It can help in finding the roots of the problems and discovering solutions. The legislator must be more concerned with statistical probabilities than with the outcome of individual cases. He must look at the outcome of the research. They can give him a statistical picture of society.<sup>225</sup>

The life of the community of the faithful is a context for canon law.<sup>226</sup> To be responsive to the needs of community, canon law must be written by the legislator who knows well the community. He must be concerned with the general consequences, the mass effect, so to speak, of the rules he makes. Those who interpret law, apply and enforce it are to be concerned with individual cases, albeit in accordance with general principles. But the legislator must have a wide view over entire society and sociological sciences are of great help also.

#### 2.2.4.2. Public Opinion Polls

One of the tools rarely applied in the canon law context is the canvassing of opinions. In sociological sciences public opinion is usually defined functionally as the opinion(s) of a public, e.g., a group whose membership is defined only by a shared concern for the subject of the opinion(s).<sup>227</sup> Public opinion is rooted in individuals and their changeable personal perceptions and judgments. Today the research of the public opinion takes a big role in life of societies, especially in politics or marketing. The main aim of the research is to know how the people define their interests, what they approve or disap-

<sup>223</sup> W. Friedmann, *Legal Theory*, London 1953<sup>3</sup>, p. 437 ff.

<sup>224</sup> V. Aubert, *In Search of Law. Sociological Approaches to Law*, Oxford 1983, p. 103 ff.

<sup>225</sup> See: M. Hout, *Demographic Methods for the Sociology of Religion*, [in:] *Handbook of the Sociology of Religion*, ed. M. Dillon, Cambridge 2003, p. 79–84.

<sup>226</sup> Cf. R. P. McBrien, *A Theological Looks at the Role of Law in the Church Today*, CLSA Proceedings 43 (1981), p. 1.

<sup>227</sup> D. C. Watt, entry: *Public Opinion*, [in:] *A Dictionary of The Social Science*, ed. J. Gould, W. L. Kolb, New York 1967, p. 563.

prove of, and it is done as a way to avoid offending voters or consumers and finally to give people what they want.<sup>228</sup>

In civil jurisprudence public opinion polls are used in two ways. The first is procedural. It consists in participation of members of community in process of making law. Some states have special procedures, like referendum. The majority has influence on the final shape of law. The second way of usage of public opinion is to be aware of concern expressed by members of the community regarding the substance of law that is being prepared. The legislator has to take into account outlook of addressees of law on the regulations being prepared for them.<sup>229</sup>

The legislator in the Church must also take into consideration public opinion and try to research it. But public opinion must be is treated differently. It should be adopted.<sup>230</sup> In the field of the Church, J. H. Newman defined opinion, in continuity with the Greek philosophical tradition, as an assent to a proposition which is not true, but probably true, that is, according to the probability of that which the proposition enunciates.<sup>231</sup>

Foremost, the legislator should support the existence of public opinion in the Church in the fashion desired by Pope Pius XII. The Pope valued public opinion and has said that the Church is a living body, and that something would be lacking in its life if there were no public opinion, a defect to be blamed on pastors and the faithful.<sup>232</sup> It is better to foster debates inside the Church for two reasons. Firstly, all debate stilled in the Church will reappear in the public space, that is, in the means of social communication, and that will be under worse conditions than if it takes place inside the Church where the spirit of understanding is higher. Secondly, in the Church the legislator can probably more clearly hear and understand what people want and expect from him, as he has more contact with them. On the other hand, public debates are essential in modern world because the gospel is for the people. It must then be present in the public arena. The best way to reach people, especially nonbelievers, is through a message sent by modern means of communication.

Public opinion is presented in *CIC* 1983 in a very modest way. Canon 212 § 2 and § 3 says that Christ's faithful are at liberty to make known their needs, especially their spiritual needs, and their wishes to the Pastors of the Church. They have the right, indeed at times the duty, in keeping with their knowledge,

<sup>228</sup> Cf. entry: *Public Opinion*, [in:] A. G. Johnson, *The Blackwell Dictionary of Sociology. A User's Guide to Sociological Language*, Malden-Oxford 2000<sup>2</sup>, p. 245–246.

<sup>229</sup> A. Pieniążek, M. Stefaniuk, *Socjologia prawa. Zarys wykładu*, Kraków 2003, p. 263–265.

<sup>230</sup> H. Legrand, *Reception, sensus fidelium, and Synodal Life: an Effort at Articulation*, transl. T. J. Green, *The Jurist* 57 (1997), p. 420–421.

<sup>231</sup> J. H. Newman, *A Grammar of Assent*, London 1874, p. 58.

<sup>232</sup> Pius PP. XII, *Allocution to Participants in the International Convention of Catholic News Reporters*, 17.02. 1950, *AAS* 42 (1950), p. 251–257, especially p. 256.

competence and position, to manifest to the sacred Pastors their views on matters, which concern the good of the Church. They also have the right to make their views known to others of Christ's faithful. They must always respect the integrity of faith and morals, and show due reverence to the Pastors and take into account both the common good and the dignity of individuals.<sup>233</sup>

### 2.2.4.3. Cultural

Culture could be defined as the whole of material and spiritual achievements of human kind, and also as shared beliefs, values, customs, practices, and social behavior of a group of people especially transferred and passed along to next generations.<sup>234</sup> But cultural issue is a complicated one. There is no one universal and stable culture.<sup>235</sup> There are as many cultures as there are sets of meaning and values informing common way of life.<sup>236</sup> Also, due to the fact that the one and only Catholic Church exists from and in many Particular Churches (LG 23, can. 368), there are many cultures in the Church. Taking into consideration that the Church is universal, the differences between cultures are vast.

Law as a product of human beings is a part of culture. Elements important for law, like, for instance, values, institutions, aims, court procedures, and ways of dealing with problems are culturally conditioned. Law can be described ethnographically as a part of the indigenous culture and society.<sup>237</sup> It is clear, that canon law depends on culture.<sup>238</sup> The dependence of legislation on culture can be considered from two points of view – from the legislator's perspective and from the perspective of the user of law.

Everyone is immersed in his own culture and everyone is to some degree determined by his own culture. There is no easy escape from "cultural matrix."<sup>239</sup> No one can stay outside his own culture. The legislator cannot speak outside his own cultural matrix.<sup>240</sup> The cultural context will be present in the outcome of his legislative activity. It requires, first of all, that the legislator knows his

<sup>233</sup> Cf. J. H. Provost, *Response to Hevré Legrand*, *The Jurist* 57 (1997), p. 435–436.

<sup>234</sup> Cf. entry: *Culture*, [in:] *Webster's New World Dictionary...*, p. 337.

<sup>235</sup> R. D'Andrade, *Cultural Meaning Systems*, [in:] *Culture Theory. Essays on Mind, Self and Emotion*, ed. R. A. Shweder, R. A. LeVine, Cambridge 1985, p. 88–119.

<sup>236</sup> Cf. B. Lonergan, *Method in Theology*, Toronto 1999, p. 301.

<sup>237</sup> L. Nader, *Preface to the Paperback Edition*, [in:] *Law in Culture and Society*, ed. L. Nader, Berkeley-Los Angeles-London 1997, p. VII.

<sup>238</sup> E. Corecco, *Die kulturellen und ekklesiologischen Voraussetzungen des neuen CIC*, *Archiv für katholisches Kirchenrecht* 152 (1983), p. 3–30; M. de Muelenaeve, *Cultural Adaptation and the Code of Canon Law*, *Studia Canonica* 19 (1985), p. 31–59.

<sup>239</sup> Cf. B. Lonergan, *Method in Theology*, Toronto 1999, p. XI; Ch. H. Kraft, *Christianity in Culture*, New York 2000, chapter: *The Cultural Matrix*, p. 43–99.

<sup>240</sup> L. Örsy, *The Interpreter...*, p. 46.

culture and be aware of its characteristics. He is also required to understand other cultures.<sup>241</sup> He must take into consideration the tension between cultures. The law he makes may be used, that is, interpreted and applied in the different culture and that can be a source of difficulty.<sup>242</sup>

Looking at the problem from the perspective of the users of law, it is to be said that they can expect that the legislator will show them respect and take into consideration specifics of their culture in process of making law.<sup>243</sup> It must be noticed that universal canon law, although made for the faithful who live all over the world, that is, in many cultures, is itself made in mainly European one.<sup>244</sup> Of course, users of law are obliged to know the culture in which context the law was formulated. It is of great help in interpreting law and reaching the real sense of it.<sup>245</sup> Certainly, the norms of the code are universal and are transcultural. However, how these ideals are lived out in each individual culture is different.<sup>246</sup>

#### 2.2.4.4. Religious Context

As it has been already stressed, one of the principles for the legislator's work is ecumenism. Canon law must be of help in the restoration of unity among all Christians, which the Church is bound by the will of Christ to promote. Likewise, canonists must protect the rights and freedom of their flock and help them to conserve their own Catholic identity.

The situation of the community for which the legislator is being responsible, is influenced by the presence of other Churches or communities. They constitute a religious environment. The religious convictions or attitudes of the people can reinforce and support the values and activities of church congregations, or they can impede and thwart them.

Catholic community can be in contrasting religious situations. Some examples can be presented. First, it can be in overwhelmingly Catholic context wherein the vast majority of the population is at least nominally Catholic. In such a situation, the Churches live and operate freely. Many elements of the surrounding culture reflect and reinforce Catholic faith and practice. This is an ideal situation. There can also be a situation, in which the milieu is dominantly Christian, but the Church is one among many Christian churches and religious groups. There are many opportunities for rivalry and conflict between religious

<sup>241</sup> J. M. Huels, *Interpreting Canon Law in Diverse Cultures*, *The Jurist* 47 (1987), p. 289–290.

<sup>242</sup> For further reference, see: P. Kroczyk, *Problem interpretacji prawa kanonicznego w świetle pluralizmu kulturowego*, *Analecta Cracoviensia* 37 (2005), p. 509–516.

<sup>243</sup> M. Wijlens, „*Salus animarum suprema lex*”..., p. 588.

<sup>244</sup> L. Örsy, *The Interpretation of Laws...*, [in:] *The Art of Interpretation...*, p. 70, ft. 23.

<sup>245</sup> J. M. Huels, *Interpreting Canon Law in Diverse Cultures*, *The Jurist* 47 (1987), p. 289–290.

<sup>246</sup> L. A. Robitaille, *Consent, Culture and the Code*, *Studia Canonica* 33 (1999), p. 138.

forces, as well as, opportunities for agreement and cooperation. The third situation is that of non-Christian contexts in which Christians are a small minority and may be barely tolerated by the religious majority. Public manifestations of Christian faith and any kind of evangelization are forbidden. There is a social pressure against Christian culture and conversions to Christianity. At last, there can be secular environments wherein all religions are viewed with suspicion or disfavor. Here the local churches may be tolerated or even persecuted.<sup>247</sup> There are many more complex religious situations than these four examples. The point is that the religious environment within which the local churches live exerts pressures or brings benefits which pervasively affect the freedom, growth, and even the very identity of the communities of faith.

The legislator must be aware of and well informed about the religious context of his Church or community. He must protect the legitimate rights of Catholic congregations, and weigh the impact of the surrounding religious culture on those communities.

#### 2.2.4.5. Civil Legal and Political

Relationship between Church and state is a very sensitive subject because it is not only theoretical but also practical problem.<sup>248</sup> The legislator in his work has to face it.

The starting point is that according to the Second Vatican Council, the Church and the political community are in their own fields autonomous and independent from each other (*GS* 76). The faithful of the Church are at the same time also citizens. They are tightly bound up in all types of temporal affairs both political and legal. The legislator is responsible for the faithful and must throw light upon these affairs in such a way that they may come into being and then continually increase according to Christ, to the praise of God (cf. *LG* 31). The Church is never to do politics, but to evangelize people, and in doing this it is changing the face of the world. The Church must be always itself.

##### 2.2.4.5.1. Civil Legal

Contemporary systems of civil law have special law to protect freedom of worship and conscience. Democratic states are not interested in religious beliefs and the Church order. They give some leeway for religious acts of the Church. Of course, civil law puts requirements on the faithful. The faithful are not excluded from civil obligations on the grounds of their obligation to their faith but they are under civil law norms as much as other citizens. It is the ideal of equal rights in practice. The Church accepts such a situation

<sup>247</sup> J. A. Coriden, *Canon Law as Ministry...*, New York-Mahwah 2000, p. 69–70.

<sup>248</sup> R. Sobański, *Problem stosunku Kościoła do państwa w teorii i w praktyce*, Prawo Kanoniczne 35 (1992) no. 3–4, p. 9–23.

and even the Second Vatican Council exhorts the faithful to obey civil law (*GS* 43). Of course, the general idea of equity does not interfere with some rights or entitlements for Catholics (other religious or denominations as well) in the provisions of civil law.

The church lawgiver in his legal actions that fall into consideration of the norm of civil law must not interfere with civil competences. Still the legislator has a right and a duty to give norms to order what is needed from the Church's point of view, even if that would be in contradiction with state's point of view. After all, the Church and the state do not create the competing law systems, but both the Church and state are to cooperate for the sake of the same people.<sup>249</sup> That is why the Church's system of law willingly uses the civil regulations and incorporates some norms into its own system (can. 22).

This is the rationale behind the postulate that the legislator must know the civil law: international law, state law, and particular state law. Depending on which milieu the Church is working, the legislator must be familiar at least with the basics of the system of law, e.g. common law, continental system, or other. He must also be aware of their interactions and possible conflicts.<sup>250</sup> The relevance of canon and civil law is not a general, hypothetical topic. It is real and practical.<sup>251</sup>

#### 2.2.4.5.2. Political

The legislator must also know the political reality of the users of canon law and try to be prudent in planning goals and in taking means to achieve them. The Church does not interfere with state on political issues. But still the Church has a right to put pressure on the faithful who are citizens to use democratic procedures to achieve Church's goals (can. 227).

Of course, the Church teaches that political authority must always be exercised within the limits of the moral order and directed toward the common good-with a dynamic concept of that good-according to the juridical order legitimately established or due to be established (*GS* 74).

#### 2.2.4.6. Economical

The economy, its structure and strength, shapes many aspects of human existence. Due to their importance, the legislator must be aware of economic conditions as vital factors for the individual faithful, which cause results affecting dioceses, parishes, associations, religious communities, etc. Also, the types of financial assistance for Churches or church-related institutions

<sup>249</sup> R. Sobański, *Kanonizacja prawa "cywilnego" w Kodeksie Prawa Kanonicznego*, *Studia Iuridica* 31 (1994), p. 306.

<sup>250</sup> Cf. F. G. Morrissey, *Canon Law meets Civil Law*, *Studia Canonica* 32 (1998), p. 183–202.

<sup>251</sup> W. W. Bassett, *Relating Canon and Civil Law*, *The Jurist* 44 (1984), p. 18.

are in question, because annual budget of church juridical persons depends on the economy.

The legislator should be aware of the economic aspect of ecclesial community.<sup>252</sup> He has a right to make a law with provides for the needs of the Church and to demand the material means from the faithful (can. 222 § 1, can. 1260) and he also has special obligations to carry out in practice the Church's social justice teaching (cf. can. 222 § 2, can. 528 § 1). Of course, universal law or law that intends to cover milieus with different economical standards, cannot give concrete legal solutions. Particular legislator shares the biggest responsibility for the economical structural relations within and among the people under his law.

#### 2.2.4.7. Technical

The Church considers the wonderful technological discoveries, which men of talent, especially in the present era, have made with God's help, as good ones. They can be of great service to mankind (cf. *Inter mirifica*<sup>253</sup> 2). Therefore, technical sciences and technical inventions are the subject of interest of the legislator.

Awareness of the changing world is a requirement. Being out of touch would be dangerous, because it could create a barrier between the Church and the faithful who participate in the changes of the world. There cannot be a gap between law and life. Law must give answers how to behave in situations created by technical inventions.<sup>254</sup>

The pastoral dimension of law also has a technical component. As an example the Decretum of the Congregation for the Doctrine of the Faith from 23.9.1988<sup>255</sup> can be presented. It established a penalty of *latae sententiae* excommunication for those who divulge the content of a sacramental confession through means of social communications or who record it in any way on some device. It can be said that technical sciences and inventions change reality and pose a challenge to legislators.

<sup>252</sup> Cf. J. A. Coriden, *Canon Law as Ministry...*, p. 66–68.

<sup>253</sup> Sacrosanctum Concilium Oecumenicum Vaticanum II, Decretum *Inter mirifica* de instrumentis communicationis socialis, 4.10.1964, *AAS* 56 (1964), p. 145–153.

<sup>254</sup> Cf. R. Sobański, *Nowa kodyfikacja jako zjawisko kościelne (Dyskusja nad promulgacją nowego Kodeksu Prawa Kanonicznego)*, *Prawo Kanoniczne* 26 (1983) no. 1–2, p. 10.

<sup>255</sup> Congregatio pro Doctrina Fidei, Congregatio decretum quo ad Poenitentiae sacramentum tuendum, excommunicatio latae sententiae illi quicumque ea quae a confessario et a poenitente dicuntur vel per instrumenta technica captat vel per communicationis socialis instrumenta divulgat, infertur, 23.09.1988, *AAS* 80 (1988), p. 1367.

### 2.3. Textual Elements of Legislation

The text of law is a medium of communication between a legislator and users of law. Norms for behavior are coded in the text of legal act. It means that textual elements of legislation play an important role in the process of legislation.

#### 2.3.1. Clear Text of Law

In civil theory of law the desideratum of clarity of law represents one of the most essential ingredients of legality.<sup>256</sup> Canonists have the same outlook on the issue.<sup>257</sup> The term *clear law* can be understood in many ways. All of them are important for the legislator.<sup>258</sup> For instance, clear law represents clarity of systematization of laws. It means that system of law is well organized, and it is easy to find a proper act of law dealing with a certain matter. Lack of required features of a system of law, such as coherence among the laws or cohesion of laws, makes the system unclear and as a result unwieldy. Clear law means also clarity of classification of the actual state of affairs according to certain laws. It occurs when a user of law can easily connect given situation with a certain law. This understanding of clarity is strictly connected with the clarity of systematization of laws. Clear law refers also to sureness as to what is required by law in a certain situation and there is no doubt about what the norm of law means.

All these understandings of clear law have their beginning in clear text of law, that is, a law written in a proper way. Clear text of law is a text recognized as a law and easy to read and to understand. It is a text that is not difficult to interpret. Without a clear text of law it is impossible to gain clear law. Clear text of law is the very beginning of good law. Some textual elements of the legislation important for clear text of law should be presented here.

#### 2.3.2. Language Issues

The jurisprudence is of the opinion that the language issue is very important for theory of law and, what follows, the process of legislation. Legal theory in this realm tries to find help and methodological equipment in the philosophy of language.<sup>259</sup> A clear understanding of some of the problems of philosophy

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<sup>256</sup> L. Fuller, *The Morality of Law*, New Haven 1967, p. 63.

<sup>257</sup> B. Gangoiti, *Teologia e Filosofia del Diritto del Nuovo Codice*, Angelicum 60 (1983), p. 528.

<sup>258</sup> K. Opalek, J. Wróblewski, *Prawo. Metodologia, filozofia, teoria prawa*, Warszawa 1991, p. 253–254.

<sup>259</sup> T. Gizbert-Studnicki, *Is an Empirical Theory of the Language of Law Possible?*, [in:] *Polish Contribution to the Theory...*, p. 102.



of language is very useful for legal philosophers, lawyers and legislators.<sup>260</sup> Presentation of some of the language problems is a necessary introduction to the understanding of language used in law. It gives the essential tools and means in the process of lawmaking.

### 2.3.2.1. Natural Language

Natural language is usually understood as language created spontaneously by a certain group of people. It is stretched in time and it is not up to a single decision.<sup>261</sup> It is historically entangled. Due to its way of formation, it is unsystematic and irregular. Natural language is characterized by ambiguity of expressions, vagueness and inaccuracy. Other attributes of natural language are, for instance: the impossibility of dividing words and phrases of the natural language into syntactic categories, the frequent confusion of language and meta language, the dependence of meaning upon different linguistic and extra linguistic contexts, the enthymematic or even illogical nature of reasoning.<sup>262</sup> Due to these features, the situation in which the language in question precisely and unambiguously represents the reality,<sup>263</sup> is only an ideal impossible to reach.<sup>264</sup> On the other hand, these features cannot be considered only as imperfections of the natural language because sometimes they are advantageous. They make it possible for the language to present the reality in a more natural way and are of help in presenting the nuances of changing reality.

Some scholars distinguish within the natural language a number of variants. One of them is an *ethnic language*. It is a language based on the literal language of a certain community but has some elements of artificial language.<sup>265</sup> Another variant of natural language is a *colloquial language*. It is a language commonly accessible to people mainly in terms of lexis and its usage is widely spread.<sup>266</sup> The presented variants are important in some approaches to languages used in law context, because the form of natural language is *popular language*. It is a kind of language used every day by most of the

<sup>260</sup> Cf. T. Endicott, *Law and Language*, [in:] *The Oxford Handbook of Jurisprudence...*, p. 967.

<sup>261</sup> J. Giedymin, J. Kmita, *Wykłady z logiki formalnej, teorii komunikacji i metodologii nauk*, Poznań 1966, p. 24–25.

<sup>262</sup> G. Keil, *Język*, [in:] *Filozofia. Podstawowe pytania*, ed. E. Martens, H. Schnädelbach, transl. K. Krzemieniowa, Warszawa 1995, p. 620–623; T. Gizbert-Studnicki, *Is an Empirical Theory of the Language of Law Possible?*, [in:] *Polish Contribution to the Theory...*, p. 102.

<sup>263</sup> There is a presumption that the reality is logical, unambiguous and possible to describe in formal way.

<sup>264</sup> Fortunately, there are some techniques useful in dealing with listed features and in managing them.

<sup>265</sup> M. Zieliński, *Interpretacja jako proces dekodowania tekstu prawnego*, Poznań 1972, p. 6; R. Sarkowicz, J. Stelmach, *Teoria prawa*, Kraków 2001, p. 49–50.

<sup>266</sup> M. Zieliński, *Interpretacja jako proces...*, p. 6–7.

population. Sometimes, a postulate can be heard that law be written in popular language. It could create an universally understood and accepted standard of communication between the user of law and the legislator. Every law would be accessible to users of law without mediators like professional lawyers. This would be of help in respecting freedoms of and rights.<sup>267</sup>

However, the legislator should be very skeptical of this idea. Law written in popular language is to be more understandable for common users of law, but at the same time law would be inconvenient and awkward if used by lawyers. In result, the outcome of interpretation would be difficult to predict for the legislator and, what follows, it can upset the certainty and stability of judicial decisions.

It has to be added that some philosophers of language trying to eliminate enumerated features of natural language came up with the idea of creating an artificial language, that is, language created prior to usage, in other words, fully formal language.<sup>268</sup> The idea of formalization of language is expressed in two main points: creation of lexicon of all expressions allowed to be used and creation of rules to connect them.<sup>269</sup> The idea presumes the possibility of general formalization, symbolization, axiomatization, and algorithmization of human intellectual activity.<sup>270</sup> This end seems to be impossible to realize. Although some parts of the thought can be an inspiration for the legislator. The idea of an artificial language is used in language of law.

### 2.3.2.2. Legal Language and Juridical Language

After this necessary introduction regarding the language in general, it should be noted that the inquiry into the specific language of law is considered one of the central tasks of legal theory.<sup>271</sup>

Judging by the origin of language used in the contexts of law, it seems that it is based on natural language. Lawyers use some expressions taken from colloquial variations.<sup>272</sup> Deeper analysis of the language, however, leads to the conclusion that it is an artificial language in the realm of legal definitions, which is supported by the fact that some words and expressions used in the context of law have different, usually more precise meanings.<sup>273</sup>

<sup>267</sup> Cf. R. Sobański, *Nowa kodyfikacja ...*, p. 3.

<sup>268</sup> The idea has long history; a very famous author representing the idea was: G. W. Leibniz, *De arte combinatoria*, Lipsiae 1666.

<sup>269</sup> Cf. M. Zieliński, *Interpretacja jako proces...*, p. 6.

<sup>270</sup> L. Kołakowski, *Racjonalne i irracjonalne aspekty racjonalizmu Leibniza*, [in:] G. W. Leibniz, *Nowe rozważania dotyczące rozumu ludzkiego*, vol. I, transl. I. Dąbbska, Warszawa 1955, p. xxxvii.

<sup>271</sup> T. Gizbert-Studnicki, *Is an Empirical Theory of the Language of Law Possible?*, [in:] *Polish Contribution to the Theory...*, p. 102.

<sup>272</sup> K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa*, Warszawa 1969, p. 41.

<sup>273</sup> S. Wrótkowska, Z. Ziemiński, *Zarys teorii prawa*, Poznań 1997, p. 148.

Some scholars are of the opinion that it is necessary to make some distinctions in language used in law. According to them there is: 1) the legal language, which appears in two forms: (a) the language of legal texts (statutes, regulations,) as a raw material of expressing legal norms, or (b) the language of legal norms reconstructed on the grounds of those texts in the process of interpretation. There is also 2) the juridical language, that is, the language referring to the law, then the language in which one describes the content or the form of legal norms, one states the validity or the effectiveness of them, and so on.<sup>274</sup> Analogically to these distinctions, it can be said that in the context of church law the language is used as the canon language and the canonical language.<sup>275</sup>

### 2.3.3. Problem of Latin

As it is known, Latin is an official language of the Catholic Church. The knowledge and use of this language is so intimately bound with the Church's life. For ages it was the only language allowed in official usage. Through changes in culture it became less popular. The church authorities attempted to stop that process.<sup>276</sup>

Although modern languages are widely used in teaching and communication in the Church, Latin is still an important language for the Church. It is deemed worthy of being used in the exercise of teaching in which "magnifica caelestis doctrinae sanctissimarumque legum veste."<sup>277</sup> Also, in the field of church law, Latin has its importance and most of universal official documents are written

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<sup>274</sup> B. Wróblewski, *Język prawny i prawniczy*, Kraków 1948, p. 134 ff; K. Opałek, *Z teorii dyrektyw i norm*, Warszawa 1974, p. 239 ff.

<sup>275</sup> R. Sobański, *Eklezjologia nowego Kodeksu Prawa Kanonicznego*, *Prawo Kanoniczne* 28 (1985) no. 1–2, p. 5. It must be noticed that there are some problems with clear cut distinctions among the kinds of language due to similarities in grammatical form of the sentences used in canon law context, see: R. Sobański, *Metodologia prawa...*, p. 154, ft. 1.

<sup>276</sup> For instance, by a document, like: Joannes PP. XXIII, *Constitutio Apostolica Veterum Sapientia* in Graecorum Romanorumque inclusa litteris, 22.02.1962, *AAS* 54 (1962), p. 129–135.

<sup>277</sup> Pius PP. XI, *Motu proprio Latinarum litterarum de peculiari litterarum latinarum schola in athenaeo gregoriano constituenda*, 20.10.1924, *AAS* 16 (1924), p. 417.

in this language.<sup>278</sup> In the case of *CIC* 1983 it was strictly ordered that: “Publicam vim et efficacitatem Codicis Iuris Canonici habet textus unus Latinus.”<sup>279</sup>

This position is held not without some significant pros. Latin is universal and non-vernacular. It does not favor any one nation, but presents itself with equal impartiality to all and is equally acceptable to all. Its concise, varied and harmonious style, full of majesty and dignity makes for singular clarity and impressiveness of expression. It is immutable, that is, set and unchanging whereas modern languages are liable to change.<sup>280</sup>

Of course, what is considered as an advantage in certain situations can be evaluated as a disadvantage in other circumstances. When the legislator would like to refer to some current situation and use a word well-known in today’s culture or just name a new technical method or instrument, it can be impossible to find a proper word in Latin. In such situations, *Opus Fundatum Latinitas* can be helpful. It is an institution founded by Pope Paul VI in 1976. Its specific aim is to create new words and increase Latin dictionary of neologisms in *Lexicon recentis Latinitatis*.<sup>281</sup>

### 2.3.4. Translations

Another problem with the usage of Latin is the fact that it must be translated into modern languages. Some theoretical ideas regarding translation need to be clarified before the practical side of translation will be given.

In the beginning, the philosophical background of a translation of languages is in order. First, the legislator must assume that translation understood as the transformation of language from one form to another is not only possible,<sup>282</sup> but also as the outcome of the process can be satisfactory from the legislator’s point of view. In translation, the translator changes expressions of one language into expressions of another language. The change must be done without disturbing the essence of the content or the sense of the text. Nothing must be altered. Of course, there still can be posed questions about the fidelity of translation,

<sup>278</sup> One of exceptions is document: Pontificium Consilium ad Unitatem Christianorum Fovendam, Directoire pour l’application des principes et des normes sur l’oecuménisme, 25.03.1993, *AAS* 85 (1993), p. 1039–1119. It was published in French. Another exception is document by Congregatio de Causis Sanctorum, Istruzione *Sanctorum Mater* per lo svolgimento delle Inchieste diocesane o eparchiali nelle Cause dei Santi, 17.05.2007, *AAS* 99 (2007), p. 465–517. It was published in Italian.

<sup>279</sup> Secretaria Status, Normae de Latino textu Codicis Iuris Canonici tuendo eodemque alias in linguis convertendo, 28.01.1983, *Communicationes* 15 (1983), p. 41.

<sup>280</sup> *Veterum Sapientia*, no. 3–7, p. 133–135.

<sup>281</sup> See: [http://www.vatican.va/roman\\_curia/institutions\\_connected/latinitas/documents/rc\\_latinitas\\_20040601\\_lexicon\\_it.html#1](http://www.vatican.va/roman_curia/institutions_connected/latinitas/documents/rc_latinitas_20040601_lexicon_it.html#1) (access: 11.10.2009).

<sup>282</sup> Entry: *Translation*, [in:] *Black’s Law Dictionary...*, p. 1637.

especially if it is considered that the translation is between languages, which represent different cultures, and different law dictionaries.<sup>283</sup> This is why translation of *CIC* 1917 was prohibited, and this is why Latin version of *CIC* 1983 is the only one legally binding.

The legislator who uses different language from the language of the users of law, in order to help the translator in his work, must respect some rules. In the process of legislation he must support translatability of his text, understood as an essential quality of his works.<sup>284</sup> First, the legislator must know that characterization of legal language is proposed in terms of legal lexicon, syntax, pragmatics and style.<sup>285</sup> Lexicon is of special importance, because the first role in legal text plays what the legislator said, and the second how he said it. Taking into consideration that the nature of law is to order rather than exhort, advise, or recommend, the syntax, pragmatics and style are in the background.

It can be said that the process of translation of the Church legal texts is difficult and complex. The legislator must be aware of it and undertake the challenge of making the laws of canon law available to Christ's faithful. As it was noted in the case of *CIC* 1983: "Necessitas ipsa integritatis tutandae Latini textus novi Codicis Iuris Canonici ac simul praestandae fidelitatis interpretationum illius textus recentioribus in linguis suadet omnino ut opportunas ea de re Sancta Sedes proferat regulas."<sup>286</sup>

In *CIC* 1983, one can detect the care of the supreme legislator about the quality of translation of text important for life of the Church. The translation of documents of the Church, laws included, is regulated by some canons like: can. 825 § 1, can. 826 § 2, can. 827 § 1, can. 829, can. 838 § 3, can. 828, can. 1474 (cf. *DV* 22). Other legislators can also issue some laws to regulate the matter.<sup>287</sup>

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<sup>283</sup> D. Robinson, *Becoming a Translator. An Introduction to the Theory and Practice of Translation*, London-New York 2007, p. 189–194; D. Cao, *Translating Law*, Clevedon-Buffalo-Toronto 2007, p. 31–32; M. Crick, *Explorations in Language and Meaning: towards a Semantic Anthropology*, London 1976, p. 160; J. M. Huels, *Interpreting Canon Law in Diverse Cultures*, *The Jurist* 47 (1987), p. 253.

<sup>284</sup> Cf. W. Benjamin, *The Task of the Translator*, transl. H. Zohn, [in:] *The Translation Studies Reader*, ed. L. Venuti, London-New York 2000, p. 16.

<sup>285</sup> D. Cao, *Translating Law*, Clevedon-Buffalo-Toronto 2007, p. 7.

<sup>286</sup> Secretaria Status, Normae de Latino textu Codicis Iuris Canonici tuendo eodemque alias in linguis convertendo, 28.01.1983, Communicationes 15 (1983), p. 41.

<sup>287</sup> As it was done *ex Summi Pontificis Ioannis Pauli II mandato* by the Secretariat of State, see: Secretaria Status, Normae de Latino textu Codicis Iuris Canonici tuendo eodemque alias in linguis convertendo, 28.01.1983, Communicationes 15 (1983), p. 41.

### 2.3.5. Lexis of Text of Law

As it was said, legal lexicon, that is, lexis of the text of the law must be given a special attention by the legislator. The problems connected with it should be more thoroughly discussed.

#### 2.3.5.1. General Rule

Words used to build up sentences in legal text should be, as much as possible, popular in the common use. Specialized terms, words of foreign origin, older forms or neologisms should be avoided, if possible. Words should be used in the first meaning taken from universal dictionary of language. Meanings taken from jargon of professions are not accepted. If the legislator has doubts that a word would be understood in the way he intends, he can always use its definition.

#### 2.3.5.2. Significant Features of Words

In the process of building lexis of the text of law, there are three very important features of words. They can be dangerous and useful for drafting. The legislator must be aware of them and avoid or use them, as needed. The features are: equivalence, ambiguity and synonymy.<sup>288</sup>

##### 2.3.5.2.1. Equivalence, Ambiguity and Synonymy

Equivalence is when there is a link between one expression and one meaning. Ambiguity is created by situation when one expression is linked with more than one meaning. Synonymy occurs when the same meaning can be expressed by more than one expression. The state of being in equivalence generally comes from the internal property of the word in rare situation. Most often equivalence comes and can be reached by the context of usage of the expressions or can be achieved by legal definitions.<sup>289</sup> Synonymy, for the reasons presented above, must be avoided.

##### 2.3.5.2.2. Indeterminateness and Unclearness of Words

Other significant features of words that the legislator should pay attention to are the indeterminateness and the unclearness of words. Generally speaking, the enumerated characteristics of expressions concern problems with establishing, respectively, the meaning and the range of expressions.<sup>290</sup>

<sup>288</sup> C. M. Zieliński, *Interpretacja jako proces...*, p. 12.

<sup>289</sup> S. Wronkowska, M. Zieliński, *Problemy i zasady redagowania tekstów prawnych*, Warszawa 1993, p. 115 ff.

<sup>290</sup> M. Zieliński, *Wykładnia prawa...*, p. 161.

Indeterminate word is lacking clarity or precision because its meaning is not precisely determined and it is difficult to be sure of the meaning. The definition of an indeterminate expression is not a complex of features constitutive for the supposed meaning of the expression.<sup>291</sup>

Unclear expression is a word about which it is impossible to tell, if it is a designator of the name even after getting familiar with the features of the objects. The expressions in question have a certain area of unclearness or even two areas of unclearness, when it is impossible to tell with exactness the borders of the meanings.<sup>292</sup>

There are many examples of presented expressions in *CIC* 1983. For instance, can. 249 orders that the students are not only to be taught their native language “accurately” (“accurate”), but are also to be “well versed” (“bene calleant”) in Latin, and have a “suitable knowledge” of other languages (“congruam habeant cognitionem”). It is impossible to tell what level of expertise they are required to have, only the hierarchy of the knowledge of the languages can be set. Another example is expression “at night” from can. 938 § 4 (“nocturno tempore”). It is permitted to reserve the blessed Eucharist in some other safer place during the time, but it is hard to tell exactly which hours legislator had in mind.<sup>293</sup>

The presence of such words in act of law has both positive and negative outcomes. First, the work of the interpreter of law is made difficult by the occurrence of indeterminate and unclear expressions in the legal text. His job is to give the user of law clear-cut norm and that means longer process of interpretation. He should use the most suitable meaning of the indeterminate and unclear expressions while taking into consideration the profile of the law situation. Interpreter must also be ready to justify his choice of the meaning. On the other hand, the lawmaker can make law by these words more flexible and thanks to that more realistic and more open to the adjustment of changing life. Thanks to the indeterminateness and the unclearness of the law expressions, the lawmaker gives the interpreter more room for decision. It is called a *decision zone*.

Summing up, it can be said that the indeterminate and unclear expressions have to be treated in a proper way by a legislator. They can dangerously weaken the expected clarity of the law but they can also enhance the flexibility of its implementation.

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<sup>291</sup> Zob. Z. Ziemiński, *Logika praktyczna*, Warszawa 2000, p. 29–30.

<sup>292</sup> M. Zieliński, *Wykładnia prawa...*, p. 165 ff.

<sup>293</sup> For more examples in *CIC* 1983, see: P. Kroczyk, *Niedookreśloność i nieostrość zwrotów w prawie kanonicznym na przykładzie KPK z 1983 r.*, *Annales Canonici* 1 (2005), p. 175–185.

### 2.3.5.3. Legal Terms and Legal Definitions

Legal terms and definitions in law are useful tools in legislative process. They help to communicate in a precise manner between legislator and the users of law. They give some certainty for interpretation and later on for application of norms.

#### 2.3.5.3.1. Legal Term

To find the definition of a legal term, there must be given some criteria for searching because not every word or expression found in legal texts is a legal term. A word or an expression found in legal text can be called a legal term if it is defined by a legislator himself; its aim is to create or highlight an object and without this action the term or the object would not exist or it would not be noticed. Also, in situation, when word or expression is repeated many times in legal texts, it can be called and treated as legal term.<sup>294</sup>

If at least one of these criteria is fulfilled, it is sure that a word or expression is of special importance to the legislator. He used it purposely. At the same time, it is of essence for the meaning of the text and needs proper treatment. It is fundamental for interpretation and application of law.

#### 2.3.5.3.2. Legal Definitions

Definitions present in legal texts are called legal definitions. They define, that is, describe precisely words or expressions that can be found in an act of law by words and expressions considered to be better known. This is how definition works. The general reason for placing definitions in law is to assure the passing on of a precise idea from legislator to the users of law. There are also some detailed motives to put legal definition in text of law.

One of them is that by legal definition, the legislator can explain the meaning of word or expression that is not widely known. It can create conventional object, subject or activity that is not yet known. Also by that means the legislator can change the meaning of a known word. Definition in law text eliminates indeterminateness and the unclearness of words and changes an ambiguous word or expression used in popular language into a word or expression with certain, desired by the legislator meaning.<sup>295</sup> It appears that legal definitions function as interpretations given by legislator; they are given in the act of law itself.<sup>296</sup>

<sup>294</sup> W. Patryas, *Definiowanie pojęć prawnych*, Poznań 1997, p. 12.

<sup>295</sup> Cf. M. Zieliński, *Wykładnia prawa...*, p. 188–191; S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki...*, p. 208.

<sup>296</sup> Z. Ziemiński, *Logika praktyczna*, Warszawa 2000, p. 240.



From legislator's point of view probably the most useful is a classical definition.<sup>297</sup> This kind of definition is a definition understood as a sentence that consists of three parts: (1) *definiendum*, is a term to be described, (2) connector and, (3) *definiens*, that is a passage describing the meaning of *definiendum*.

The legislator in drafting law can use many methods to create definitions.<sup>298</sup> The philological method is popular. It consists of examination of different contexts in which certain word appears. The essence of the method is the analysis of the text.

The legislators must obey some practical pieces of advice regarding legal definition.<sup>299</sup> The most practical are as follows: trying to build definition, it must be remembered, that definition must be a short but integrated sentence, which is fully understandable without resorting to other definitions. Definition must define by using words and expressions better known than a defined word or expression to avoid error called *ignotum per ignotum*. The error called *idem per idem* occurs when in *definiendum* and *definiens* the same words or expressions are used.

Another piece of advice concerns the usage of definitions. Firstly, definition must be given into act of law only when it is really necessary. The legislator of lower range ought to respect and use definitions given by higher legislator. If the definition was established for a certain law by the legislator, he must adhere to it and use it in the entire document. He cannot change the meaning in the act of law. It is highly recommended that a legislator use the same definition in all acts of law issued by him. If it is not possible, legislator can use word or expression with different meaning, but he must emphasize that in the act of law the word or expression means this or that.

Some precautions and warnings must also be mentioned in that regard. As a well-known sentence states, definitions can be dangerous. First of all, law definitions, especially strict ones, make law less flexible. It becomes completely closed for unprecedented and unforeseeable cases. Giving some leeway to interpreters and allowing them to create definition dynamically, that is, for a certain situation, can produce good results. Sometimes definition closes or at least narrows the way in which life shapes law. Unconscious of the problem, the legislator can force users of law to ignore reality and stick to prescribed definition regardless of reality. The Pontifical Commission for Revision of the Code of Canon Law noticed these dangers in *Coetus*

<sup>297</sup> For other kinds of definition, see: P. Kroczek, *Zasada „clara non sunt interpretanda”...*, p. 73; W. Patryas, *Definiowanie pojęć prawnych...*, p. 127.

<sup>298</sup> More about methods of creating definitions, see: T. Kotarbiński, *Dzieła wszystkie*, vol. 1, *Elementy teorii poznania, logiki formalnej i metodologii nauk*, Wrocław-Kraków-Gdańsk-Łódź 1990, p. 52 ff.

<sup>299</sup> P. Kroczek, *Zasada „clara non sunt interpretanda”...*, p. 74–75.

*studiorum de normis generalibus* and arbitrated in *Questiones praeliminaries* that “legislator non debet dare definitiones, sed debet ferre; [...] legislatorem abstinere debere a definitionibus quae non sunt omnino necessariae, quia omnis definition in iure est periculosa.”<sup>300</sup> It seems to be safer for the legislator and because of it more appropriate for him to keep the Revision Commission’s stated methodology of not providing definitions. Definitions are of concern more to the doctrine of law than legislation.

Generally speaking, using legal terms and building definitions are an important part of drafting law. Making mistakes at that stage can cause problems not only in the document where definition is to be included and to which it refers directly but also in other documents, especially issued by legislator on lower level where definition would be used.

It is a good habit to enclose terms and definitions in special part distinguished from other parts of act of law. It is called “dictionary” and it is usually placed at the beginning of the act of law.<sup>301</sup> First of all, this solution makes communication between legislator and the users much better. It is of great help for users of law in the process of interpreting law. It also allows legislator to omit repetitions in the text and speak more precisely by encouraging him to define necessary words before he starts drafting law.

#### 2.3.5.4. Other Elements of Legal Lexicon

There are some words and expressions in legal lexis that potentially can be difficult to use. Alone they do not mean anything but they are parts of a complex structure and allow legislator to express his will in details. To this collection one can add common phrases, idioms, and other phrases.

##### 2.3.5.4.1. Common phrases

There are some common phrases that can be used by the legislator. There is no general objection to the use of common phrases so as to convey the proper and effectual meaning to the reader. It is necessary to take proper care so that these common phrases are not used for the sake of style or in a superfluous manner.

##### 2.3.5.4.2. Idioms

Another problem for the legislator are idioms, that is, expressions the meaning of which cannot be derived from the conjoined meanings of its elements but rather the meaning is linked to the whole expression as it would be one word. The legislator should avoid using idioms. There are some problems with them. Sometimes they cannot be recognized by the interpreter as idioms and

<sup>300</sup> *Communicationes* 15 (1984), p. 144.

<sup>301</sup> S. Wronkowska, *Podstawowe pojęcia prawa...*, p. 67.

are read as the separate sentences.<sup>302</sup> They are difficult to translate and proper understanding of them requires a certain level of proficiency in language.

#### 2.3.5.4.3. Frequently used phrases

Some words and expressions are used in legal text very often. All of them have special functions in act of law. They can make the rules of law flexible and suitable for many different circumstances. They can also make the rules more rigid and inflexible. It is important for the legislator to know the possibilities and use them properly.<sup>303</sup>

##### 2.3.5.4.3.1. Ordering

Typical ordering form is imperative form of verb. But it is not used often in *CIC* 1983. Ordering is expressed by Latin verbs like, for instance:

1. *Debere*. It is used in canons, e.g., can. 16 § 2 and translated in context as: “must be promulgated,” and can. 1651: “the judgement be executed,” also in negative form, like in can. 36 § 2 *non debere*, what is: “must not be.”
2. *Tenere*. It is used in canons, e.g., can. 387, and translated in context as: “is bound to give an example,” can. 822 § 2: “to have the duty of,” can. 916: “is to remember the obligation to.”
3. *Adstringere*. It is used in canons, e.g., can. 13 § 2: and translated in context as: “oeregrini are not bound,” can. 209 § 1: “the faithful are bound to,” can. 292: “no longer bound by.”
4. *Oportere*. It is used in canons, e.g., can. 61 § 3: and translated in context as: “reason must be,” can. 68: “it is necessary to,” can. 251: “must be based.”

The same effect is gained by several nouns like:

1. *Officium*. It is used in canons, e.g., can. 211, and in translation stands in phrase: “the faithful have the obligation,” can. 663 § 1: “principal duty is to,” can. 794 § 1: “the Church has the duty.”
2. *Munus*. It is used in canons, e.g., can. 239 § 2, as English: “deputed to this work,” can. 364: “principal task of,” can. 365 § 1: “the special role.”
3. *Obligatio*. It is used in canons, e.g., can. 71: “a canonical obligation,” can. 127 § 2 no. 2: “the Superior is not in any way bound to” or in can. 127 § 2 Latin: “obligatione tenentur” means “are obliged.”

<sup>302</sup> M. Zieliński, *Interpretacja jako proces...*, p. 10–11.

<sup>303</sup> The analysis of phrases of *CIC* 1983 was done by: P. Erdő, *Expressiones obligationis et exhortationis in Codice Iuris Canonici*, Periodica 76 (1987), p. 3–27; R. Sobański, *Metodologia prawa...* p. 49–56. In Polish civil jurisprudence the terms are analyzed by: M. Zieliński, *Wykładnia prawa...*, p. 132–162. A very solid monograph about language of *CIC* 1917 is: K. Mörsdorf, *Die Rechtssprache des Codex iuris canonici eine kritische Untersuchung*, Paderborn 1967, reprint from edition: Paderborn 1937.

Not only verbs and nouns can encode orders, but also Latin “gerundivum”, that is, a particular verb form. In Latin, the gerundive is a verbal adjective used to indicate that a noun needs or deserves to be the object of an action. For instance: “standum est” (can. 684 § 4, can. 730, can. 744 § 2, can. 1060, can. 1184 § 2) translated as: “are to be followed” or “must be followed, must be upheld.”

#### 2.3.5.4.3.2. Prohibiting

Prohibitions are expressed by verbs: “prohibere” and “vetare.” The first verb is used, for instance, in can. 679 and is translated in sentence: “Bishop can forbid a member” or can. 1722: “even prohibit public participation.” Verb “vetare” is met in can. 1077 § 1: “in a specific case forbid a marriage,” can. 1127 § 1: “it is forbidden to have.”

Prohibiting can be expressed not only by specific verbs. Also, adding sanction makes certain action banned and illegal (e.g., can. 1373, can. 1374) or invalidating or incapacitating (e.g., can. 182 § 2, can. 188, can. 1200 § 2, can. 1083 § 1). The same effect is achieved in any canon formulating conditions for decent and licit action (e.g., can. 487 § 1: “nemini licet” – “no one may be allowed to,” can. 905 § 1: “non licet sacerdoti” – “a priest may not”).

#### 2.3.5.4.3.3. Allowing

In canons, which contain allowing norms with phrases expressing authorization or entitlement the following verbs are used:

- 1) *Posse*. It occurs, e.g., in can. 1565 § 1 (“can be done”), and in can. 1672 (“may be done”).
- 2) *Spectare*. It can be noticed in, e.g., can. 470, can. 584 (“can do something”) or in can. 700 (“to belong to”), or in can. 838 § 1 (“to pertain to”).

Many times noun “ius” is used in connection with verbs like: “est,” “habet,” “gaudet,” e.g., in can. 190 § 1, can. 213, can. 214, can. 426 (“have the right to”). Sometimes noun “facultas” in connection with verbs like: “habet,” “gaudet,” “agnoscitur,” e.g., can. 667 § 1, can. 691 § 1, can. 885 § 2 (“to have faculty”). Sometimes the noun “potestas” with verbs: “gaudet,” “habet,” “pollet,” like in can. 135 § 2, can. 333 § 1, can. 427 § 1 (“to have power”) is an allowing phrase.

#### 2.3.5.4.3.4. Exhorting

In Latin, the verbs that express recommendation, suggestion are “commendare,” “laudare.” In *CIC* 1983 they are used in canons: can. 280 (“valde commendatur,” in English: “highly recommended”), can. 298 § 1 and can. 299 § 1 (“laudatae vel commendatae,” in English: “praised or recommended”), can. 382 § 1 (“valde commendatur,” what in translation is: “strongly recommended”).

Other words are: “convenire,” in expressions: “valde convenit” translated by: “entirely appropriate” (can. 1014); or “oratoria benedici convenit” translated as: “it is appropriate oratories be blessed” (can. 1229). Also “expedire” in can.

473 § 1 “expedire iudicaverit” – “to judge it useful”, can. 863 – “si id expedire iudicaverit,” which is in English: “if he judges this appropriate.” Verb “suadere” is in can. 1233: “bonum id suadere videantur” – “would seem to make this advisable”, can. 372 § 2: “utilitas id suadeat – thought to be helpful.”

Also, adverbs like “convenienter” (can. 1286 no. 2), “laudabiliter” (can. 1155), “utiliter” (can. 708) in the indicative are used to express exhortation.

#### 2.3.5.4.3.5. Assessment

Popular are phrases of assessment, like: “gravi causa” – “grave reason” (can. 41), “iusta causa” – “just reason” (can. 56), “sufficiencia causa” – “sufficient reason” (can. 90 § 2), “iusta et rationabili causa” – “just and reasonable cause” (can. 90 § 1), “gravi urgentique causa” – “grave and urgent reason” (can. 139 § 2). The legislator must very careful to use assessment phrases and use them always attentively and judiciously. Due to its indeterminacy and unclearness they are not easy to interpret. It must be remembered that the phrases can be used to describe quite different situations. Proper usage can be of great help to render various shades of meaning intended by the legislator. On the other hand, assessment phrases pose an obligation for the user of law to assess the level and kind of specific facts or qualities. Assessment phrases cannot be used to hide the lack of substance matter in the legislator’s legal statements. In such situations, the legislator would by his law say simply nothing. It seems that it is better to specify all the grounds or reasons on the basis of which a decision is to be given by the concerned authority.<sup>304</sup>

#### 2.3.5.4.3.6. Excusing

The legislator must pay attention to the fact that *CIC* 1983 many times permits subjects of the law to determine themselves whether to observe the general rule stated in a canon or to follow some other practice using *cause excusing from law*. An excusing cause is any factor that justifiably excuses a subject of the law from its observance.<sup>305</sup> Due to some circumstance, the subject is morally and legally excused from fulfilling the law as long as that excusing circumstance lasts. There are many examples of excusing causes in the code.

Quite a frequent phrase in *CIC* 1983 is “nisi” (“unless”).<sup>306</sup> It allows connecting two sentences and makes text of law shorter and more intelligible. Of course, it can be fully replaced by two sentences written after full stop. Many times an excusing cause is marked by the expression in question (e.g., can. 2, can. 4, can. 6, can. 8).

<sup>304</sup> B. R. Atre, *Legislative Drafting...*, p. 222A.

<sup>305</sup> J. M. Huels, *Nonreception of Canon Law by the Community*, *New Theology Review* 4 (1991), p. 53.

<sup>306</sup> The word *nisi* can be found almost 460 times in *CIC* 1983, see: <http://www.intratext.com/IXT/LAT0010/I.HTM> (access: 20.01.2010).

Another legal expression signifying an excusing cause is just “impedimento” (“impediment”), “iusto impedimento” (“lawful impediment” or “to be lawfully impeded”) or “legitimo impedimento” (“legitimate impediment”), e.g., can. 179 § 1, can. 182 § 2, can. 274 § 2, can. 379, can. 382 § 2, can. 408 § 1, can. 444 § 1 and § 2, can. 464, can. 527 § 3, can. 1593 § 2, can. 1595 § 1.

Sometimes, the phrase “nisi aliud in iure expresse caveatur” (“unless law expressly provides otherwise”) or similar in meaning to this phrase is used (for instance in can. 5 § 1, can. 11, can. 15 § 1, can. 22, can. 1349, can. 1351) to give an effect of excuse to an express provision found anywhere in the act or in any other law. It is an attempt to create a situation in which the provisions of the act in question will be subjected to any specific provision in other laws. The situation here is very peculiar, because it is always possible to identify a particular provision, which is to have an effect over the present Legislation. Better course would be to specify the provisions in specific terms.<sup>307</sup>

Canon law also recognizes impossibility of observing law. Something can be “physice aut moraliter impossibile” – “physically or morally impossible” (can. 844 § 2). Sometimes an excuse can be “necessitate” – “a necessity” (can. 1119). Sometimes it can be an “urgente etiam extrema necessitate” – “urgent and extreme necessity” (can. 927). Also, “gravi incommodo” (“serious inconvenience”) is another cause the excuses from the observance of law (e.g., can. 859, can. 1065 § 1, can. 1116 § 1, can. 1323, can. 1324). The ultimate excuse valid in many situations is “periculo mortis” – “danger of death” (e.g., can. 530 no. 2, can. 566 § 2, can. 865 § 2).

#### 2.3.5.4.3.7. Limiting

It must be mentioned that, in act of law, the legislator can use words that put limitations on interpretation and application of norms and that can also limit non-verbal variable presented in act of law.<sup>308</sup>

The legislator can use, for instance, expressions like: “nefas est,” which means “absolutely prohibited” (can. 983 § 1, can. 927, can. 1026, can. 1190 § 1). The use of the expression suggests that the legislator does not foresee any cause that would excuse from this sacred duty. Other strong prohibitions in canon law, though less strong are: “vetitus” – “forbidden” (e.g., can. 887, can. 908, can. 1333 § 3, can. 1335), “non lice” or “illicitus” – “not permitted” (e.g., can. 179 § 1, can. 488, can. 558, can. 567 § 1), and “prohibitus” – “prohibited” (e.g., can. 137 § 2, can. 886 § 1, can. 1124). In short, the more important the value

<sup>307</sup> B. R. Atre, *Legislative Drafting...*, p. 222G-222F.

<sup>308</sup> About non-verbal variables of act of law, see: Chapter 3. It must be mentioned that sometimes the legislator himself can determine and describe the limitation in the law or give them by an authentic interpretation.

behind the law, the less readily can individuals or groups excuse themselves from the law's observance.<sup>309</sup>

#### 2.3.5.4.3.8. Referring to Time

It should be a rule for legislator to prescribe an exact due date or an actual time frame for fulfilling obligation or exercising right. Whenever it is impossible some special phrases should be used, like "quam primum" – "as soon as possible" (e.g., can. 184 § 3, can. 388 § 4, can. 413 § 1 and § 3), or "tempore opportuno" – "in good time" or "at the proper time," or "at a suitable time" (e.g., can. 344 no. 3, can. 890, can. 1001), or other similar forms that mean to do something within a reasonable time, with an undertaking to do it in the shortest practicable time.

#### 2.3.5.4.3.9. Ending

For the certainty of total revocation of law, it is good to use ending phrases, especially those that are of significance in jurisprudence. The frequently used phrases are<sup>310</sup>:

"Contrariis non obstantibus" – it means that any acts on the same level of importance must not be contrary to the law. If it is used in universal law, it means that any universal law contrary to the law is abolished.

"Contrariis quibuscumque non obstantibus" – it means that any acts on the same or lower level of importance must not be contrary to the law. If it is used in universal law, it means that any universal and particular law contrary to the law is abolished.

"Quibusunque contrarii non obstantibus etiam speciali mentione dignis" – it means that any laws must not be contrary to the law, even those that need special mention to be abolished, like special law.

"Non obstantibus quibuslibet privilegiis etiam speciali vel individua mentione dignis necnon consuetudinibus contrariis" – it means that privileges and legal customs are abolished.

Ending phrases are evidently of help to users of law. Apart from the content of a law they decide which acts of law are in force.

<sup>309</sup> J. M. Huels, *Nonreception of Canon Law by the Community*, *New Theology Review* 4 (1991), p. 54–55.

<sup>310</sup> M. Żurowski, *Prawo Nowego Przymierza...*, p. 43; H. Heimerl, H. Pree, *Kirchenrecht: allgemeine Normen...*, p. 48.

## 2.4. Encoding Norm into Canon

In some civil theories of law<sup>311</sup> there is a basic and recognized distinction between: 1) a law (an act of law,<sup>312</sup> a normative legal act<sup>313</sup>), 2) a legal article, and 3) a norm (a rule, a legal rule).<sup>314</sup> There is a postulate to use the distinction in canon law following civil jurisprudence.<sup>315</sup> Not only to use the same language as civil lawyers do to understand each other better, but also for better legislation in the Church. Of course, it is important to be fully aware of differences in legal traditions and legal cultures.<sup>316</sup>

In the field of canon law an act of law can be defined as a formal product of legislative action taken by a competent legislator in form of normative legal act that consists of sentences, issued to put into practice of the Church the legal, that is, canonical norms.<sup>317</sup>

Suitably following this, legal article (also: canonical article) is a sentence, graphically singled out by period or semicolon (but not comma), that builds an act of law.<sup>318</sup> It is the smallest unit of an act of law. Sometimes a legal article itself creates a separate and distinct part of writing, that is, basic technical unit of an act of law which is denoted as: canon, article, and paragraph (§).<sup>319</sup> It is so, e.g., in case of can. 1.

It happens also, that some legal articles are grouped together as a separate basic technical unit of an act of law (e.g., can. 2). A separate basic technical unit of an act of law should be clearly graphically distinguished in a text. The name of it is always connected with number, which is growing in text. The choice of the name is up to legislator. But it would be advisable not to use the

<sup>311</sup> For instance, in the Polish theory of law, the first who used it was: Z. Ziemiński, *Przepis prawny a norma prawna*, *Ruch Prawniczy i Ekonomiczny* (1960) no. 1, p. 105–122.

<sup>312</sup> To avoid misuse of word “law” in sense of phenomenon and in sense of writing the expression “an act of law” will be more often used.

<sup>313</sup> Here the meaning of the word “act” is always reduced to “a law,” and must not be mistaken with an act of person, deed, action. Although these are the first meanings of the word, see: entry: *Act*, [in:] *Black’s Law Dictionary...*, p. 27.

<sup>314</sup> For grounds and methods of such distinction, see: Z. Ziemiński, *Przepis prawny a norma prawna*, *Ruch Prawniczy i Ekonomiczny* (1960) no. 1, p. 105–122; S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, Poznań 1997, p. 134; S. Wronkowska, *Podstawowe pojęcia prawa...*, p. 32–33.

<sup>315</sup> R. Sobański, *Ustawy Kościelne*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 55.

<sup>316</sup> About the problem in Italian, German, and Polish, see: P. Skonieczny, *La buona fama: problematiche inerenti alla sua protezione in base al can. 220 del Codice di Diritto Canonico latino*, Romae 2010, p. 10–11 and 36–37.

<sup>317</sup> Cf. R. Sobański, *Teoria prawa kościelnego...*, p. 122; cf. entry: *Act*, [in:] *Black’s Law Dictionary...*, p. 28.

<sup>318</sup> M. Zieliński, *Wykładnia prawa...*, p. 16; S. Wronkowska, *Podstawowe pojęcia prawa...*, p. 64.

<sup>319</sup> Cf. entry: *Article*, [in:] *Black’s Law Dictionary...*, p. 127.



word “canon” and to reserve it only for *CIC* 1983 to avoid misunderstanding and misleading, especially in quotation.

Norm is a rule of conduct, pattern to follow, model or standard of how to act, against which something or someone is judged. It is an indication of the way of acting, a prescription how to behave in certain situations or in face of certain fact. Norm explicitly orders what to do.<sup>320</sup> In the material sense, norm is a structure of values. In the formal sense, norm is a structure of obligation.<sup>321</sup>

Norm is always a general statement and can be applied in unspecified number of cases. That is why a norm must be later on applied to a concrete situation. It is built according to schema: subject of norm (S), in the certain conditions (C), that are equal to situation described in law (L), must lead to the result (R). In short: every C carries S to state R. The schema can be transformed into the concept of norm as a three-element-body.<sup>322</sup> In this concept typical norm consists of 1) hypothesis, 2) disposition, and 3) sanction. Hypothesis is a subject in certain conditions prescribed in law who is instructed to do something, which is in disposition. In case of different behavior of addressees of a norm, they will be punished as it is provided in sanction.<sup>323</sup>

Meanwhile, in *CIC* 1983 the terms “norm” is used interchangeably and with various attributes.<sup>324</sup> Sometimes “norm” (“norma”) is used to express an act of law, like in title of Book I of *CIC* 1983, titled: *General Norms (De Normis Generalibus)*. The books speak about acts of law: promulgation, interpretation, etc. Sometimes “norm” is used for an article (a canon), like in can. 1399: *General Norm (Norma Generalis)*. In many places in *CIC* 1983 “norma” stands for an “order” or a “prescription”, like in can. 633 § 3.

There is no need to use the term according to the given distinction all the time. The canonical tradition shows that canon lawyers managed without it. But at least a legislator has to be conscious of the difference and use this knowledge in his practice. It would help him in making law. Of course, the situation that the same object has the same name is absolutely required.

<sup>320</sup> Cf. entry: *Norm*, [in:] *Black's Law Dictionary...*, p. 1159–1160; Entries: *Norms, Rules*, [in:] B. H. Bix, *A Dictionary of Legal Theory*, New York 2004, p. 149, and p. 192–193.

<sup>321</sup> H. Pree, *Die evolutive Interpretation...*, p. 217.

<sup>322</sup> More about it: J. Śmiałowski, W. Lang, A. Delorme, *Z zagadnień nauki o normie prawnej*, Warszawa 1961.

<sup>323</sup> M. Zieliński, *Wykładnia prawa...*, p. 32.

<sup>324</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 152–155.

### 2.4.1. Canonical Norm

Norm is a source of every law.<sup>325</sup> It is a sentence that comes from text of law. It is not given by the legislator directly. The legislator does not write norms, at least he does not do it directly. He writes canons formulated in acts of law. No canon is applied but rather the norm that flows from it as a result of the process of interpretation. Usually norm is interpreted from a legal article or legal articles; sometimes even from different acts of law (cf. can. 17). It can be said that norm is hidden or coded in canon(s), and by interpretation it is uncovered.<sup>326</sup> So, the legislation is a process, which aims to encode a general norm into a form of canon.

It is a very important statement. The legislator must not look only at the sentences he wrote and analyze the external wordy shape, but he must go deeper and be imaginative enough to see how users of law in process of interpretation would extract the norms from the text, and what the norms would be. In this sense, the legislator is the first interpreter of his law, even before promulgation. During the process of drafting the law, he must try to foresee situations in which the norms from the canons would be interpreted and applied.

There are some important features of norm that are to be known to legislator. Every norm is general and abstract. Norm is general, because subject (S) of norm is indicated in general way. Norm is addressed to general category of subjects, like “Christifideles” (“Christ’s faithful,” can. 204 § 1), “clerici” (“clerics,” can. 273), or “Persona quae duodevigesimum aetatis annum explevit” (“A person who has completed the eighteenth year of age,” can. 97 § 1). Sometimes, the range of general category is clarified and determined by legislator, like in can. 228 § 2: “Laici debita scientia, prudentia et honestate praestantes” (“Lay people who are outstanding in the requisite knowledge, prudence and integrity”). To general category “laici” (“lay people”) some of their skills are added to tighten the range of the norm. The same can be done by indication of time (e.g., can. 920 § 2), place (e.g., can. 881), or purpose (e.g., can. 1448 § 1).

Another problem is with addressing norm to a specified gender. Due to changes in modern society gender-neutral drafting has been the norm for some years in many jurisdictions, which use the English language to draft legislation.<sup>327</sup> The need to implement gender-neutral drafting has occasioned

<sup>325</sup> P. Felici, *Norma iuridica e pastorale*, [in:] *La norma en el Derecho Canónico. Actas del III Congreso internacional de Derecho Canónico* [Pamplona, 10–15.10.1976], vol. 1, Pamplona 1979, p. 14.

<sup>326</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 153.

<sup>327</sup> D. Greenberg, *The Techniques of Gender-neutral Drafting*, [in:] *Drafting Legislation: a Modern Approach*, ed. C. Stefanou, H. Xanthaki, Burlington 2008, p. 63. This article on pages 63–76, explores the advantages and disadvantages of different techniques that can be adopted

consideration of a variety of techniques. Due to the fact that gender-neutral legislation is not required in the Church, it seems that addressing canonical norms to a person, or a Catholic is a good solution for church legislator and does not require further research.

Norm is abstract, because it regulates the situations described in an abstract way, that is, by giving some typical features for the situations. The more features of situation that are given by the legislator, the less cases the norm will concern. The higher level of abstraction a norm has, the wider its range. There is from the legislator's point of view a constant tension between abstract and detail norm.

Law can express general norms in many ways: "obligatione tenetur" ("to be obliged," can. 71), "gravamine prohibetur" ("wholly forbidden," can. 984 § 1), "prohibentur" ("to be forbidden," can. 286). The distinctions between the ways of expressing will are important for the legislator, but the importance should not be overestimated. It is a secondary matter in canon law.<sup>328</sup> The way of formulating the prohibition or order shows the importance of a regulated matter. The more strong language is used when the legislator wants to underline essential matters. Some sanctions can be also added. But much more important from these is to choose properly suitable act of law. Instruction must be an instruction; decree must be a decree, etc.<sup>329</sup>

One must be clear here. Thinking in terms of norm and normatively must not take away the thinking about law in the Church as canonical one.<sup>330</sup> The fact that the law order in the Church is "canonical" means not only that the name is different from civil one. It indicates the character of law in the Church. The term "norm" in canon law must be understood in canonical way.

All canons are given to protect and promote practice of faith. They are given to be freely accepted as the faith itself is. When a norm interpreted from them is not observed, that is usually a sin. For the faithful the sanction of sin is enough. The gravity of sin is the theological matter. That is why most canons in *CIC* 1983 are without sanctions. Of course, the postulate to remove all sanctions from church law would go too far. Some sanctions are needed to protect the community and individuals especially when the danger is serious. The legislator in the Church cannot take as his position the way of thinking according to which the law without sanction is the law of second quality canons (*normae imperfetae*). They both fit perfectly the community inside which they will be used, that is, the community of Church.

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by drafters who are required to abandon the practice of using masculine pronouns in reliance on the implicit inclusion of their feminine equivalent.

<sup>328</sup> R. Sobański, *Kościół – prawo...*, p. 275.

<sup>329</sup> R. Sobański, *Uwagi o prawodawstwie...*, p. 161.

<sup>330</sup> R. Sobański, *Kościół – prawo...*, p. 272.

As it was said, norms are rather not written directly, although some legal articles can make an impression of being norms. Some canons, like can. 1398, have a shape of norm: “Qui (S) abortum procurat (C), effectu secuto (L), in excommunicationem latae sententiae incurrit (R)”<sup>331</sup> Or like can. 1087: “Invalide matrimonium attentant, qui in sacris ordinibus sunt constituti”<sup>332</sup> which can be easily transformed into norm. Canons usually present action (can. 960), describe features of action (can. 336), circumstances of action (can. 976), or way of performing them (can. 964). Sometimes canons define terms (can. 992, can. 993), or declare something general (can. 113 § 1). But all of them are necessary to build up norm.

It must be added also that in penal law, including canonical penal law, one could distinguish two specific types of norms. One can be called *sanctioned norm* and the other *sanctioning norm*. The two types are linked together very closely; the sanctioned norm is the primary norm in sense of existence and sanctioning norm is the secondary norm.<sup>333</sup>

Sanctioned norm protects value or good. It can be present in an act of law or in any other document written by legislator. The norm in question is more like general statement about the aims of legislation. An example can be seen in the sentence from Litterae encyclicae *Evangelium vitae* no. 57: “Quapropter Nos auctoritate usi Petro eiusque Successoribus a Christo collata, coniunctum cum Ecclesiae catholicae Episcopis, ‘confirmamus directam voluntariamque hominis innocentis interfectionem graviter inhonestam esse semper’.”<sup>334</sup> It means that norm orders to protect and defend human life. Sanctioning norm provides sanction for violating sanctioned norm. The norm in question must be put in an act of law. Examples of such norm are sanctions from can. 1397 or can. 1398.<sup>335</sup>

The term “norm” appears in *CIC* 1983 in many contexts and in connection with many adjectives. Their analysis leads to the conclusion that the term norm is not absolutely needed for legislator to use it in his activity. He can use other names, like “regula,” “prescriptum,” “constitutio,” or “canon,” as well. They seem

<sup>331</sup> Can. 1398: “A person who actually procures an abortion incurs a latae sententiae excommunication.”

<sup>332</sup> Can. 1087: “Those who are in sacred orders invalidly attempt marriage.”

<sup>333</sup> Cf. H. Kelsen, *General Theory of Law and State*, transl. A. Wedberg, Clark 2009<sup>3</sup>, p. 63–64. For commentary on this, see: J. Stone, *Legal System and Lawyers’ Reasoning*, London 1964, p. 111–112; J. Lande, *Nauka o normie prawnej*, Lublin 1956, p. 9–10.

<sup>334</sup> Joannes Paulus PP. II, Litterae encyclicae *Evangelium vitae* de vitae humanae inviolabili bono, 25.03.1995, *AAS* 87 (1995), p. 401–522, no. 57 (“Therefore, by the authority which Christ conferred upon Peter and his Successors, and in communion with the Bishops of the Catholic Church, I confirm that the direct and voluntary killing of an innocent human being is always gravely immoral”).

<sup>335</sup> The cited canons also include sanctioned norms protecting human life.

to be synonymous.<sup>336</sup> But the usage of *n o r m* in making law and planning act of law can be of help for a more analytical approach to the text of law. It could bring benefits later on when text of law will be interpreted by users of law. Predicting this, the legislator can be more precise in expressing his will and idea.

### 2.4.2. Condensation and Division of Norms in Canons

The legislator use two techniques in drafting the law: 1) *c o n d e n s a t i o n* of norm in a legal article or 2) *d i v i s i o n* of norms in legal articles.<sup>337</sup> It is important that the legislator has in mind that every text will be interpreted and it means firstly transformed into norms.

Usually, due to economy of the legal text, that is, the need of making it shorter, the legislator applies the technic of condensation of norms in a legal article. It means that one legal article includes more than one norm. Typical example is can. 1447: “*Qui causae interfuit tamquam iudex, promotor iustitiae, defensor vinculi, procurator, advocatus, testis aut peritus, nequit postea valide eandem causam in alia instantia tamquam iudex definire aut in eadem munus assessoris sustinere.*”<sup>338</sup> There are several norms, in which conditions (C) change depending on subjects. Other example is can. 1031 § 1: “*Presbyteratus ne conferatur nisi iis qui aetatis annum vigesimum quintum expleverint et sufficienti gaudeant maturitate, servato insuper intervallo sex saltem mensium inter diaconatum et presbyteratum; qui ad presbyteratum destinantur, ad diaconatus ordinem tantummodo post expletum aetatis annum vigesimum tertium admittantur.*”<sup>339</sup> It consists of two sentences, which encode two norms.

Sometimes, reverse process can be applied, when legislator divides one norm into few legal articles. The reason for doing this is also economy of the text. By the division legislator omits repetitions of some parts of the text.

There are two kinds of division. One is *s y n t a c t i c d i v i s i o n*. It is a division of subjects of norms, or circumstances that are then placed in different legal

<sup>336</sup> For an extensive analysis and examples, see: R. Sobański, *Z zagadnień normy kanonicznej*, Prawo Kanoniczne 33 (1990) no. 1–2, p. 11–15.

<sup>337</sup> M. Zieliński, *Wykładnia prawa...*, p. 103–131. See also: A. Bator, entry: *Kondensacja norm*, [in:] *Wprowadzenie do nauk prawnych...*, p. 112–113 and A. Bator, entry: *Rozczłonkowanie norm w przepisach*, [in:] *Wprowadzenie do nauk prawnych...*, p. 154–155.

<sup>338</sup> Can. 1447: “Any person involved in a case as judge, promotor of justice, defender of the bond, procurator, advocate, witness or expert cannot subsequently, in another instance, validly determine the same case as a judge or exercise the role of assessor in it.”

<sup>339</sup> Can. 1031 § 1: “The priesthood may be conferred only upon those who have completed their twenty-fifth year of age, and possess a sufficient maturity; moreover, an interval of at least six months between the diaconate and the priesthood must have been observed. Those who are destined for the priesthood are to be admitted to the order of diaconate only when they have completed their twenty-third year.”

articles. There is no need to repeat many times the same. For instance, as it is in can. 540 § 1: “administrator paroecialis iisdem adstringitur officiis iisdemque gaudet iuribus ac parochus” (“parochial administrator is bound by the same obligations and has the same rights as a parish priest”), and there is no need to repeat “administrator paroecialis” (“the parochial administrator”) in every canon that concerns the pastor. Of course, some exceptions can be made, but still it is better to make the text shorter. The similarity of office a parish priest and the parochial administrator allows for this.

The next is the *content division*. It happens when legislator in one legal article presents general norm, but in other legal article modifies it. For instance, can. 1376: “Qui rem sacram, mobilem vel immobilem, profanat, iusta poena puniatur.”<sup>340</sup> But the canon must be read together with can. 1323–1326, where circumstances of abolishing penalty, diminished punishment or more serious punishment are presented. Also, the general canon is modified by, for instance, can. 1327: “Lex particularis potest alias circumstantias eximentes, attenuantes vel aggravantes, praeter casus in cann. 1323–1326,”<sup>341</sup> and together with law to which the canon in question refers to.

Sometimes the technic of condensation of norms does not reward. For instance, in *CIC* 1983, there are two canons similar in content: 1) can. 521 § 1: “Ut quis valide in parochum assumatur, oportet sit in sacro presbyteratus ordine constitutus,”<sup>342</sup> and 2) can. 546: “Ut quis valide vicarius paroecialis nominetur, oportet sit in sacro presbyteratus ordine constitutus.”<sup>343</sup> The only difference is in the subject of the two norms. But because of dissimilarity of *parochum* (an parish priest) and *vicarius paroecialis* (an assistant priest) legislator decided to make two canons. On the other hand, due to can. 540 § 1, there is no need for canon like this to be validly appointed *administrator paroecialis* (a parochial administrator), one must be in the sacred order of priesthood.

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<sup>340</sup> Can. 1376: “A person who profanes a sacred object, moveable or immovable, is to be punished with a just penalty.”

<sup>341</sup> Can. 1327: “A particular law may, either as a general rule or for individual offences, determine excusing, attenuating or aggravating circumstances, over and above the cases mentioned in can. 1323–1326.”

<sup>342</sup> Can. 521 § 1: “To be validly appointed a parish priest, one must be in the sacred order of priesthood.”

<sup>343</sup> Can. 546: “To be validly appointed an assistant priest, one must be in the sacred order of priesthood.”

### 2.4.3. Types of Legal Articles

There can be made many divisions between the types of legal articles. Canon law shares most of the divisions with civil jurisprudence.<sup>344</sup> An act of law can contain many different types of legal articles. In general an overall character of every act of law is built on majority of types of legal articles it contains. The articles decide the type of legal documents.

Taking into consideration the subject matter of canons, there are: general canons that present that which is regulated (can. 1400 § 1) and specific ones that decide how the matter is regulated (can. 489 § 1). Due to the way of determining and causing wanted effect, canons can be: ordering (can. 668 § 1), prohibiting (can. 285 § 3), or allowing (can. 905 § 1). There are referring legal articles. They do not regulate matter directly, but refer to other articles (can. 75, can. 135 § 4, can. 164), or indicate how the matter should be regulated or refer to special law (can. 360, can. 1402, can. 1403 § 1 and § 2). The referring articles can also derogate the entire act of law (can. 6 § 1) or only some articles of an act of law. The last case is in a situation of amendments.<sup>345</sup>

Another distinction among legal articles depends on circumstances in which norm from the articles is to be used. There are canons that bind absolutely (*ius cogens*) and its usage cannot be diminished or limited by users of law (can. 199, can. 1440 about norms from can. 1438 and can. 1439). There are other canons, which bind relatively the interested parties. These canons bind only when users have not decided differently (*ius depositivum*, can. 1465 § 1, can. 1508 § 2, can. 1514). There is a subtype in the last type (*ius semidepositivum*). It designates maximum and minimum range and allows shaping of the value of the matter to this designated limit or limits (can. 1420 § 4).

There are punitive articles. They consist of prohibition against taking certain action or prohibition against not taking certain action and penalty sanction. Sometimes the penalty is unspecified (can. 1392), sometimes it is specified (can. 1394 § 1).

There are articles that invalidate (*lex irritans*). It means that they make certain acts null (can. 1108 § 1). There are articles that incapacitate (*lex*

<sup>344</sup> See civil jurisprudence on this matter: S. Wronkowska, *Podstawowe pojęcia prawa...*, p. 36–39, and p. 73–75.

<sup>345</sup> As it was, in case of: Joannes Paulus PP. II, Litterae apostolicae motu proprio *Ad tuendam fidem* quibus normae quaedam inseruntur in Codice Iuris Canonici et in Codice Canonum Ecclesiarum Orientalium, 18.05.1998, AAS 90 (1998) no. 4, p. 459–460.

*inhabilitans*, can. 171 § 1). They must be distinguished from articles that provide for possibility of annulment of certain acts (can. 125, can. 126, can. 149 § 2).<sup>346</sup>

The last type of articles worth mentioning is ending canons. They consist of details of promulgation and *vacatio legis*.<sup>347</sup> Also, they can be an invocation to Jesus Christ, Our Lady or the Saints, and there can be blessing also and place, and date of signing the document.<sup>348</sup>

## 2.5. Suppositions in Law

Supposition in law (*praesumptio iuris*) is a special assumption that something is true, without proof of its veracity (cf. can. 1584).<sup>349</sup> It is a rule of law written by legislator in law itself. This rule is meant to help establish facts.

The legislator builds the suppositions on two foundations. One is the values of law, that is, situations desirable by legislator, and the second is vital statistics, which means that the legislator orders or takes as true a state that most usually occurs. There are also suppositions built on both, that is, values and statistics, for instance the supposition of the validity of marriage expressed by sentence “*matrimonium gaudet favore iuris*,” until the contrary is proven (can. 1060). Another example is that the father is he who is identified by a lawful marriage, unless by clear arguments the contrary is proven (can. 1138 § 1).

There are some distinctions in suppositions. One can single out 1) *praesumptio iuris tantum*, that is, it admits evidence to the contrary (as it is in case of: can. 15 § 2, can. 124 § 2, can. 1138 § 1, can. 1267 § 1), and 2) *praesumptio iuris ac de iure*, which admits no evidence to the contrary (e.g., can. 97 § 2, can. 99).

According to another division there is 1) *formal supposition* that orders to take certain fact or state as relevant and truthful unless otherwise proven (such a kind of supposition can be find in can. 1060), and 2) *material supposition* that orders to take as true state A when state B has been proven (see: can. 1061 § 2).

Generally speaking, in modern law systems, there are mainly these kinds of suppositions that can be overcome by facts to the contrary.<sup>350</sup> From the point of view of users of law, it is good when legislator offers some procedures

<sup>346</sup> For more, see: M. C. Heinzmann, *Le leggi irritanti e inabilitanti: natura e applicazione secondo il CIC 1983*, Roma 2002, p. 121–150.

<sup>347</sup> This decree, once published in *L'Osservatore Romano*, comes into force immediately.

<sup>348</sup> E.g., Rome, from the Offices of the Congregation for the Doctrine of the Faith, June 29, 1997, the Solemnity of the Blessed Apostles Peter and Paul.

<sup>349</sup> Entry: *Supposition*, [in:] *Black's Law Dictionary...*, p. 1578.

<sup>350</sup> Cf. S. Wronkowska, *Podstawowe pojęcia prawa...*, p. 152.



about how to prove facts to the contrary and what quality of arguments must be used in such a proof.

## 2.6. Uniformity of Law

It could be that the change in a law made by legislator is not made by writing a completely new law that replaces the old one, but rather by writing a separate law that changes the old law without, however, changing the original text of the law. Such situation causes some problems, first of all, for users of law. They have to work simultaneously not on one but two and sometimes more laws, that is, the original one and the law or laws that bring change to the original law. It causes technical problems and factual ones.<sup>351</sup>

It is a good habit of the legislator, when after every single change in law he issues a uniformed text of laws where corrections and improvements are contained. It is, of course, not promulgation, but simply publishing of editorial work and making it known. The uniformed text has the same authentic value as the original one. When such an action takes place it is up to the legislator. It is advisable that it would not be too long from enacting changes in law.

The uniformization of law can be done also not by legislator but by other subjects, for example, a publishing house. The acts of law made by the subjects do not have official status, they are not authentic, but they can be fairly used by users of law. They do not differ in content from the uniformed law issued by legislator.<sup>352</sup>

## 2.7. Collections of Laws

From the beginning of the Church there have been created sets of act of law promulgated by the competent ecclesiastical authorities, both in the West and in the East. The reasons behind these sets were to create and maintain legal sureness, with reference to the sources of norms.

The criteria of collecting documents was different. The collections were first (between 1<sup>st</sup>–6<sup>th</sup> c.) based on a chronological technique (chronological collections), like, for instance, in the West – *Codex canonum Ecclesiae Africanae* or in the East – *Corpus canonum orinetale* (*Collecio orientalis chronologica*, or *Syntagma canonum*).<sup>353</sup> Then a systematical method was followed (from 6<sup>th</sup> c.),

<sup>351</sup> S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki...*, p. 203.

<sup>352</sup> S. Wronkowska, *Podstawowe pojęcia prawa...*, p. 80.

<sup>353</sup> P. Gasparri in the *Praefatio* to *CIC* 1917 described the collection “*quae antiquarum collectionum fere omnium quasi principium et fons habenda est*”; see: *Codex Iuris Canonici*.

like in the West: *Collectio Hispana systematica*<sup>354</sup> and in the East – *Nomocanon XIV titulorum*,<sup>355</sup> and other so called – systematic collections.<sup>356</sup>

Later a more complicated method was used. The aim was not only to collect but also to critically reformulate. The pinnacle achievement was Gratian's work *Concordia discordantium canonum (Discordantium canonum concordia)*.<sup>357</sup> His technique, called *sic et non*, was to collect acts of law and other documents with legal significance using early scholastic method.<sup>358</sup> Gratian quoted a great number of authorities: the Bible, papal and conciliar legislation, statements from the Church Fathers, theological opinions, and extracts from Roman laws and secular law. He arranged the material systematically, according to subject matter. But his greatest contribution was the way in which he applied the newly emerging techniques of logic and dialectics to resolve conflicts between canons. The outcome of his work was a harmonized and ordered collection of all known and respected acts of law. This was something more than any another collection of laws; it was a new kind of book altogether. It was a clear and internally coherent systematization of the entire canon law.<sup>359</sup> Although *Decretum* was a private collection, it was widely accepted and received in the Church.<sup>360</sup>

From the legislative point of view, Gratian is also important because he gave a material foundation for the new method of making universal law. Its basic assumption is that the decision made for certain case to solve one

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Pii x Pontificis Maximi iussu digestus, Benedicti Papae xv auctoritate promulgatus, praefatione Emi. Petri Card. Gasparri et indice analytico-alphabetico auctus, Typis Polyglottis Vaticanis 1919, p. xxvi.

<sup>354</sup> PL 84, col. 23–92.

<sup>355</sup> PG 104, col. 975–1218.

<sup>356</sup> For more examples and bibliography see, e.g., C. van de Wiel, *History of Canon Law*, Louvain 1991, p. 41–52; T. Pawluk, *Wprowadzenie to studiów kanonistycznych*, Warszawa 1979, p. 95–101. See also: L. Kéry, *Canonical Collections of the Early Middle Ages (ca. 400–1140): a Bibliographical Guide to the Manuscripts and Literature*, Washington 1999.

<sup>357</sup> *Decretum magistri Gratiani*, 1140, [in] *Corpus Iuris Canonici*, vo. I, Lipsiae 1879, col. 1–1424. About the versions of titles of the work see: F. Heyer, *Der Titel der Kanonensammlung Gratians*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung 2 (1912), p. 336–342.

<sup>358</sup> More about Gratian's method, see: H. Pree, *Die evolutive Interpretation der Rechtsnorm im Kanonischen Recht*, Wien-New York 1980, p. 5–7; P. Hemperek, W. Góralski, *Komentarz do Kodeksu Prawa Kanonicznego z 1983 roku*, vol. 1, part 1, *Historia źródeł i nauki prawa kanonicznego*, Lublin 1995, p. 83–85. There were other canonists that used method like this, e.g., Isidore of Seville, Burchard of Worms, Anselm of Lucca, Hincmar of Reims, Abbo of Fleury, see: H. Pree, *Die evolutive Interpretation...*, p. 8; A. Winroth, *The making of Gratian's "Decretum"*, Cambridge 2000, p. 15–18.

<sup>359</sup> H. Pree, *Die evolutive Interpretation der Rechtsnorm im Kanonischen Recht*, Wien-New York 1980, p. 15.

<sup>360</sup> A. Stickler, *Historia iuris canonici latini*, vol. 1, *Historia fontium*, Augustae Taurinorum 1950, p. 210 ff; A. Winroth, *The making of Gratian's "Decretum"*, Cambridge 2000, p. 2.

problem becomes a universal and general norm that can be applied to other cases and problems.<sup>361</sup>

The next great collection of laws was *Decretalium (Liber extravagantium, or Liber extra)*<sup>362</sup> of Pope Gregory IX promulgated in 1234 by Bull *Rex pacificus*.<sup>363</sup> It was the first authentic and universal collection and by promulgation itself became a law and not, as it was earlier, just a gathering of laws. After this many other collections were made, for example, by Pope Boniface VIII *Liber sextus*<sup>364</sup> and later added to them *Regulae iuris*,<sup>365</sup> *Clementinae* of Pope Clement V,<sup>366</sup> *Extravagantes*<sup>367</sup> of Pope John XXII and *Extravagantes communes*.<sup>368</sup> They were all officially sanctioned by Pope Gregory XIII in Bull *Cum pro munere pastorali*, 1.07.1580,<sup>369</sup> and Decree *Emendationem*, dated 2.06.1582,<sup>370</sup> ordered that henceforth only the emended official text was to be used and that in the future no other text should be printed. They are now in *Corpus Iuris Canonici*.<sup>371</sup>

<sup>361</sup> R. Sobański, *Teoria prawa kanonicznego*, Warszawa 1992, p. 37.

<sup>362</sup> Gregorius PP. IX, *Decretalium compilatio*, 5.09.1234, [in:] *Corpus Iuris Canonici*, editio Lipsiensi secunda post Ae. L. Richter curas ad librorum manuscriptorum et editionis romanae fidem recognovit et adnotatione critica instruxit Ae. Friedberg, vol. II, Lipsiae 1881, col. 5–928.

<sup>363</sup> Gregorius PP. IX, Bulla *Rex pacificus* pia miseratione disposuit sibi subditos fore pudicos, pacificos et honestos, 5.09.1234, [in:] *Corpus Iuris Canonici*, vol. II, Lipsiae 1881, col. 1–4.

<sup>364</sup> Bonifacius PP. VIII, *Liber sextus decretalium*, 3.03.1298, [in:] *Corpus Iuris Canonici*, vol. II, Lipsiae 1881, col. 933–1124.

<sup>365</sup> Bonifacius PP. VIII, *De regule iuris*, 3.03.1298, [in:] *Liber sextus decretalium*, [in:] *Corpus Iuris Canonici*, vol. II, Lipsiae 1881, col. 1122–1124. The significance of the *Regulae Iuris* is well presented by: V. Bartocetti, *De Regulis Iuris canonici regularum in Libro VI Decretalium earumque praesertim cum Codice J. C. relationum brevis explanatio*, Roma 1955 or E. G. Roelker, *An Introduction to the Regulae iuris*, *The Jurist* 10 (1950), part 1: p. 217–303, and part 2: p. 417–436.

It must be here mentioned that in *Decretalium compilatio* of Pope Gregory IX there are in Titulus XLI: *De regulis iuris*, eleven rules of law similar to those presented in *Liber sextus* of Pope Boniface VIII; see: *Corpus Iuris Canonici*, vol. II, Lipsiae 1881, col. 927–928.

<sup>366</sup> Clemens PP. V, *Constitutiones*, 25.10.1317, [in:] *Corpus Iuris Canonici*, vol. II, Lipsiae 1881, col. 1133–1200.

<sup>367</sup> Joannes PP. XXII, *Extravagantes*, 1500, [in:] *Corpus Iuris Canonici*, vol. II, Lipsiae 1881, col. 1205–1236.

<sup>368</sup> Joannes PP. XXII, *Extravagantes decretales*, 1500, [in:] *Corpus Iuris Canonici*, vol. II, Lipsiae 1881, col. 1237–1312.

<sup>369</sup> Gregorius PP. XIII, Bulla *Cum pro munere pastorali* humeris nostris inuncto, 1.07.1580, [in:] *Corpus Iuris Canonici*, vol. I, Lipsiae 1879, col. LXXIX–LXXXII.

<sup>370</sup> Gregorius PP. XIII, *Decretum Emendationum* decretum locorumque a Gratiano collectorum, 2.06.1582, [in:] *Corpus Iuris Canonici*, vol. I, Lipsiae 1879, col. LXXIX–LXXX.

<sup>371</sup> *Corpus Iuris Canonici*, editio Lipsiensi secunda post Ae. L. Richter curas ad librorum manu criptorum et editionis romanae fidem recognovit et adnotatione critica instruxit Ae. Friedberg, vol. I–II, Lipsiae 1879–1881.

## 2.8. Codification of Law

Codification is the process of compiling, arranging, and systematizing laws of given jurisdiction, or of a branch of the law into an ordered code. The result of the process is a code.<sup>372</sup> A code covers usually only one of the fields of law: civil law, penal law, family law, public law, administrative law, etc.<sup>373</sup>

Although a code is promulgated as an act of law, making law is not the same as codification.<sup>374</sup> Civil jurisprudence sees big advantage in codification because a code is usually more stable than a singular act of law. Preparation of the code is entrusted to special commissions and they consist of outstanding specialists.<sup>375</sup> Today in modern states the usage of codes is very common.<sup>376</sup>

Codification has a long history.<sup>377</sup> But the Church did not make it its point of interest until the beginning of 20<sup>th</sup> century.<sup>378</sup> The reasons were practical. During codification, law is renewed, simplified, standardized and unified. The first code was promulgated by Pope Benedict xv in 1917.<sup>379</sup>

After the Second Vatican Council many things changed in the Church. *Aggiornamento* has changed the way of thinking about the Church<sup>380</sup> and also about its law.<sup>381</sup> It was called *novus habitus mentis*. The term was used by Paul

<sup>372</sup> Entry: *Codification*, [in:] *Black's Law Dictionary...*, p. 294.

<sup>373</sup> As the only *Allgemeines Landrecht für die Preußischen Staaten*, Berlin 1794, had over 19.000 articles and included all state law.

<sup>374</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 122.

<sup>375</sup> S. Wronkowska, *Podstawowe pojęcia prawa...*, p. 117.

<sup>376</sup> R. C. van Caenegem, *European Law in the Past and the Future: Unity and Diversity over Two Millennia*, New York 2002, p. 1 ff.

<sup>377</sup> The first code was *Codex Theodosianus* issued by the Emperor Theodosius II in 438. It was a compilation of the laws of the Roman Empire under the Christian emperors since 312.

<sup>378</sup> For a concise history of the process of codification and reference bibliography, see: C. van de Wiel, *History of Canon Law*, Louvain 1991, p. 165 ff.

<sup>379</sup> *CIC* 1917 was promulgated on 27.05.1917 by Pope Benedict xv, *Constitutio Apostolica Providentissima Mater Ecclesia*, *AAS* 9 (1917) II, p. 5–8. The code was in force from: 19.05.1918.

<sup>380</sup> Joannes pp. xxiii, *Sollemnis allocutio ad emos patres cardinales in urbe praesentes habita, die xxv ianuarii anno mcmlx*, in *coenobio monachorum benedictinorum ad S. Pauli extra moenia, post missarum sollemnia, quibus beatissimus pater in patriarchali basilica ostiensis interfuerat*, 25.1.1959, *AAS* 51 (1959), p. 65–69, especially p. 68–69. The meaning of the word *aggiornamento* is analyzed in: J. Gręźlikowski, *Odnowa prawa kanonicznego w perspektywie aggiornamento*, [in:] *Sobór Watykański II. Inspiracje i wpływ na Kodeks Prawa Kanonicznego z 1983 roku*, ed. K. Burczak, Lublin 2006, p. 49–52.

<sup>381</sup> The connections of the Council and canon law are analyzed in: W. Góralski, *Inicjatywa papieża Jana xiii dotycząca reformy prawa kanonicznego na tle Soboru Watykańskiego II*, [in:] *Sobór Watykański II. Inspiracje i wpływ...*, p. 27–35.

vi<sup>382</sup> and was repeatedly analyzed and commented on by many canonists.<sup>383</sup> It was also judged from the historical point of view.<sup>384</sup> The whole outlook on the Church as community was modified.<sup>385</sup> Accordingly, the law needed to be updated, and the code was to be changed, too.<sup>386</sup> There were many acts of law issued to bring into life the teachings of the Council. These and other argumentations led to a thorough renewal of the code.<sup>387</sup>

There was an idea to precede the new code with a fundamental law. In the period from 1965 to 1980, seven concepts and two alternative concepts of a fundamental church law *Lex Ecclesiae Fundamentalis* circulated.<sup>388</sup> However, this

<sup>382</sup> The present canon law is under the sign of the expression “novus habitus mentis,” that is, “a new attitude of mind.” It comes from Pope Paul vi. He used it in his Allocution to the Commission for the Revision of the Code and made a comment which was to reflect not only the unique approach adopted in the revision process but also an insight that would resonate with a particular period in the history of canon law. He remarked: “Nunc admodum mutatis rerum condicionibus – cursus enim vitae celerius ferri videtur – ius canonicum, prudentia adhibita, est recognoscendum: scilicet accommodari debet novo mentis habitui, Concilii Oecumenici Vaticani Secundi proprio, ex quo curae pastorali plurimum tribuitur, et novis necessitatibus populi Dei,” see: Paulus pp. vi, Allocutio ad E. mos Patres Cardinales et ad Consultores Pontificii Consilii Codici Iuris Canonici recognoscendo, 20.11.1965, *AAS* 57 (1965), p. 985–990, here p. 988. See also: Paulus pp. vi, Allocutio Perlibenter sane iis qui in Gregoriana Studiorum Universitate «Cursui renovationis canonicae pro iudicibus aliisque tribunalium administris» interfuerunt, 14.12.1973, *AAS* 66 (1974), p. 10; Paulus pp. vi, Allocutio ad Tribunalis Sacrae Romanae Rotae Decanum, Praelatos Auditores, Officiales et Advocatos, novo Litibus Iudicandis ineunte anno, de protectione iustitiae perfectiore reddenda, 4.02.1977, *AAS* 69 (1977), p. 147–153, especially: p. 153.

<sup>383</sup> L. Örsy, *The Meaning of “novus habitus mentis”: the Search for New Horizons*, *The Jurist* 48 (1988), p. 429–447. L. Örsy, “*Novus habitus mentis*”: *New Attitude of Mind*, *The Jurist* 45 (1985), p. 251–258; R. C. Lara, *Some Reflections of the Proper Way to Approach the Code of Canon Law*, *CLSA Proceedings* 46 (1984), p. 32–35.

<sup>384</sup> B. E. Ferme, *Ius condere: Historical Reflections on the 1983 Code*, *The Jurist* 63 (2003), p. 171–192.

<sup>385</sup> S. Tymosz, *Nauka Soboru Watykańskiego II o Kościele jako Ludzie Bożym w normach Kodeksu Prawa Kanonicznego z 1983 r.*, [in:] *Sobór Watykański II. Inspiracje i wpływ na Kodeks Prawa Kanonicznego z 1983 roku*, ed. K. Burczak, Lublin 2006, p. 145–164.

<sup>386</sup> Generally about it, see: F. McManus, *The Second Vatican Council and the Canon Law*, *The Jurist* 22 (1962), p. 259–286. For specific subjects of modifications, see, for instance, for penal law: A. G. Miziński, *Wpływ nauki Soboru Watykańskiego II na przepisy kościelnego prawa karnego w KPK 1983 r.*, [in:] *Sobór Watykański II. Inspiracje i wpływ...*, p. 37–60; for particular Churches: J. Dyduch, *Odzwierciedlenie nauczania Soboru Watykańskiego II o Kościołach partykularnych w Kodeksie Prawa Kanonicznego*, [in:] *Sobór Watykański II. Inspiracje i wpływ...*, p. 37–60; for diocesan bishop: E. Górecki, *Wpływ ustaleń soborowych na kształt norm dotyczących urzędu biskupa diecezjalnego w KPK z 1983 r.*, [in:] *Sobór Watykański II. Inspiracje i wpływ...*, p. 111–122; for lay members of Christ’s faithful: T. Rozkrut, *Normy KPK z 1983 r. o roli świeckich w Kościele jako wynik nauki Soboru Watykańskiego II*, [in:] *Sobór Watykański II. Inspiracje i wpływ...*, p. 123–144.

<sup>387</sup> There were also voices challenging the form of code as suitable for church law, for instance, see: S. Kuttner, *The Code of Canon Law in Historical Perspective*, *The Jurist* 28 (1968), p. 139.

<sup>388</sup> About the genesis of *Lex Ecclesiae Fundamentalis* and work progress on the project, see: R. Sobański, *Refleksje o kościelnym prawie fundamentalnym*, *Śląskie Studia Historyczno-Teologiczne*

fundamental church law was never promulgated. Some of regulations were included in *CIC* 1983 and *CCEO* 1990.

The preparations for the codification were long and laborious.<sup>389</sup> The work was directed and carried out by ten principles of the renewal of the code.<sup>390</sup> They served as guidelines during the process of revising the code in question.<sup>391</sup>

Finally, Pope John Paul II promulgated the new code for Latin Church<sup>392</sup> and for Eastern Catholic Churches.<sup>393</sup> The code was meant to systematize all catholic law, but the idea was not rigorously put into practice. Some realms of life of the Church are out of the code, like: the Roman Curia, of which the constitution and competence is defined by special law (can. 360)<sup>394</sup>; or regulation for the period when the Roman See is vacant, or completely impeded, for which the special laws enacted for these circumstances are to be observed (can. 335).<sup>395</sup> Other realms that are not included in the codes are: process of canonization,<sup>396</sup> and chaplains to the armed forces. These are governed by special laws (can. 569).<sup>397</sup> Also, the codes do not determine the rites to be observed in the celebration of liturgical actions (can. 2; *CCEO* 1990 can. 3). The

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5 (1972), p. 43–57, A. Gauthier, *The progress of the Lex Ecclesiae Fundamentalis*, *Studia Canonica* 12 (1978), p. 377–388.

<sup>389</sup> The history of stages was presented in *Sacrae disciplinae leges*, p. VII–X and in *Praefatio*, p. XIX–XXX. For critical approach see: H. Smitz, *Der Weg zum Codex Iuris Canonici von 1983*, [in:] *Handbuch des Katholischen Kirchenrechts*, ed. J. Listl, H. Schmitz, Regensburg 1992, p. 50–56.

<sup>390</sup> They were submitted to the examination of a general session of the synod of bishops (4.11.1967) and approved. They were published in *Communicationes* 1 (1969), p. 77–85 as *Principia quae Codicis iuris canonici recognitionem dirigant*, and they are also in *Praefatio*, p. XXI–XXIII.

<sup>391</sup> For commentary on the principles of the renewal of the code, see: R. Sobański, *Nowy Kodeks Prawa Kanonicznego jako zjawisko kościelne i prawne*, [in:] *Duszpasterstwo w świetle nowego Kodeksu Prawa Kanonicznego*, ed. J. Syryjczyk, Warszawa 1985, p. 31–36; G. Ghirlanda, *Wprowadzenie do prawa Kościelnego*, przeł. S. Kobiółka, Kraków 1996, p. 71–101.

<sup>392</sup> *CIC* 1983 was promulgated on 25.01.1983 by Joannes Paulus PP. II, *Constitutio Apostolica Sacrae disciplinae leges Codex Iuris Canonici promulgatur*, *AAS* 75 (1983) II, p. VII–XIV. The code has been in force from: 27.11.1983.

<sup>393</sup> *CCEO* 1990 was promulgated on 18.10.1990 by Joannes Paulus PP. II, *Constitutio Apostolica Sacri canonice Codex Canonum Ecclesiarum Orientalium promulgatur*, 18.10.1990, *AAS* 82 (1990), p. 1033–1044. The Code has been in force from: 1.10.1991.

<sup>394</sup> Joannes Paulus PP. II, *Constitutio Apostolica Pastor Bonus* de Romana Curia, 28.06.1988, *AAS* 80 (1988), p. 841–930.

<sup>395</sup> Joannes Paulus PP. II, *Constitutio Apostolica Universi dominici gregis* de Sede Apostolica vacante deque Romani Pontificis electione, 22.02.1996, *AAS* 88 (1996), p. 305–343.

<sup>396</sup> Joannes Paulus PP. II, *Constitutio Apostolica Divinus perfectionis Magister* modus procedendi in Causarum canonizationis instructione recognoscitur et Sacrae Congregationis pro Causis Sanctorum nova datur ordinatio, 25.01.1983, *AAS* 75 (1983) I, p. 349–355.

<sup>397</sup> Joannes Paulus PP. II, *Constitutio Apostolica Spirituali militum curae* qua nova canonica ordinatio pro spirituali militum curae datur, 21.04.1986, *AAS* 78 (1986), p. 481–486.

argument that these acts of law are an integral part of the main body of law for the Church is that these acts of law were published together with *CIC* 1983.<sup>398</sup>

This brief introduction can be informative for a legislator and can give him some clues for his work. First of all, the general idea of codification in the Church resembles the idea of codification in state. The benefits of codification are similar. The technical rules for building body of a code are almost the same. But differently from civil law, the Church code does not have to include all canonical law. The code in the Church is to facilitate access to the most important parts of regulations. The next thing to be kept in mind is that the principles of renewal are still to be used by legislator. They present proper way of thinking about church law.

## 2.9. Some of the Techniques of Legislative Drafting

Legal text differs from other kinds of text. Drafting of the law must be done in special way, that is, according to special rules. The legislator is obliged to write law in a special way. The rules and methods of drafting or formulating text of law are called the techniques of legislative drafting.

Generally speaking, their aim is to help legislator in making law of good quality that is: legal articles and acts of laws.<sup>399</sup> It is mostly done by helping him to formulate legal text in clear language.<sup>400</sup> The clear language can be defined as the idiomatic and grammatical use of language that most effectively presents

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<sup>398</sup> See, for instance, in *Code of Canon Law Annotated...*, there are: *Pastor Bonus*, p. 1422–1551; *Universi dominici gregis*, p. 1556–1613; *Divinus perfectionis Magister*, p. 1380–1409; *Spirituali militum curiae*, p. 1410–1421.

<sup>399</sup> W. Gromski, entry: *Technika prawodawcza*, [in:] *Wprowadzenie do nauk prawnych...*, p. 233–234.

<sup>400</sup> H. Jadacka, *Poradnik językowy dla prawników*, Warszawa 2006<sup>2</sup>, p. 9.

ideas to the readers.<sup>401</sup> The clear language is plain, concise, simple, direct and consistent.<sup>402</sup> The legislator is to follow them while taking legislative action.<sup>403</sup>

### 2.9.1. Wording

Every single word in legal text has to communicate something to user of law. Economy of words in legislation means that every word is used purposely and bears its meaning. There is no space in legal text for empty and useless words added only as a kind of ornament. There are some reasons behind the need for economy of words. First, unnecessary words, sentences or structural parts of an act of law are dangerous for the meaning of the text. They can cause the risk that an interpretation of elements in question would disrupt the process of interpretation and mislead users of law. Secondly, economy of words is to make act of law shorter. Act of law becomes shorter and more concise. It is good for usage by the interpreter or for reference. It is also better for emending text later on. Economy of words is a feature of good legislative drafting.

Another rule for wording is that the words used by legislator must be simple, popular among users of law, or at least widely used in law context.<sup>404</sup> Archaic

<sup>401</sup> A problem must be here noticed. Studies have identified specific linguistic characteristics for languages. For instance, the English legal lexicon is full of archaic words, formal and ritualistic usage, word strings, common words with uncommon meanings and words of over-precision, among others. In legal English, complex structures, passive voice, multiple negations, and prepositional phrases are extensively used. German legal texts commonly employ multiple attributive adjectives. In legal German, the terminology is often highly abstract, with a high frequency of the use of nouns. Legal text in German is characterized by deference to accuracy, clarity, completeness and complex syntax. "To sum up, the foregoing characterization of legal language is a general description of the linguistic markers believed to be common in most if not all legal languages in varying degrees." See: D. Cao, *Translating Law*, Clevedon-Buffalo-Toronto 2007, p. 21–23, and given there literature.

<sup>402</sup> Cf. B. A. Garner, *The Elements of Legal Style*, New York 2002<sup>2</sup>, p. 5; cf. R. Atre, *Legislative Drafting...*, p. 12–22.

<sup>403</sup> For further reference, see, e.g.: M. Ruthnaswamy, *Legislation: Principles and Practice*, Delhi 1974; R. Dickerson, *The Fundamentals of Legal Drafting*, Boston 1986<sup>2</sup>; B. Child, *Drafting Legal Documents: Principles and Practices*, St. Paul 1992<sup>2</sup>; G. G. Thornton, *Legislative Drafting*, London 1996<sup>4</sup>, B. R. Atre, *Legislative Drafting. Principles and Techniques*, New Delhi 2006<sup>2</sup>; G. Bowman, *Art of Legislative Drafting*, European Journal of Law Reform 7 (2007) no. 1–2, p. 3–18; J. Wróblewski, *Zasady tworzenia prawa*, Warszawa 1989; S. Wronkowska, M. Zieliński, *Problemy i zasady redagowania tekstów prawnych*, Warszawa 1993; M. Błachut, W. Gromski, J. Kaczor, *Technika prawodawcza*, Warszawa 2008; *Zarys metodyki pracy legislatora. Ustawy. Akty wykonawcze. Prawo miejscowe*, ed. A. Malinowski, Warszawa 2009.

<sup>404</sup> *CIC* 1983 uses words taken from: 1) Roman law, e.g., "dispensatio" (can. 85); "presumptio" (can. 1584); 2) popular language: "incola," "advena," "peregrines" (can. 100); 3) theological language: "sacramentum" (can. 840); "sacramentalium" (can. 1166); 4) language used in church context: "dioecesis" (can. 369), "paroecia" (can. 515 § 1). For general treatment of the problem, see, e.g., A. Gauthier, *Roman Law and Its Contribution to the Development of Canon Law*,



words should be avoided. Also, expressions borrowed from foreign languages must be kept to a minimum. They are justified only when they have been integrated with language of users of law. If necessary, an explanation may be added to clarify the term or phrase. Simplicity of language makes communication of law between legislator and the users of law easy to understand. The terminology should be taken from acts of law with higher authority. A piece of subsidiary legislation must not differ from that used in a main act of law. The same rule also applies to all documents that are more or less parallel and apply to the same area of activities.

Another important rule is that usage of the meaning of the word must be stable. It is the essential rule in law. Different words must not be used to express the same idea. The same word must not be used to express different ideas. In legislative drafting, monotony is rather positive quality.

All these rules must be respected simultaneously. None of them can be treated as the main rule. For instance, the principle to use simple language cannot override other rules or restrict the legislator in writing precisely what he wants to order. Accuracy should not be sacrificed for the sake of brevity, or simplicity.

## 2.9.2. Style

The style is a manner in which words are combined according to general rule: proper words in proper places.<sup>405</sup> A good style is required for consistency and clarity of text. Several problems need to be mentioned in this context.<sup>406</sup>

### 2.9.2.1. Legal Character

The draft of legislation is not poetry or prose. It does not have to be pleasant to read. Its main goal is not to entertain a reader but to send him an understandable, that is, easy to decode message. So the variations of words or phrases for pleasure or elegance are undesirable.

Good style in law requires drafting in accordance with the rules of grammar that normally apply to every document, not to spoken language. Even if it bears no strict orders but rather exhortation, it is not a homily. It must not include expressive signs such as exclamation marks, repetitions, hyperboles or others. An act of law does not express desires or wishes. It orders, authorizes, prohibits, or imposes penalties and it does it in a uniformed way.

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Ottawa 1996; A. Dębiński, *Ecclesia vivit lege romana. Znaczenie prawa rzymskiego dla rozwoju prawa Kościoła łacińskiego*, [in:] *Starożytne kodyfikacje prawa*, ed. A. Dębiński, Lublin 2000, p. 131–145; A. Dębiński, *Kościół i prawo rzymskie*, Lublin 2008, s. 118–155.

<sup>405</sup> B. A. Garner, *The Elements of Legal Style*, New York 2002<sup>2</sup>, p. 3 and p. 6.

<sup>406</sup> Cf. B.R. Atre, *Legislative Drafting...*, p. 3–10.

Although the matter that is regulated by law is complex, it does not justify the legislation being complicated. A good drafter can express even a complex reality in a simple way. The legislator is not supposed to disclose everything in one document but he must count on an interpreter and presume that he will do his job duly.

The next feature of proper legal style is directness of expressions. It is good when sentences are written as norm and are straight and devoid of unnecessary politeness. It is especially important when a duty or obligation is conferred or imposed.

Not every sentence in act of law must formulate a hypothesis and start with interrogative pronouns, interrogative determiner, interrogative pro-form, interrogative pro-adverb, like for example: “qui” (can. 84, can. 1596 § 3) or “quicumque” (can. 99), or “persona quae” (can. 97 § 1), usually translated in English version of *CIC* 1983 by: “whoever” or in construction: “a person who.” It is easier for the legislator to use indicative form. What is important is that sentences would be easily transformed into the conditional sentences.<sup>407</sup>

An act of law must speak in the present tense. The future and the past are used only to express the temporal relationship between two events. The next element of style is punctuation marks. Punctuation is an element of the sentence that creates order in the text and allows dividing long sentence into smaller parts that express one meaning. It is important to notice that sometimes the meaning of a provision depends on its punctuation.<sup>408</sup>

Parentheses or brackets are normally used to add non-essential items of information, but sometimes they bear definition. They must not be used too often, because they interrupt the flow of the sentence. The problem is with acronyms. Only those that are commonly used and familiar may be used in an act and even they should be explained in an act.

<sup>407</sup> R. Sobański, *Metodologia prawa...*, p. 89.

<sup>408</sup> There was a dispute called *comma pianum*. Pope Pius v issued Bulla *Ex omnibus afflictionibus* de errores Michaëlis Baii de hominis natura et de gratia, 1.10.1567 (DS 1901–1980) to condemn views of theologian Baius. The Bull was not punctuated in its original form. The affair of the *comma pianum* arose from the fact that the sense of the Bull was totally determined by the placing of a single comma. It could be understood as total condemnation of Baius' views or the views were possible to accept. See: D. Oko, *Łaska i wolność. Łaska w Biblii, nauczaniu Kościoła i teologii współczesnej*, Kraków 1997, p. 150; see also: M. W. F. Stone, *Michael Baius (1513–89) and the Debate on “Pure Nature”*: *Grace and Moral Agency in Sixteenth-Century Scholasticism*, [in:] J. Kraye, R. Saarinen, *Moral Philosophy on the Threshold of Modernity*, Dordrecht 2005, p. 64, where the history of the dispute and the possible understanding of the Bull are presented, p. 51–90.

### 2.9.2.2. Positive and Negative Statements

It seems that the legislator who uses English language to formulate law should prefer positive statements to negative ones. They are usually easier to understand. They are likely to be more direct and straightforward. For instance, the sentence: “Administrative acts extend to those cases expressly stated” is probably easier to follow than “Administrative acts must not be extended to cases other than those expressly stated,” but in Latin the same sentence is: “Actus administrativus non debet ad alios casus praeter expressos extendi” (can. 36 § 2). And there can be given another example. The sentence: “A precept to which a penalty is attached is to be issued when the matter has been very carefully considered” seems to be more understandable than the sentence: “A precept to which a penalty is attached is not to be issued unless the matter has been very carefully considered.” Latin text is: “Praeceptum poenale ne feratur, nisi re mature perpensa” (can. 1319 § 2). As it can be seen, in Latin the postulate to prefer positive statements more than negative ones is not proper due to rules that govern the language.

It would be wrong to try to express everything as positive statements even in English. In particular, a double negative does not always equate to a positive. The drafter needs to take great care. Each case depends on its own circumstances. It is wrong to lay down rules applicable to all cases.

It must be underlined that choice between negative or positive statements depends on original language of text of law. What is a reasonable postulate in case of one language does not have to be workable in another, as it was demonstrated.

### 2.9.2.3. Active or Passive Voice

Generally speaking, the same sentence can be expressed in two forms: the active voice and the passive voice. It seems that law that is written in English should be in active voice. First of all, because readers who use English generally find it easier to understand active voice. Also because, the active voice better expresses legislator’s will. Active voice sounds like an order and the sentence of law is, after all, a command. The advantage of the active voice is that the subject of the sentence names performer of the action named in verb. The passive form either omits, or reduces the emphasis on the person performing the action. Using passive voice may lead to a lack of directness.<sup>409</sup>

But it would be wrong to assert that the drafter must always use the active voice in English. Sometimes he uses the passive deliberately. Especially, when an active subject is not described in detail, and the matter concerns objects. For example: “Confirmation must be given in writing” – “Confirmatio in scriptis

<sup>409</sup> G. G. Thornton, *Legislative Drafting*, London 1996<sup>4</sup>, p. 60.

dari debet” (can. 179 § 3), or: “The first day is not to be counted in the total” – “Dies a quo non computatur in termino” (can. 203 § 1). Passive voice is perfectly justified in case of general prohibitions or where the context clearly designates the person responsible for applying the rule. So there is no automatic rule that everything should be expressed in the active rather than the passive. The golden rule is that you need to think about each case based on its merits.

Here again, as above, a reservation must be made. The postulate about the active and passive voice is to be applied in English texts. In another language the matter could be seen differently as it was demonstrated in Latin.

### 2.9.3. Orderliness

An act of law should be built according to special schema. It can be called legal orderliness. It is advisable that the numerous acts would be constructed alike as they come from the same legislator. Legal orderliness requires of any act of law that it contains: title, structure, parts, and enumerations. All these elements are important for legal text. The larger an act is, the more significant it is. The order of presenting norms is of great importance for users of law. It has a special meaning in process of interpretation and must be taken into consideration.<sup>410</sup>

#### 2.9.3.1. Title

Every act of law should have a title. A title must be adequate to the essences of contained norms and their legal significance and importance. The title of the act of law must render the importance and legal significance of the act of law and give an outline of what the act of law norms. The practice of the Church is that the titles of universal law documents are taken from the first words of the document.<sup>411</sup>

#### 2.9.3.2. Preface

Sometimes after the title a preface can be added. There are some arguments in favor and against this practice.

First of all, preface can clarify the legislator’s intentions and motives for taking legislative action.<sup>412</sup> *Ratio legis est anima legis* and it can be presented in the

<sup>410</sup> Cf. K. Mörsdorf, *Zur Neuordnung der Systematik des Codex Iuris Canonici*, Archiv für katholisches Kirchenrecht 137 (1968), p. 5.

<sup>411</sup> E.g. Joannes Paulus PP. II, *Constitutio Apostolica Sacrae disciplinae leges Codex Iuris Canonici promulgatur*, AAS 75 (1983) II, p. VII–XIV; the first sentence is: „Sacrae disciplinae leges Catholica Ecclesia, procedente tempore, reformare ac renovare Consuevit, ut, fidelitate erga Divinum Conditorem Semper servata, eadem cum salvifica missione ipsi concredita apte congruerent”, p. VII.

<sup>412</sup> For instance: *To protect the faith of the Catholic Church against errors.*

preface. By this, the preface can be a factor of mobilization and participation of users of law. The part in question can also be a presentation of origin and history of the act of law. All these can underline the significance of law. Adding preface for these reasons is a common practice, especially after the Second Vatican Council. Since then, the new documents have consisted of two parts: general part, which works like extended preface, and specific part, where norms are placed.<sup>413</sup>

Although civil legislation technique uses a rather different rule: *finis legis non cadit sub lege*, for the church lawmaker using this rule is not very appropriate.<sup>414</sup> It is enough that civil legislator just orders something without explanations. He has at his disposal means of constraint to execute subordination from citizens.

In the Church, the main means to urge observance of law is a word used in explanatory way. Church legislator must do everything possible to make the connection between observing law and practicing faith easier for users of law.<sup>415</sup>

Sometimes preface can be very useful for another reason. Especially but not exclusively in case of “executory” acts of law, when it is advisable to legitimize the act of law by citing another act of law which serves as the foundation of the “executory” one.<sup>416</sup>

From the other point of view, adding preface can be judged as not advisable. It must be remembered that the rules of interpretation of law are to be applied to the whole text of law, including preface. It is safer for legislator and for the readability of his *mens legislatoris* to write a special non-legal document, which would not be a law, and to include in it what was meant to be in preface.

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<sup>413</sup> See, for instance: Paulus PP. VI, Constitutio Apostolica *Indulgentiarum doctrina* Sacrarum Indulgentiarum recognitio promulgatur, 1.01.1967, *AAS* 59 (1967), p. 5–24; Joannes Paulus PP. II, Litterae apostolicae motu proprio *Ad tuendam fidem* quibus normae quaedam inseruntur in Codice Iuris Canonici et in Codice Canonum Ecclesiarum Orientalium, 18.05.1998, *AAS* 90 (1998), p. 457–461.

<sup>414</sup> About the rule from moral point of view, see: J. Fuchs, *Theologia moralis generalis*, vol. I, Romae 1971<sup>2</sup>, p. 143 and K. Demmer, J. F. Keenan, *Shaping the moral life: an approach to moral theology. Moral traditions & moral arguments*, Washington 2000, p. 83.

<sup>415</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 237.

<sup>416</sup> See, for instance: Congregatio pro Doctrina Fidei, Modifiche alle “Normae «de gravioribus delictis»”, 15.07.2010, *L'Osservatore Romano* 150 (2010) no. 161, 16.07.2010, art. 1 § 1 explained that: “Congregatio pro Doctrina Fidei, ad normam art. 52 Constitutionis Apostolicae Pastor bonus, cognoscit delicta contra fidem et delicta graviora, tum contra mores tum in sacramentorum celebratione commissa atque, ubi opus fuerit, ad canonicas sanctiones declarandas aut irrogandas ad normam iuris, sive communis sive proprii, procedit, salva competentia Paenitentiariae Apostolicae et firma manente Agendi ratione in doctrinarum examine.”

### 2.9.3.3. Division

When the act of law is well divided, it is well organized. In such a document, it is easier for users of law to find the needed act of law and inside the law to locate a required regulation. The drafter of law shall normally observe the following rules in structuring the draft legislation.

The main body of any act of law consists of prescriptive sentences. They can be set into smaller groups in accordance with their subject. The model of good organization of any act of law is *CIC* 1983. The code is divided into books (*liber*), and a book consists of titles (*titulus*); title is sometimes divided into chapters (*caput*). The basic unit of *CIC* is canon (*canon*), and sometimes canon is divided into paragraphs or directly into numbers, of course, sometimes some paragraphs are also divided into numbers. It is advisable that the orderliness of any act of law would follow this example but in smaller documents the presented division must be applied with necessary changes. Anyway, the basic features of the model must be respected.

First of all, every unit must have its own typical name and number. Units of higher level start with a certain word, for example: book, title, chapter, lower with canon, paragraph, or their abbreviations like: “can.,” “par.” (“para.”), or a sign: “§.” It is important for giving the reader a clue about the hierarchical structure of that act of law. After the characteristic name, there must follow the number or the name that characterizes the idea of the unit or both number and name. It is not recommended to divide into too many organizational units. It is because the hierarchy of units in act of law must be visible, and easy to read. Too many units make the order of units unclear.

The second rule is that every unit, no matter if a large one or a small one, must enclose one specific idea or a group of similar ideas. Units of the same theme must be concentrated. It helps the reader to find all important regulations for a specific matter. Sometimes units, especially more important ones, can have their own titles. There must also be a sentence regarding the date on which the law is in effect. Of course, the legislator cannot forget the place, date and his signature.

### 2.9.3.4. Enumeration

Enumerations, that is, lists of a number of things one by one should not be excessive. There are some reasons for this. Firstly, enumeration that is too long requires from the reader a constant referring to the beginning of a sentence. Secondly, enumerations are rarely complete and the longer they are, the more the reader will be tempted to conclude that the items not included have been deliberately excluded. It is good to write exactly whether enumeration

is exhaustive. It means that it contains all the items that legislator has in mind. Enumeration that is not exhaustive should be named as such.

#### 2.9.3.5. Graphical Distinction

Graphical distinctions of the text, such as: italic, bold, underline or others are used to emphasize some words or expressions in the text. Apart from this motive, graphical distinctions are used for names, titles, and foreign words. Italic, for instance, can be used for marking quotations. They are of help to the reader in concentrating on the most important parts of text and they make the reader follow legislator's reasoning.

They can be used, like in many editions of *CIC* 1983 that follow *AAS*, for expressions "latae sententiae," "ferendae sententiae" (can. 1352 § 2, can. 1356). But the usage of them must not be too frequent. First of all, it is easy to omit characteristics in reprinting or citing legal text. Secondly, by giving a plain text legislator does not direct the interpreter but rather gives him some leeway and necessary freedom in finding the proper meaning of the text.

#### 2.9.4. Economy of Text

The following rules of good legislation are about economy of text. Text should be brief and concise as much as it is good in terms of its usage by interpreter.

##### 2.9.4.1. Sentences

As far as sentences in the act of law are concerned, generally speaking, they should be short and concise like can. 1.<sup>417</sup> Sentences should be simple; they should have one subject and one verb in the sentence. They should express only one idea.

Only words that are absolutely needed should be used. Any unnecessary word should be omitted. An unnecessary word should be considered any word without which the same matter is preserved. The legislator must remember that full understanding of a long sentence by reader is time consuming, because it requires re-reading sentence and mentally dividing it into digestible smaller sentences. The drafter should generally save the reader the trouble by dividing it up for him.

However, it is not always desirable to draft in short sentences. For instance, a long sentence may be desirable to avoid repetition of the same expression at the beginning of each sentence. This might occur where there is a list of prohibited or ordered activities and it may be absurd to repeat the initial

<sup>417</sup> Can. 1: "Canones huius Codicis unam Ecclesiam latinam respiciunt."

expression for each separate activity. However, here too a restriction must be made. If a long sentence is used, it is best not to let a subject and its verb become separated by a lengthy phrase. If it is, the reader may lose the connection between them.

#### 2.9.4.2. Repetitions

First general rule is that any act of law should not repeat itself. The next rule is that any act of law should not repeat any other act of law. Of course, act of law can refer a reader to other acts of law. In some cases repeating the sentences from other act of law can be used and is accepted. In a situation when the legislator knows that the addressees of law are not very familiar with other acts of law or they have no opportunity to refer to other laws. Another situation, when the exception from avoidance of repetitions in question is possible, happens in case of statute or similar kinds of law. The legislator can repeat some of the most important parts of law. By doing this he can provide proper communication between him and the users of law.

At the same time, the legislator who repeats pieces of previous acts of law in a new law must be aware of a danger involved in such action. There is a possibility that the text of the previous law would be copied inaccurately. Of course, in a new place, that is, in a new law, the copied text could be interpreted differently because of the changed context (cf. can. 17).

In referring to other acts of law, the legislator should be referring to the basic form of those acts of law, and not to acts that only refer to the basic acts. Doing this the legislator avoids cascade references, which are very difficult to handle in process of interpretation. Cascade reference happens when article S<sub>1</sub> refers to article S<sub>2</sub> and S<sub>2</sub> is not an express norm but refers to article S<sub>3</sub>. This situation takes place in *CIC* 1983, where can. 1364 § 1 refers to can. 1336 § 1 no. 3, and this canon refers to 1336 § 1 no. 2.

## 2.10. Methods of Making Law

Process of making law according to jurisprudence is usually done in many different ways.<sup>418</sup> To them belong:

- 1) Drafting law by legislator (legislation). This is currently the most frequent way of making law in the states and in the Church. For example *CIC* 1983 was done in such a way.
- 2) Agreement between subjects (contract), Concordats are set up in this way.

<sup>418</sup> Cf. R. Sarkowicz, J. Stelmach, *Teoria prawa*, Kraków 2001, p. 112.



- 3) Reception in the sense of transfer of law, when law of one community is accepted by another community (community refers here to a state, a nation, or a tribe).
- 4) Canonization, when the system of canon law incorporates under certain circumstances norms from civil legal system or civilization, that is, a reverse to canonization process (cf. can. 22),
- 5) Authentic interpretation; it is a kind of interpretation done in way of act of law. This interpretation, in the Church, is done by legislator or subject entitled by legislator to do so (cf. can. 16).
- 5) Custom that in the Church is, of course, the legitimate source of law (cf. can. 23), but today in modern Church there is a very little room left for customary laws. It is mostly for practical reasons. Custom is the best interpreter of the law (can. 27), and although this maxim was adopted from Roman law, it shows the high regard in the canonical tradition for the role of custom.
- 6) Legal precedent can also be enumerated here. In common law legal systems, a precedent or authority is a legal case establishing a principle or rule that a court or other judicial body adopts while deciding subsequent cases with similar issues or facts.

For further deliberations only some points on the list would be useful, because not every single one of them is present in the Church's system of law. For instance, it is hard to point out the situation in the reality of the Church, when law is made in legal precedent. Of course, the adjudication of the Roman Rota and the Apostolic Signatura, that is, *praxis (stylus) Curiae Romanae* (cf. can. 19) are very valuable for adjudication of lower tribunals and they influence them. They are cited by the lower tribunals to strengthen the argumentation in a verdict but they do not constitute law. It is worth adding that the Church Tribunals not only interpret and apply law but also contribute to its development. It has been so, for instance, with can. 1095 no. 3, which treats inability to assume the essential obligations of marriage.<sup>419</sup>

## 2.11. Models of Making Law

Some models of making and passing law can be described.<sup>420</sup> The first is the executive model. Historically, many diocesan norms have resulted from this type of process. Various rules and regulations are sent out to constituencies

<sup>419</sup> L. Gerosa, *Interpretacja prawa w Kościele...*, p. 152.

<sup>420</sup> Cf. J. A. Alesandro, *Particular Legislation*, [in:] *Code, Community, Ministry. Selected Studies for the Parish Minister Introduction the Code of Canon Law*, ed. E. G. Pfnausch, Washington 1992<sup>2</sup>, p. 24–27.

by diocesan bishop. As a legislator he does his job alone. No one shares his responsibility. In general, this can be an efficient method of producing norms.

The next one is the conciliar model. It is used by legislative body to which belong some members. It is used by provincial councils and Episcopal conferences. The conciliar model draws together legislators. They draft law until a final form is achieved which wins a consensus.

The third is the synodal model. It shares the advantages of the conciliar model although in this case there is no deliberative voting since the Pope, in case of synod of bishops or diocesan bishop in case of diocesan synod, is seen as the sole legislator.

Later on the diocesan pastoral and presbyteral council model shall be presented. Both councils offer another style of drafting of particular law through representative consultation on a lesser scale than that of the synod. Both are strictly consultative in nature although a close working relationship between the bishop and his council may in practice produce a broad model of governance, at least in the area of policy and norms (can. 500, can. 514). The use of consultative bodies in developing local legislation is an alternative to Episcopal executive decrees, or at least provides a broader participation by the members of the Church in arriving at such decrees.

The next group is religious model. The religious institutes have been involved in redrafting of their constitutions and directories on a vast scale. They discovered many ways of eliciting the consensus of the community for the drafting of documents, which would clarify their very identity and their basic structures of governance and discipline. Various institutes have approached this task in different ways.<sup>421</sup>

In sum, it can be said that all the models of drafting law can be simplified to two: 1) authoritarian manner and 2) conciliar manner. The first one excludes discussion on the drafting of the law and any way of giving opinions about the law. The second provides wide consultation and sometimes can be connected with collegiality if the bishops are involved. It seems that the second one should be today exercised more often, because it can contribute to better understanding and obeying of law.

## 2.12. Stages of the Process of Legislation

The stages of drafting law must be considered as very important. Civil jurisprudence treats the formal procedure of legislative action as essential.

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<sup>421</sup> For instance, a special process of making law in the Dominican Order; see more: P. Walter, *Democracy in Dominican Government*, Concilium 2 (1992), p. 59–64.

In state model, the procedure depends on political system and law. Usually it is a multi-stage proceeding.<sup>422</sup>

Unfortunately, *CIC* 1983 does not offer any norms about legislation proceedings, except can. 7 and can. 8. But the legislator has to have the process in question well organized. Many things must be decided and determined at the proper stage of the process. Following the well-organized procedure makes the process of drafting law safer.<sup>423</sup>

## 2.12.1. Some Arrangements

### 2.12.1.1. Legislator's Awareness of his Competences

At the beginning, it must be presumed that the legislator in the Church is driven to take legislative action by the sense of duty before God and by his love for community. He must be aware that legislative action is one of the ways of fulfilling his mission in the community.<sup>424</sup>

When the legislator is eager to make use of his legislative power he should have knowledge about his legislative competences. It is not enough to get to know the general competences when taking the office that offers legislative power. The legislator must be sure of his competences every time he wants to issue a new law or change any law. But not only the knowledge of church law is important, also cognizance of civil law is a factor.<sup>425</sup>

At times in regard to some matters there are no laws that explicitly qualify the legislator to norm. He seems relatively free to set policy. At this time, he must be especially careful not to cross the limits of his competences.

Essential for the legislator in recognizing his legislative competences is the knowledge of the system of canon law. For instance, the code envisions the bishop as adapting universal norms to specific circumstances, particularly because of his proximity to the legal-pastoral situation.<sup>426</sup> For sure, legislator's awareness of his competences and his normative role in the Church's system of law is the first step in being a good legislator.

<sup>422</sup> A. Pieniążek, M. Stefaniuk, *Socjologia prawa. Zarys wykładu*, Kraków 2003, p. 250–251.

<sup>423</sup> See proposals of models of stages of the legislative process. Some of these findings are used in the presented model. See: L. Örsy, *The Interpreter...*, p. 29–30; R. Sobański, *Kanon 7*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 55; A. Pieniążek, M. Stefaniuk, *Socjologia prawa...*, p. 250–251.

<sup>424</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 102.

<sup>425</sup> Cemetery norms (can. 1243), processions (can. 944 § 2), deacon internship (can. 1032 § 2), pre-ordination retreat (can. 1039), registration of marriage (can. 1121 § 1), burial register (can. 1182).

<sup>426</sup> One sees this for example in the canons on sacramental sharing (can. 844 § 5), general absolution (can. 961 § 2), communal anointing services (can. 1002), pre-marriage preparation (can. 1064), and on non-Eucharistic Sunday celebrations (can. 1248 § 2).

### 2.12.1.2. Situation of Community

Any intrusion in the life of the community, especially by legal decision, must be preceded by a diagnosis of life of its members.<sup>427</sup> It means that legislator has to collect all the necessary data to be familiar with the situation of the community. The concept of law is dependent on context created by the *status quo* of the community.

The concept is the outcome of the following elements: 1) assessment of values necessary to be gained by society, 2) judgment of the concrete situation, and 3) recognition of the needs of the community. These three elements form the obligation for the community in current situation to do this or that.<sup>428</sup>

The elements cannot be prioritized in theory in advance. The concrete situation helps legislator to put them in order. Sometimes, the starting point for the legislator are values and a law is a tool for him to impose them on the community. It happens that the legislator must start with the situation that reveals the need for certain values.

In the first situation, the legislator has a difficult task of assessing the values, and the capacity of the community to appropriate these values. The more diverse the community, the more difficult such a complex task is. Thus the legislator for the universal Church has the task of finding out what values need to be universally gained. The norms through which these values are to be appropriated might be very different.<sup>429</sup>

In the second situation, the legislator must become acquainted with the specific situation in life of the community with special attention paid to any relation to values of universal or particular importance. The tension between the values and certain reality formulates the special needs for the values. The needs must be recognized as authentic and important by both the community and the legislator.

At this point, it must be noted that, on the one hand, the capacity of community and possibilities of the users of law to recognize their own needs and to fulfill them through action according to law is important for life of the law. If the community is incapable of doing so, the law remains fruitless. It would become the legislator's wish list. On the other hand, the legislator must see whether the needs constitute a proper Christian desire and will lead to values.

In the case when the legislator judging the situation can assess the needs but the community is blind to them, he must encourage them to reach for the value by fulfilling certain needs to which they are blind. It would be good if the process of getting to know the situation of the community would

<sup>427</sup> Cf. S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki...*, p. 23.

<sup>428</sup> R. Sobański, *Ustawy kościelne*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 55.

<sup>429</sup> M. Wijlens, „*Salus animarum suprema lex*”..., p. 587.

be conducted on a regular basis and with the help of empirical sciences. The data is to be collected without any partiality, always according to the standards of probability and statistics.<sup>430</sup> By recognizing the situation of the community, the pastoral dimension of the legislator's activity is shown. It is to foster the pastoral care of souls as much as possible.<sup>431</sup> Pastoral orientation should be appreciated by legislator and presented in his way of thinking, as well as, in concrete regulations, projects and solutions.<sup>432</sup>

### 2.12.1.3. Consultations

After collecting data, the legislator must understand it and interpret it correctly. He can do it by himself or he can also consult with others. The consultations are important, because the legislator is not for himself and he must always relate to the community. Unfortunately, the legislator, especially the one not democratically elected, is inclined to plan in the abstract, and forget about the real state of things.<sup>433</sup> Consultation in the Church simply requires the pastors to exercise their authority in dialogical fashion (cf. *LG* 37).<sup>434</sup> Consultation poses no threat to authority of power because it is not determinative of the final decision.

It seems that J. H. Newman's remark concerning the consultation of the faithful in doctrinal matters<sup>435</sup> is valid for legislation, as well. It means that making law should not be restricted to higher hierarchy or only to clerics.<sup>436</sup> On the other hand, legislator's policy that rejects the consultation with addressees of law can do a lot of harm to the community and to law itself.<sup>437</sup>

It should be a standard pattern that consultations are held before making decisions. The relevant principle was articulated by Roman law<sup>438</sup> and expressed in the medieval canonical rule: "Quod omnes tangit debet ab omnibus approbari" (cf. *CIC* 1917 can. 101 § 1 and § 2; *CIC* 1917 can. 526; and also can. 119 § 3 of the 1983 code).<sup>439</sup> There are two main reasons for that. "The principle

<sup>430</sup> J. M. Bocheński, *Współczesne metody myślenia*, transl. S. Judycki, Poznań 1993, p. 125–126.

<sup>431</sup> *Praefatio*, principium 3, p. XXI.

<sup>432</sup> R. Sobański, *Idee przewodnie nowego Kodeksu Prawa Kanonicznego*, [in:] *Duszpasterstwo w świetle nowego Kodeksu Prawa Kanonicznego*, ed. J. Syryjczyk, Warszawa 1985, p. 49–54.

<sup>433</sup> Cf. L. Örsy, *The Dynamic Spirit of Common Law and the Renewal of Canon Law*, [in:] *Law for Liberty: the Role of Law in the Church Today*, ed. J. E. Biechler, Baltimore 1967, p. 179.

<sup>434</sup> H. J. Pottmeyer, *Dialogue as a Model for Communication in the Church*, [in:] *The Church and Communication*, ed. P. Granfield, Kansas City 1994, p. 97–103.

<sup>435</sup> J. H. Newman, *On Consulting the Faithful in Matters of Doctrine*, Kansas 1962, p. 106.

<sup>436</sup> L. Örsy, *Quantity and Quality of Laws after Vatican II*, *The Jurist* 27 (1967), p. 389–392.

<sup>437</sup> L. M. Örsy, *The Reception of Laws by the People of God: a Theological and Canonical Inquiry in the Light of Vatican Council II*, *The Jurist* 55 (1995), p. 517, ft. 28.

<sup>438</sup> *Cod.* 5, 59, 5, 2.

<sup>439</sup> *RI* 29: *Quod omnes tangit debet ab omnibus approbari*. See: Y. Congar, *Quod omnes tangit ab omnibus tractari et approbari debet*, *Revue historique de droit français et étranger*,

of consulting the presbyters and people is far more than a pragmatic strategy, it is a theological imperative. It is based on the implications of membership in the Church and the active sharing of all members in its mission."<sup>440</sup>

In current law, consultation sometimes is required for validity of acting (can. 127), otherwise, it is a general counsel for prudent action.<sup>441</sup> Consulting also involves reminding those who have something to offer that they have an obligation to speak up (can. 127 § 3), especially if they disagree, because "Qui tacet consentire videtur."<sup>442</sup>

#### 2.12.1.4. Making Decision

Next, a decision is to be made. The legislator must consider if he is to continue process of making law or, because of certain reasons, he is to give up the legislative action.

##### 2.12.1.4.1. Abandoning Legislative Action

The reasons for giving up can be as follows: the legislator reaches a conclusion that the community can help themselves and he can help the community in other way, that is, not by a new law. It is possible that not a new legislation but just a change of interpretation of old law or the change in the way of application can solve the problem. Sometimes, the present law is adequate to solve the problem of the community but due to some reasons it is not visible in action. Sometimes, new legislation is not a good idea. It would be better to animate currently binding law by making it more known and popular. Also, other methods have to be taken into consideration like: persuasion, exhortation, or change in organization. The idea of self-regulation by the community must also be taken into consideration while noting the record of similar cases. It is not allowed to assume that new law is the best way to influence reality and achieve goals.<sup>443</sup> Sometimes, the legislator will have to stop his activity because he reaches the conclusion that the time for new law is not proper, or that he has not enough data to formulate good norms.

At this stage it must be remembered that the decision-making is not the same as choice-making. The making of a choice is only one element in decision-making, and not always the most important element or the most

36 (1958), p. 210–259.

<sup>440</sup> J. A. Coriden, *Canon Law as Ministry...*, p. 172.

<sup>441</sup> See list developed by T. J. Green, *Consultation with Individuals or Groups Regarding to Episcopal Discretion*, [in:] *Code, Community, Ministry...*, p. 63–65.

<sup>442</sup> *RI* 43.

<sup>443</sup> Cf. S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki...*, p. 23.

influential.<sup>444</sup> Decision-making in law making, whether undertaken by an individual acting alone or by complex body entitled to make law, is a complex process; it involves several stages, only one of which is the making of a choice.

#### 2.12.1.4.2. Keeping Legislative Action

If the legislator decides to go further, some arrangements must be made. First, he must know the current law very well. As it has been said, the current *status quo* of reality of the community is a motive for initiating the legislative action and the current law is the basis of the future changes in legislation.<sup>445</sup> If present law does not work, or is not effective enough and, because of that, is not satisfactory it needs to be replaced. The legislator must get to know the unproductive law to avoid its mistakes. After this, the process of drafting the new law can begin.

### 2.12.2. Drafting Law

#### 2.12.2.1. Goals of Law

The legislator must determine a goal or goals of a new law. Jurisprudence advises to divide the goals into: essential goals or final, and instrumental goals which are staging posts. It is advisable for the legislator to differentiate between goals understood as outcomes to be achieved and goals understood as protection of the state of affairs. Other distinctions are of help for the legislator: goals can be positive when they aim to gain desired state of affairs and negative goals which in essence are to avoid unwanted state of affairs.<sup>446</sup>

A hierarchy among the presented goals must be set. It is because a new law can in some circumstances reach only limited aims. Hopefully, they will be the most important ones. Having hierarchy of goals of a new law it is easy to give priority to the central one, when the collision of goals would occur.

Describing goals includes two things. One is how the situation needs to be changed and second, what kind of situation must be created. Next, some other issues must be discussed and assessed. One of them is the costs in the community and economical terms of new law. During the drafting of the law, the choice of means for realization of the goal of the law must be taken into account, such as the type of law or possible sanction.

Once the first draft of law is prepared, it must be assessed if the law is not in contradiction with the system of law or if the law does not duplicate other laws; as well as whether the goal or goals of the law are not in contradiction

<sup>444</sup> R. T. Kennedy, *Shared Responsibility in Ecclesial Decision-Making*, *Studia Canonica* 14 (1980), p. 8–9.

<sup>445</sup> Cf. L. Örsy, *Quo vadis Ecclesia. The Future of Canon Law*, *Studia Canonica* 36 (2002), p. 23.

<sup>446</sup> M. Zieliński, *Wykładnia prawa...*, p. 287.

with other laws. Without these actions it is impossible to build a consistent, coherent the system of law.<sup>447</sup>

#### 2.12.2.2. Project(s) of Law

Project of law is a formulation of *mens legislatoris* in concrete expressions taken preferably from canonical tradition. Sometimes many drafts or schemas of law can be formulated. They compete among themselves. It urges the legislator to choose one of them. Many factors must be taken into consideration in choosing the best law. First of all, the results of implementing new norms in the system of law must be provisioned. Also, legislator has to think about harmonization of new law with other laws.

The choosing of specific projects of law leads to the final decision. The choice must be implemented, in the course of which further adjustment and adaptation are almost inevitable.<sup>448</sup>

#### 2.12.2.3. Voting on Law

Sometimes, in case when the legislator is a collective body, the stages of drafting law could be supplemented by another stage, that is voting on law.<sup>449</sup> At this stage, some decisions are made that refer to project of law, amends or alternations. After this stage a bill of law is compete.

#### 2.12.2.4. General Evaluation of Law

The final stage in a complete decision-making process is evaluation. The chosen course of action, even in the hands of skilled implementers, needs to be monitored and evaluated. Until such evaluation is made, it is premature to consider a decision as final, for considerable alteration, even total reconsideration, may be necessary. Indeed, the dynamism of life in the contemporary world and the contemporary Church suggests the importance of periodic evaluation of all ecclesial plans and policies in order to prevent initially effective decisions from becoming ineffectual or even counterproductive in the light of further studies or changed circumstances.<sup>450</sup>

General evaluation of law and its possible effect is the last chance for the legislator and users of law to change law before it will create right and duty situation. Unfortunately, canon law knows neither body nor procedure

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<sup>447</sup> Cf. S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki...*, p. 24–25.

<sup>448</sup> R. T. Kennedy, *Shared Responsibility...*, p. 14.

<sup>449</sup> R. Sobański, *Kanon 7*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 55.

<sup>450</sup> R. T. Kennedy, *Shared Responsibility...*, p. 15.



to check or evaluate acts of law, to see if the act of law is coherent with the system of law or if it is internally coherent.<sup>451</sup>

### 2.12.3. Ready Act of Law

#### 2.12.3.1. Promulgation

It must be admitted that sometimes promulgation may seem unnecessary. People without the promulgation would still know that they should not murder or steal. Especially it is true in the Church, where the faithful are expected to have faith that orders some practice. But for legal binding promulgation is of essence.

Promulgation belongs to the essence of the act of law.<sup>452</sup> Promulgation of law is its coming into existence exactly as can. 7 states: “Lex instituitur cum promulgatur.”<sup>453</sup> By promulgation law is becoming a public fact. Lawmaker must not only write law but also make it publicly known in order for it to be obeyed.

The ways of promulgation are described in the 1983 code: “Leges ecclesiasticae universales promulgantur per editionem in Acta Apostolicae Sedis commentario officiali” (can. 8 § 1),<sup>454</sup> but the fact that the document has been printed in AAS does not mean that it is an act of law.<sup>455</sup> Next, “Leges particulares promulgantur modo a legislatore determinato et obligare incipiunt post mensem a die promulgationis, nisi alius terminus in ipsa lege statuatur”<sup>456</sup> (can. 8 § 2). Usually, it is done by printing in diocesan official organ. But the fact that the document has been printed does not mean that it is an act of law.<sup>457</sup> In both cases exceptions apply.

Some documents are not promulgated in typical way. Nevertheless, they are acts of law. Regular way of promulgation was not done purposely. Such is, for instance, instruction issued by the Congregation of the Holy Office

<sup>451</sup> R. Sobański, *Metodologia prawa...*, p. 69.

<sup>452</sup> Cf. D. IV, c. 3.

<sup>453</sup> Can. 7: “A law comes into being when it is promulgated.”

<sup>454</sup> Can. 8 § 1: “Universal ecclesiastical laws are promulgated by publication in the ‘Acta Apostolicae Sedis.’”

<sup>455</sup> The document published by the Secretary of State *Ordo servandus in moderatione et administratione Commentarii officialis*, 5.01.1910, AAS 2 (1910), p. 37–39, no. 4, introduced division in AAS into two parts: official (*officiale*) and supplement (*illustrativa e completiva*). The former is for documents that require promulgation to become acts of law. The latter is assigned to documents helpful for getting to know *praxis (stylus) curiae Romanae*. Unfortunately, the division has been practically never in use.

<sup>456</sup> Can. 8 § 2: “Particular laws are promulgated in the manner determined by the legislator.”

<sup>457</sup> In the diocesan organ are published also other documents like: agendas, pastoral letters, and homilies. For further reference, see: R. Sobański, *Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993*, *Prawo Kanoniczne* 38 (1995) no. 1–2, p. 139–162.

and confirmed by Pope John XXIII titled: *Crimen sollicitationes* on the matter of proceeding in the cases of solicitations.<sup>458</sup> It was an act of law.<sup>459</sup> The document was promulgated by sending it only to those who were *ex officio* interested in it.

### 2.12.3.2. Publication

Although in canon law literature promulgation is considered as the authentic publication – “promulgatio legis idem est ac legis publicatio authentice facta,”<sup>460</sup> the two terms should be distinguished. Promulgation is not the same as publication. Publication is the spread of knowledge of law (*divulgatio legis*) or a factual familiarity with the law. These two do not belong to the essence of act of law. Publication is like giving opportunity for users of law to get to know the law. It is the first step in spreading the message of the new rules. Of course, not every faithful has to know every single law. There are many very specific norms that would be of interest only to some of them. Normally publication follows promulgation, but the reverse situation is also possible. Of course, legal force of law depends on promulgation not publication.

Law must be promulgated but to become well-known and popular it should also be published. Another reason that laws should be given adequate publication is so that they may be subject to public criticism, including the criticism that they are the kind of laws that ought not to be enacted unless their content can be effectively conveyed to those subject to them. It is also obvious that if the laws are not made readily available, there is no check against a disregard of them by those charged with their application and enforcement.<sup>461</sup>

By publication one cannot understand printing. Publication can mean also propagation of law in the process of spreading the gospel. Teachings about requirements of faith and, at the same time, norms are made popular and known.<sup>462</sup>

<sup>458</sup> Supremae Sacrae Congregationis Sancti Officii, *Instructio Crimen sollicitationis de modo procedendi in causis sollicitationis*, 16.03.1962, Typis Polyglottis Vaticanis 1962, <http://www.cbsnews.com/htdocs/pdf/crimenlatinfull.pdf> (access 21.07.2010).

<sup>459</sup> See: Joannes Paulus PP. II, *Litterae apostolicae motu proprio Sacramentorum sanctitatis tutela* quibus normae de gravioribus delictis Congregationi pro Doctrina Fidei reservatis promulgantur, 30.04.2001, *AAS* 93 (2001), p. 738: “In mente retinendum est quod huiusmodi Instructio vim legis habebat, cum Summus Pontifex, ad normam can. 247 § 1 Codicis Iuris Canonici anno 1917 promulgati, praeerat Sancti Officii Congregationi et de sua ipsius auctoritate Instructio procedebat, Cardinale pro tempore existente tantum Secretarii munere fungente.”

<sup>460</sup> G. Michies, *Normae generales...*, vol. 1, p. 183.

<sup>461</sup> L. Fuller, *The Morality of Law*, New Haven 1967, p. 50–51.

<sup>462</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 236.

### 2.12.3.3. Correcting

Talking about printing one cannot omit that the legislator is obliged to correct any errors in act of law written by him. The error is here to be understood as a lack of coherence between original text of act of law (the pattern) and published text of act of law.<sup>463</sup> The error usually happens during process of editing and printing of an act of law.

When such an error occurs the legislator must take special action. The action has only declaratory value.<sup>464</sup> It is not another legislation action but it is a rather technical one. It must be done by the legislator himself or someone who is authorized by him to do that.<sup>465</sup>

If the improvements of the text are minor, for instance, they concern spelling mistakes, the action in question can be done as typical *errata sheet*. In case of major emendations, like: deleting, adding or changing word, changing punctuation, or rephrasing, the *corrigenda* must be issued. The corrections must in both situations be done clearly and distinctly, in a way, which is obvious to understand and apply to the text. It is not required to handle it as with any other act of law but it must be published, for instance, in a subsequent issue of an official journal.

### 2.12.3.4. *Vacatio legis*

Although after promulgation the act of law exists, it is not legally binding. The period between promulgation of act of law and the moment of coming into force is *vacatio legis*.

Time of suspension of the effects of the law is determined by universal law itself or ordered by the legislator in the act of law. Universal ecclesiastical laws come into force only on the expiry of three months from the date of appearing in the particular issue of the *AAS*, unless a shorter or a longer interval has been specifically and expressly prescribed in the law itself (can. 8 § 1). Particular laws begin to oblige one month from the date of promulgation, unless a different period is prescribed in the law itself (can. 8 § 2).

*Vacatio legis* has no absolute character. In various cases it is not used. Some laws are in force with the date of promulgation. This is the case with laws that are based on the divine law or laws that specify laws already being in force because of the nature of the case (can. 8 § 1). Also authentic interpretations presented by way of a law when they simply declare the sense of words which are certain in themselves (can. 16 § 2) do not need *vacatio legis*.

<sup>463</sup> S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki...*, p. 222.

<sup>464</sup> S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki...*, p. 223.

<sup>465</sup> See, for instance, corrections to *CIC* 1983, which were published in *AAS* 75 (1983) II, p. 321–324 and *Communicationes* 15 (1983), p. 131–134.

Generally speaking, *vacatio legis* is a time given to the community to familiarize itself with the law and prepare for obeying the rules. Sometimes, new law requires preparing instructions to clear some provisions of a law, to develop the manner in which law is to be put into effect (can. 34 § 1). Sometimes, a new law requires change in organization or procedures, or just financial resources. Whenever the legislator would like to set his own length of *vacatio legis* he must take into consideration all of these factors.<sup>466</sup>

The good example of rational setting of the length of *vacatio legis* is *CIC* 1983. Due to its importance and other understandable reasons, *vacatio legis* for the code was very long, so “omnes probe percontari atque perspecte cognoscere valeant, antequam ad effectum adducantur.”<sup>467</sup>

### 2.12.3.5. Life of Law

Life of law is a time when law binds the community. But the work of the legislator is not finished. Church legislator has the duty to take care of law and by authentic legislation (can. 16) to correct its understanding among the users of law. Of course, the rule and obligation of responsibility cannot be limited to the specific person of the legislator. It remains in his office, because “Is, qui in ius succedit alterius, eo iure, quo ille uti debebit” (cf. can. 132 § 2).<sup>468</sup>

## 2.13. Legal Character of the Principles of Legislation

It is obvious that legislation is not to be done according to the anarchical methodological rule that there are no rules – “anything goes.”<sup>469</sup> Generally, it can be said that one of the features of legal system is that it contains laws, which regulate legislation.<sup>470</sup> There are rules strictly for legislators. They prescribe some conventional acts by which legislator is to make law, like procedures governing the promulgation of law. There are rules how and when to publish law (can. 7, can. 8 § 1). Sometimes the rules in question give some leeway to create other rules for promulgation (can. 31 § 2, can. 446, can. 455 § 2 and § 3). Still there are rules for conventional acts that govern the making of the

<sup>466</sup> Cf. S. Wronkowska, *Podstawowe pojęcia prawa...*, p. 53.

<sup>467</sup> *Sacrae disciplinae leges*, p. xiv.

<sup>468</sup> *RI* 46.

<sup>469</sup> It is formula used in one of models for description of the development science, see: P. Feyerabend, *Against Method. Outline of an Anarchistic Theory of Knowledge*, London 1975, p. 296.

<sup>470</sup> Cf. S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki...*, p. 19–21.

law. Observance of them is required to make binding law. Disrespect for them has consequences such as that the law will not bind.

There are also written or unwritten rules for legislator that concern creation of law according to principles of the system of law, as for instance, the rule that makes *salus animarum* the highest goal of canonical law (can. 1752). The principles of renewal of the code are another example.<sup>471</sup> They can be called a guiding policy for a legislator. Disobedience toward them means that law, although valid, will not fit into the system of law and its character. It is possible that the goals of the law will be overlooked.

Rules for legislative drafting could also be singled out<sup>472</sup>. They are of help for legislator to express himself appropriately and to give proper form to the text of law he makes. They are praxeological rules for legislator.<sup>473</sup> The rules in question are not necessary for valid promulgation. In terms of effectiveness of law they can have some value for achieving the goal of law, but of themselves they are not of essence. These rules do have an influence on fulfilling norms of law. The rules of techniques for proper legislative drafting are to help make good law, in the sense that law keeps some jurisprudential standards. Law, which does not keep standards, is difficult to interpret and apply. These rules are unwritten and in the Church they do not create legal obligation.

The question is: Is it possible to give attribute of necessity, that is, to order to observe rules from the second and the third group for validity of law? The answer is: No. It would not be practical. That which is required for the law to be valid should not be too difficult to reach. Users of law and legislators as well should be able to easily reach the certainty regarding the validity of law. The possibility of verification of legitimacy of law should be then easy to carry out. The limits of validity and invalidity must be clear. Still those who have competent power can urge that lower range legislators try to follow the rules of legislation.

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<sup>471</sup> *Praefatio*, p. XXI–XXIII.

<sup>472</sup> There is Rozporządzenie Prezesa Rady Ministrów z dnia 20 czerwca 2002 r. w sprawie zasad techniki prawodawczej (Dz. U. of 2002 No. 100, item 908) in the Polish legal system, which regulates the matter.

<sup>473</sup> Cf. judicial decision of Trybunał Konstytucyjny from 21.03.2001 r., court ref. no. K 24/00, OTK ZU no. 3/2001, item 51.



## 3. Law (as Product of Legislation)

Law as a phenomenon was presented in the first chapter of the book. In this chapter law is to be understood as a legal text, a bill of law that aims to pass order from legislator to addressees. In a word, the third chapter's optic perceives the law as a material product of process of legislation.

### 3.1. Necessary Distinctions

Act of law, as a product of power of legislation, is different from other products of power of jurisdiction and execution,<sup>1</sup> or from any other form of realization of vocation by the church supervisor. The differences are material and formal. Presentation of them will allow for differentiating the laws from other documents. From the point of view of the legislator, whose power is more than just legislative, maintaining such distinction helps to avoid mixing the types of documents in his activity for the community.

#### 3.1.1. Formal

From the formal point of view legislation products have specific constitution. Two elements must be taken into consideration: source of power of the documents and the way of delivering to users.

Act of law is written only by holders of legislative power. Holders of other kinds of power under normal conditions cannot write law. They can produce other types of documents, but they cannot bring any change in a system of law. The documents in question cannot bring any new norms. Of course, some holders of legislative power, at the same time, can have other kinds of power, and they can make documents different from acts of law. It happens in the Church often, for instance, in case of diocesan bishops. It means that authorship of documents gives no guarantee of what kind of document it is.

Act of law has to be promulgated to become a binding law (can. 7). Without promulgation there is no law. It means that the law will come to life and will

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<sup>1</sup> J. Krukowski, *Administracja w Kościele. Zarys kościelnego prawa administracyjnego*, Lublin 1985, p. 107–118.

have its place alongside the rest of the existing legislation only after promulgation. It consists of two stages: signing by the legislator and publication. Other non-law documents do not require such procedure. It can be presumed that a document is not an act of law when it has not been treated according to the legislative procedure.

### 3.1.2. Material

The material difference between products of the legislative power and other forms of power are the effects in the life of society. The acts of law are general, it means that they prescribe for indefinite number addressees indicated in a general way and they prescribe a wide-ranging pattern of behavior in certain situations or circumstances. Thanks to that feature the acts have a general purpose and can be repeated many times. The usage of acts of law, due to its features, can occur indefinite number of times. Products of other kinds of power are to be applied in limited number of cases; very often just in one case, as a court judgment or an administrative act in a particular case.

## 3.2. Categorization of Acts of Law

### 3.2.1. By Range

*CIC* 1983 does not categorize acts of law. On the basis of the analysis of some canons, like: can. 12, can. 13, can. 20, one can propose certain distinctions in law: universal and particular, and characterization of the two groups. To universal law must belong all norms, also unwritten ones, which are in force for the entire Church. Its universal character does not depend on the fact that the norm binds all the faithful or precisely described groups of people. Particular law is a law, which does not bind the entire Church due to the limitations of its force to a part of the Church or to certain persons.<sup>2</sup>

The relation between the presented two categories is dynamic. Universal law and particular one are in double-way interaction. They are both needed to guarantee *communio Ecclesiarum* according to formula “in quibus et ex quibus” (cf. *LG* 23). Universal law must pledge unity but avoid over-centralization by means of the sameness of legal solutions. Particular law is to assure pluralism

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<sup>2</sup> M. Werneke, *Ius universale, ius particulare: zum Verhältnis von Universal- und Partikularrecht in der Rechtsordnung der lateinischen Kirche unter besonderer Berücksichtigung des Vermögensrechts*, Paderborn 1998, p. 102–103; cf. M. Pesendorfer, *Partikulares Gesetz und Partikularer Gesetzgeber im System des Geltenden Lateinischen Kirchenrechts*, Wien 1975, p. 17–19.



without falling into sectarianism or paying too much attention to one-sided interests.<sup>3</sup> There are many institutions and legal means, which help these relations to be effective and peaceful, like, e.g., non reception of law, *desuetudo*, *ius remonstrandi*,<sup>4</sup> or *ius supplicationis*.<sup>5</sup>

It seems that universal law is privileged in relation to particular law in canonical system. The two types of law are in a hierarchical order.<sup>6</sup> However, universal law does not derogate a particular law; the latter is valid until the universal law expressly provides otherwise (can. 20). Some authors consider the supremacy in question as a dangerous situation.<sup>7</sup>

There are some other categories of acts of law. A law can be personal and territorial. It depends on whether it binds a person directly or because of the territory in which the person is. There is also a personal law. It is a special law of which the addressees are a defined group of people, like the clergy, bishops, religious, etc.

### 3.2.2. By Author

Other division can be done according to the list of possible authors of an act of law. This kind of division depends on the bearer of legislative power.

Three different types of documents were prepared during the Second Vatican Council: constitutions – which are to be accepted as a binding church teaching, decrees – they are postulates to legislator, which direct future legal and pastoral solutions. They also include some ready to use norms and they are to be observed; declarations – express attitude of the Church to some issues and it is binding for the whole Church as starting point for other actions.

There is no doubt that the Council placed a legislative content in its documents.<sup>8</sup> This was demonstrated clearly by the fact that a *vacatio legis* was ordered for some of the documents.<sup>9</sup> In his address to the general audience,

<sup>3</sup> L. Gerosa, *Interpretacja prawa w Kościele...*, p. 80.

<sup>4</sup> Neither of the codes includes explicitly in its norms the possibility of a diocesan bishop remonstrating against papal laws. The origin of this principle is to be found in *Decretalium* (x, liber I, titulus 3, caput 5) of Pope Gregory IX which goes back to Pope Alexander III: “Is, ad quem rescriptum Papae dirigitur, debet illi parere, vel causam rationabilem assignare, quare parere non potest”; for further reference, see: H.-J. Guth, *Ius remonstrandi: das Remonstrationsrecht des Diözesanbischofs im kanonischen Recht*, Freiburg 1999.

<sup>5</sup> This is a recourse or supplication against the law itself directed to the legislator himself. It can be done by any Christ's faithful (can. 212 § 3).

<sup>6</sup> Cf. R. Sobański, *Teoria prawa kościelnego...*, p. 147.

<sup>7</sup> L. Gerosa, *Interpretacja prawa w Kościele...*, p. 82.

<sup>8</sup> F. G. Morrissey, *Papal and Curial Pronouncements...*, Ottawa 2001, p. 21–22; R. Sobański, *Normy ogólne Kodeksu Prawa Kanonicznego*, Warszawa 1969, p. 41–42.

<sup>9</sup> Paulus PP. VI, Litterae apostolicae motu proprio *Munus apostolicum vacatio legis prorogatur quorundam Decretorum Concilii Oecumenici Vaticani II*, 10.06.1966, *AAS* 58 (1966), p. 465–466.

Pope Paul VI explained the legislative importance of the conciliar texts saying that the Council laid down laws, and they must be respected. It also formulated principles, criteria, desires which must be given concrete expression in new laws and instructions, in new organisms and offices, in spiritual, cultural, and moral movements, and in organizations.<sup>10</sup>

The problem with pontifical acts is rather complex. Due to the *plenitudo potestatis* of the Roman Pontiff, no norms have been developed for regularizing the execution of these acts. Their character is mixed. Many of them have an exclusively doctrinal, exhortatory content, others have the legal significance of a general norm or a singular constitutive, and still others are responses to a request.<sup>11</sup> Seemingly, there are many types of documents issued by the Roman congregations, councils and tribunals. Legislation made by particular legislator is usually narrowed to: act of law, general decrees, “executory” decrees and instructions. The statutes legislator is the one who makes usually statutes (can. 94), rules and connected with them documents of normative character. It must be remembered that new norms can be also included in other types of documents made by any legislator; not only in the most typical ones.

There are many ways of classifying the documents made by these legislators. One can do it on the basis of the nature of the document, or the current practice in *AAS*. The division can be done also in light of the prescriptions of *CIC* 1983.<sup>12</sup> Each of these documents should be studied so that its legislative importance will be more easily ascertained. It must also be remembered that not every pronouncement of the Church has direct juridical implications. Still they must be respected. The life of the community should not be reduced to legal categories alone.<sup>13</sup>

### 3.2.3. By Effect

For the legislator, a special importance has the distinction of types of acts of law due to the effects of law and way of determining behavior. As it was said, the character of the document depends on the type of the majority of legal articles in it.

<sup>10</sup> Paulus PP. VI, *Allocutio Christifidelibus coram admissis habita*, 17.08.1966, *AAS* 58 (1966), p. 799–802, especially: p. 800–801.

<sup>11</sup> J. I. Arrieta, *Governance Structure within the Catholic Church*, Montréal 2000, p. 107.

<sup>12</sup> For further reference, see: F. G. Morrisey, *Papal and Curial Pronouncements...*, Ottawa 2001, p. 9–19; M. E. Herghelegiu, *Reservatio Papalis: a Study on the Application of a Legal Prescription According to the 1983 Code of Canon Law*, Berlin 2008, p. 67–69; J. I. Arrieta, *Governance Structure...*, p. 108–110, or W. Aymans, K. Mörsdorf, *Kanonisches Recht: Lehrbuch...*, vol. 1, p. 45–48.

<sup>13</sup> F. G. Morrisey, *Papal and Curial Pronouncements...*, Ottawa 2001, p. 8.

Laws can be divided into ordering, prohibiting, admitting, and punitive.<sup>14</sup> The obligation is active when situation requires taking action. Act of law prohibits something, which is bad or harmful. Prohibition usually binds regardless of circumstances, but permission of the competent authority can be given. Act of law can admit or allow something, but there is no obligation to use the right. On the other hand, there is an obligation to respect one's right. Punitive act of law consists of prohibition against taking certain action or prohibition against not taking certain action and sometimes is connected with the penalty sanction.

### 3.3. Documents of Legal Significance

At this point the typical documents that have legal significance will be presented. They are bearers of legal norms. By using them legislator can introduce new rules with legal force.

#### 3.3.1. Act of Law

Beginning with the First Council of Nicaea (A.D. 325), acts of law (laws) have been known in the Church as *canones*. As time went by, there came into use other synonymous or similar terms like: *constitutio*, *regulo*, *determinatio*, *praescriptio*, *praeceptum*, *statutum*, *sanctio*, *ordinatio*, *norma*. The most frequent in use have been two: *lex* and *decretum*. In this sense *lex* is used in *CIC* 1983 in can. 7 and can. 8 § 1. The Latin word in question can mean also a legal article (can. 1252), divine law (can. 98 § 2, can. 199 no. 1, can. 748 § 1), and finally law as phenomenon (can. 1752). The supreme legislator is not consistent in usage of these words.

There is no definition of a c t of l a w neither in *CIC* 1983 nor in *CIC* 1917. In the scheme of *CIC* 1983 such definition was contained in two projects of the code.<sup>15</sup> Due to its imperfection, that is, to the fact that the definition was inaccurate and incomplete and not harmonious with other canons, it was

<sup>14</sup> R. Sobański, *Normy ogólne Kodeksu Prawa Kanonicznego*, Warszawa 1969, p. 53–56; T. Pawluk, *Prawo kanoniczne według Kodeksu Jana Pawła II*, vol. I, Olsztyn 1985, p. 216.

<sup>15</sup> “Lex norma scilicet generalis ad bonum commune alicui communitati a competenti autoritate data instituitur cum promulgatur,” see: Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Schema Codicis iuris canonici iuxta animadversiones S.R.E. Cardinalium, Episcoporum Conferentiarum, Dicasteriorum Curiae Romanae, universitatem facultatumque ecclesiasticarum necnon Superiorum Institutorum vitae consecratae recognitum*, Vatican 1980, can. 7; and see: Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Codex Iuris Canonici: Schema novissimum iuxta placita Patrum Commissionis emendatum atque Summo Pontifici praesentatum*, Vatican 1982, can. 7.

given up.<sup>16</sup> Provisionally it is enough to say that act of law is a document issued by legislator to introduce new norms into the life of the community.<sup>17</sup> The main regulations of act of law are in can. 7–21.

### 3.3.2. General Decree

Canon 29 orders that general decrees, by which a competent legislator makes common provisions for a community capable of receiving a law, are true laws and are regulated by the provisions of the canons on laws. General decree is an act of law if it is: 1) an act made by competent legislator; 2) according to rules normally applicable to laws; 2) it is general and abstract, and 4) introduces new norms.<sup>18</sup> To such general decrees are applicable can. 7–21, which are normally applicable to the acts of law.<sup>19</sup>

These four indicators are very important, because unfortunately, the name *decretum* is not reserved exclusively to the certain kind of documents, which have been just defined as *decretum*. The term *decretum* signifies both laws and administrative acts which provide for execution of laws.<sup>20</sup> General decree may refer to normative legislative act (act of law) or to general executory decrees of application of law (can. 31–33, can. 455 § 1,<sup>21</sup> can. 458 no. 1, can. 522), to singular administrative act (can. 35, can. 48–58, can. 114 § 1, can. 116 § 2, can. 135 § 3; 145 § 2, can. 171 § 1 no. 3, can. 192, can. 195, can. 290 no. 1, can. 322 § 1, can. 333 § 3, can. 579, can. 589, can. 1109, can. 1334, can. 1732–1739), or judge's decisions which are not court judgments (can. 1363 § 1, can. 1458,

<sup>16</sup> R. Sobański, *Ustawy Kościelne*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 55.

<sup>17</sup> Some authors present their own definition of a law: "Lex canonica est ordinatio fidei, in bonum communionis ratione tamquam norma generalis efformata, ab auctoritate competenti pro universitate personarum legis recipiendae capaci lata et sufficienter promulgata," W. Aymans, *Lex canonica, Erwägungen zum kanonistischen Gesetzesbegriff*, Archiv für katholisches Kirchenrecht 153 (1984), p. 353, ft. 45; or: "Lex ecclesiastica est norma generalis autonoma, ab Episcopali auctoritate promulgata, ad regendam communionem ecclesiam indolis publicae, ad fines Ecclesiae específicos," F. J. Urrutia, *Legis ecclesiasticae definitio*, Periodica 75 (1986), p. 335; or: "Das kanonische Gesetz ist eine mit den Mitteln der Vernunft gestaltete, auf die Förderung des Lebens der Communio ausgerichtete allgemeine rechtsverbindliche Glaubensweisung, die von der zuständigen kirchlichen Autorität für einen bestimmten Personenkreis erlassen und gehörig promulgiert ist." W. Aymans, K. Mörsdorf, *Kanonisches Recht: Lehrbuch...*, p. 159.

<sup>18</sup> Cf. R. Sobański, *Kanon 29*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 88.

<sup>19</sup> Some authors are critical about the double name for act of law: *lex* and *decretum generale*, some do not consider it as a serious problem. See examples: R. Sobański, *Teoria prawa kościelnego...*, p. 133, ft. 121.

<sup>20</sup> *Communicationes* 3 (1971), p. 92–93.

<sup>21</sup> The confusion is seen in the interpretation of can. 455 § 1. Some clarification was done by authentic interpretation given by Pontificia Commissio Codici Iuris Canonici Authentice Interpretando, *Responsiones ad proposita dubia*, 14.05.1985, *AAS* 77 (1985), p. 771.

can. 1487, can. 1505–1509, can. 1513, can. 1514, can. 1550 § 1, can. 1556, can. 1577 § 1), or explanations concerning faith (can. 754).<sup>22</sup>

### 3.3.3. “Executory” Act of Law

There are acts of law that can be called “executory” acts of law (*leges exsecutoriae*). They are issued upon the order of act of law of higher range and in this sense they are a form of execution of legal norm. In such situation making law is, at the same time, applying norm from higher law.<sup>23</sup>

The acts of law in question are genuine acts of law, not just execution documents. They make new norms or they supplement the law of higher range because it was provided and wanted by higher legislator. He orders it directly (can. 531, can. 533 § 3, can. 638 § 1), or he gives competences to do that (can. 277 § 3, can. 636 § 2, can. 1062 § 1). The legislative process is forced by legal obligation. But in the essence, the legislative process belongs to the legislator of lower level. He is responsible for the “executory” acts of law. The execution concerns not concrete and detailed norms but the general idea; the will of higher legislator consists in norm that orders to take legislative action.<sup>24</sup>

### 3.3.4. General Executory Decree

Those who have executive power can issue general executory decrees. They define more precisely the manner of applying an act of law, or urge the observance of them (can. 31 § 1). This is true that generally speaking the decrees should not bear new legal norms. They are meant to be based on acts of law or on legal customs. A general executory decree *praeter legem* is nonsense, because of its internal contradiction.<sup>25</sup> If the decree were contrary to any act of law it would have no significance (can. 33 § 1).

The general decrees can be issued under different names, like: directory (*directirium*), declaration (*decralatorium*), norm (*norma*), and they can still be genuine acts of law not just general executory decrees. It is because practically they are issued by the same authority. Not the name of a document decides about its nature. The documents in question are to be promulgated as acts of law are (can. 31 § 1).

<sup>22</sup> See: H Socha, *Münsterischer Kommentar...*, 29/2.

<sup>23</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 227.

<sup>24</sup> R. Sobański, *Metodologia prawa...*, p. 75.

<sup>25</sup> R. Sobański, *Metodologia prawa...*, p. 75, ft. 110.

### 3.3.5. Instruction

The definition of *instructiones* given by the Pontifical Commission for the Revision of the Code of Canon Law is: “actus vel documenta quae legum praescripta declarant atque rationes in iisdem exsequendis servandas evolvunt.”<sup>26</sup> It is a document, which sets out the provisions of a law and develops the manner in which it is to be put into effect. Instruction is lawfully published by the bearer of executive power (can. 34 § 1).

The name of the document instruction can be replaced by: *ordinatio*, *epistula*, *normae*. The document in question is not meant to enact new norms. But it can be genuine act of law because, as it was with general executory decrees, it is issued by the subject who has both execution and legislative power and is entitled to create new legal norms.<sup>27</sup>

Instruction is published. It does not have to be promulgated. The instructions are given for the benefit of those whose duty is to execute the law, and they bind them in executing the law (can. 34 § 1). Generally, the addressees of instruction are not the faithful. They are mainly organs and officials and those who hold office in the Church.

## 3.4. Characteristics of Act of Law

For the legislator, it is important to know some characteristics of an act of law. It is much easier to make an act of law when the legislator knows what features his product must have. The question is: What essential features should an act of law have? The outlook here is general. The question is about main features of any act of law, not about a particular act. A particular act has, apart from main features common to any act of law, also its own characteristics.

It seems that a good source of features of act of law is the definition of act of law given by St. Thomas Aquinas. Canonists often use his definition of law as “rationis ordinatio ad bonum commune, ab eo qui curam communitatis

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<sup>26</sup> Communicationes 3 (1971), p. 92.

<sup>27</sup> Inside the document issued by Konferencja Episkopatu Polski, Instrukcja Episkopatu Polski o przygotowaniu do zawarcia małżeństwa w kościele katolickim, 5.09.1986, [in:] Akta Konferencji Episkopatu Polski 1 (1998) no. 1, p. 85–137, art. 29–34 treat about engagement. Although the document is a typical instruction, these articles bring new norms, and they must be classified as “executory” acts of law.

habet, promulgata.”<sup>28</sup> The definition gives a number of features.<sup>29</sup> It is profitable to enrich the list by analysis of *CIC* 1983. The features are as follows: legal character, rationality, given by competent legislator, addressed to generally described users of law able to receive it, abstract, it intends to cover unspecified numbers of cases, stable, promulgated,<sup>30</sup> and with innovative character.<sup>31</sup> The list of features taken as a whole gives the definition of act of canonical law.<sup>32</sup>

### 3.4.1. Legal Character

Act of law must have a legal character. It means that it must aim to create right and duty situation. It is not just an opinion, or fadvice. Act of law is not a material for discussion but rather an expression of the legislator’s will based on solid fundamentals and limited by some factors. Act of law must be understood as the source of binding norms.

### 3.4.2. Rationality

The feature of rationality means that act of law is given by mind. Act of law must take some inner features from human intellect. Here canonical tradition is of great help. Act of law must be: fair (*honesta*), just (*iusta*), possible (*possibilis*), and useful (*utilis*).<sup>33</sup> The first feature means that act of law is not in contradiction with divine law (natural or positive). Act of law is just when

<sup>28</sup> *ST*, I–II, q. 90, a. 4 co. For analysis of such definition see, for instance: R. Sobański, *Normy ogólne Kodeksu Prawa Kanonicznego*, Warszawa 1969, p. 38–39; R. Sobański, *Teoria prawa kościelnego...*, p. 106–109; Cz. Martyniak, *Obiektywna podstawa prawa według św. Tomasza z Akwinu*, [in:] Cz. Martyniak, M. Wójcik, R. Charzyński, *Dzieła*, Lublin 2006, p. 21–48.

<sup>29</sup> Some authors find the definition unclear, because *legis author*, *subjectum* or *forma* of canon law are not explained, see, e.g., G. Michiels, *Normae generales...*, vol. 1, p. 112–113. There are authors that find the definition improper for church law because it is derived only from philosophical analysis of the social life. It does not take into consideration the supernatural factors of the society of believers, which are understandable and cognizable only in terms of faith. Critically about definition of St. Thomas, see, e.g., R. Sobański, *Ustawa kościelna – “ordinatio rationis”...*, p. 27–35.

<sup>30</sup> L. Wächter, *Gesetz im kanonischen Recht: eine rechtssprachliche und systematisch-normative Untersuchung zu Grundproblemen der Erfassung des Gesetzes im Katholischen Kirchenrecht*, St. Ottilien 1989, p. 164–275,

<sup>31</sup> R. Sobański, *Kanon 7*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 55.

<sup>32</sup> Thies method is presented by T. Kotarbiński, see: T. Kotarbiński, *Dzieła wszystkie*, vol. 1, *Elementy teorii poznania, logiki formalnej i metodologii nauk*, Wrocław-Kraków-Gdańsk-Łódź 1990, p. 52 ff.

<sup>33</sup> F. Bączkiewicz, *Prawo kościelne...*, vol. 1, p. 188–189; R. Sobański, *Normy ogólne Kodeksu Prawa Kanonicznego*, Warszawa 1969, p. 38–39. For comments on this, see: P. Skonieczny, *Koncepcja prawa Akwinaty – niewykorzystany kapitał? Wprowadzenie do głosów w dyskusji*, *Przegląd Tomistyczny* 1 (2007), p. 183–203, especially: p. 194.

it aims at fostering justice understood in terms of the Church, not of the world. Law must take care of individuals, as well as, the community and the protect good of the two. It must also balance the rights and duties (cf. can. 223). Realization of act of law must be possible both physically and morally. If not it causes harm. The abilities of addressees of law are to be deduced by the legislator from his picture of an average member of community in normal circumstances. Rarely can act of law order something above the regular requirements. It is allowable only when it is absolutely necessary for the community in a specific hard time, like war, for the limited time or for longer time but only when someone would willingly submit to the act of law. Outside these circumstances the act of law has no juridical significance; it can be only understood as a proposal or exhortation. The last feature is usefulness. Act of law is useful when its norms are practical, helpful, and functional. Law cannot bind people for nothing that is senseless.

### 3.4.3. Competency of Legislator

Generally speaking, only document given by bearer of legislative power can be an act of law. Competency here is not connected with features of the legislator, like rationality (proper knowledge in realm of jurisprudence, about factual matter, language skills, etc), but competency here is linked with his office and his position in the community. The legislator is competent when law allows him to make law for certain subjects.

### 3.4.4. Addressed to Generally Described Users

Any act of law is addressed to indeterminate number of users of law. They are, of course, described by their features or situations, circumstances, conditions, etc. Sometimes, the description of addressees can specify them and this can narrow a number of cases to even one. It happens rarely.

### 3.4.5. Users Able to Receive It

The community able to receive law is a community or a part of that community at the head of which stands a legislator. It can be presumed that rational legislator would not make law for addressees unable to receive it. Ability of reception of law presumes and requires that members of community be free men, responsible and ready to take on burdens of law.



### 3.4.6. Abstract

Act of law is abstract in the sense that it is covering unspecified number of cases. The cases regulated by act of law are described by specific features of situations in which norms from act of law are applied. The features are chosen by legislator. He considers them as important. Of course, it can be that an act of law, although in theory abstract, due to specific aim is to regulate a situation, which is unique and *sui generis*.<sup>34</sup>

### 3.4.7. Stable

It means that act of law is given for unspecified and unlimited time. The legislator can hardly predict circumstances that would cause the force of the act of law to cease. It happens only when act of law is issued in certain circumstances and its sense has connection with them. This feature is not as essential as rationality of law. Changed law is still considered as law. Of course, law changed too often, especially without any good reason, might not be held in high esteem. When law is seen as a stable and solid regulator of life, then legislator can be considered as rational and serious.

### 3.4.8. Promulgated

Act of law not promulgated does not exist as law. Before promulgation act of law is just an idea written by legislator in specific form, but without any force of law. There lacks an essential part of legislative process and because of this act of law cannot become law (*irritatio legis*). Promulgation constitutes act of law as source of norm.

### 3.4.9. Innovative Character

Innovative character means that act of law must change *status quo* in legal system. It can be done by bringing some new norms, changing old ones or revoking them. It would be completely pointless to promulgate more than one identical act of law. Of course, it does not preclude one from reminding users of law about law that binds them.

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<sup>34</sup> Like for instance: Joannes Paulus PP. II, Constitutio Apostolica *Universi dominici gregis* de Sede Apostolica vacante deque Romani Pontificis electione, 22.02.1996, AAS 88 (1996), p. 305–343.

### 3.5. Problems with Hierarchy of Documents

Any act of law is to be placed among other acts of law and in relation to them. That causes a serious problem of mutual influence and interference of laws in legal system. The civil jurisprudence states that connection between laws is of great importance. The relationship among them must be properly ordered and can be called hierarchical.<sup>35</sup> This is a basic feature responsible for proper working of the whole system of law.

Unfortunately, nothing of the kind is in canon law, except hierarchy from formal point of view between universal and particular law.<sup>36</sup> It has been a reality in the Church for many centuries, that there are many juridical documents in use. Canonical science has used various terms to designate them.<sup>37</sup> With such a large number of documents, there is a problem with hierarchical layout of them. The legislators in the Church might clarify the legal import of their pronouncements. It is important for stability and order of system of law. Next, it has a meaning when it comes to interpretations. Those who interpret these documents must examine carefully the mode of promulgation, and distinguish what is official as opposed to what is an opinion of an authoritative editor by considering the source of the document.<sup>38</sup>

It is very difficult to make a kind of hierarchy of norms within the category of Roman documents since the name given to a particular document does not reveal immediately its nature. The names do not indicate the document's true juridical significance. This is a nuisance for canonists. They too need theory to help them understand and explain the system of canon law. The special problem is with ecclesiastical documents that are issued by different authorities at various levels, are of diverse natures and weight, and go by many names, which do not always indicate the document's true significance.<sup>39</sup>

Still, there are some theories of classifying documents proposed in canonical jurisprudence.<sup>40</sup> One of them is based on juridical value of documents accord-

<sup>35</sup> See: E. A. Farnsworth, *An Introduction to the Legal System of the United States*, New York 1996<sup>3</sup>, p. 61–64 or S. Wronkowska, *Podstawowe pojęcia prawa...*, p. 46–47.

<sup>36</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 147.

<sup>37</sup> E. Labandeira, *Clasificación de las normas escritas canónicas*, *Iuris Canonici* 29 (1989), p. 679–680.

<sup>38</sup> F. G. Morrissey, *Papal and Curial Pronouncements...*, Ottawa 2001, p. 19.

<sup>39</sup> J. M. Huels, *A Theory of Juridical Documents Based on Canons 29–34*, *Studia Canonica* 32 (1998), p. 337–338.

<sup>40</sup> F. G. Morrissey, *Papal and Curial Pronouncements...*, Ottawa 2001. The study was first published as: F. G. Morrissey, *Papal and Curial Pronouncements: Their Canonical Significance in Light of the 1983 Code of Canon Law*, *The Jurist* 50 (1990), p. 102–125. A very first version was originally published in 1974 as: F. G. Morrissey, *The Canonical Significance of Papal and Curial Pronouncements*, Hartford 1974; see also: Joël-Benoît d'Onorio, *Le pape et le gouvernement*

ing to can. 29–34.<sup>41</sup> It deals with documents that are exclusively or primarily juridical in nature and based on the *CIC* 1983. This is why it is worth mentioning.

The theory in question is rooted in both canon law and ecclesiastical practice, and is applicable to all general norms and documents emanating from the Holy See as well as lower-level authorities with some refinements.

First, it is important to notice that not every document issued by legislator has the same legislative meaning. There are three kinds of acts which each have a different juridical value in descending order, there are also three categories or levels of binding of juridical documents in accord with their canonical weight, their level of authority. By categorizing documents, it is possible to understand readily and explain coherently the relative significance of documents issued in variety of forms.

The first step of the theory is to determine whether the document is magisterial or juridical by attending not only to its form but, more importantly, to its purpose and content. Some documents are products of the *munus docendi*. Other documents may be either magisterial or juridical in nature that is *munus regendi*. Some documents frequently have a mixed nature, both theological and juridical, but are primarily juridical. The significance of theological documents, or the theological parts of mixed documents, must be assessed according to theological criteria. Of course, canonists are also interested in documents of theological significance.

Having the first recognition done one can take the second step and assess the significance of juridical documents and typify them in hierarchical order. At the first level are legislative documents containing laws. Laws are: 1) general decrees given by a competent legislator, 2) general administrative norms issued by an executive authority of that legislator (can. 29–30). The second level consists of documents containing juridical norms issued for the community in general by an executive authority, and not a legislative power, and binding upon those for whom these norms were made (can. 31–33). They are subordinate to the laws. The third level, issued by holders of executive power, consists of documents that bind only the executors of the law (can. 34). They are called “instructions,” and they cannot be contrary to law. The author of the theory stresses that the list above deals only with legally (law and custom) and juridically (acts of executive or judicial power) binding acts.

For completeness, there must be added a fourth category or level of documents. The fourth level is not covered by any canon but by the practices of the Church that are more extensive than its canon law. They have a juridical

*de l'Église*, Paris 1992, p. 99–117. For list of the theories and critical reviews, see: K. Martens, *The Nature of Authority of Roman Documents*, [in:] *CLSA Proceedings* 70 (2007), p. 131–164.

<sup>41</sup> J. M. Huels, *A Theory of Juridical Documents Based on Canons 29–34*, *Studia Canonica* 32 (1998), p. 337–370.

character, in that they deal with matters that may be regulated by law, but the documents are intentionally drawn up and issued without any binding force. Those documents are not legally or juridically binding on anyone but they are morally binding and are a form of guidelines. Such provisions may be even legally or juridically binding if they are quotations of binding norms from other documents. Their authority, however, does not come from the present document but from the original source from which they were cited.

The schema is, of course, not perfect. Many documents do not fit the groups. The matter in question may be the documents with complex nature that consist of many parts that fit into many levels. It must be admitted that the search for a theory of ecclesiastical documents is not a purely academic exercise but an exercise with practical value for the life of the Church, as it will help to understand the proper nature and authority of a document.

Based on this schema, some rules for the legislators can be proposed. First, that document should be produced under certain names and titles, which will enable the reader to state what type of document one is dealing with based only on the title. A law should be labeled as law. Next, the title should refer to the matter included in the document. Also, to create more order and to give indicators for easy classification the title must say whether the document is legislative, executive or another kind of document. And the third, that legal documents must have specific characteristics, both material and formal. As a result: (1) the relation between various and connected documents will become clear-cut, and (2) it will lead to the appropriate response by Christ's faithful, i.e., they will do or not do something, or, will believe or not believe something.

The problems of the hierarchy of documents, as well as, the nature of juridical norms themselves are topics that are being addressed by canonists today. The complexity involved in assessing the juridical value of different kinds of documents or the norms within them poses a problem for both interpreters of the law and those required to observe it. Further simplification in these areas would be welcome.<sup>42</sup>

### 3.6. Addressees of Act of Law

The point can be put in the question: Who is the subject of church law? It is important for the legislator to know whom he will bind by his acts.

Of course, the one for whom the law is destined, is the community. The community alone is *capax legem recipiendi*. Law must cover general and

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<sup>42</sup> Cf. P. Smith, *Determining the Integral Reordering of Law: Tools for the Canonist*, *Studia Canonica* 35 (2001), p. 132.

uncountable cases that can happen in the community. But sometimes the legislator must have in his mind not only community as general congregation of persons, but also the subjects of law like groups and even sometimes individuals. In such sense, the law itself should indicate whom it binds. To do this legislator must know who can be covered by his law.

The subject of canon law is a subject capable of rights and duties in the Church, that is, capable of having juridical relations in the canonical legal order. Two types of juridical subjects are distinguished: the physical person and the juridical person (cf. can. 96–123).

### 3.6.1. Physical Person

#### 3.6.1.1. Catholics

General rule states that the addressees of canonical norms can be only those who are incorporated into the Catholic Church by baptism or were received into the Church after the baptism and they are members of the Catholic Church. They can be called “the faithful” in the sense in which *CIC* 1983 uses the term – Catholics. They have rights and duties proper to Christians (can. 96). They are bound by merely ecclesiastical laws when they fulfill some other requirements like: 1) a sufficient use of reason and, unless the law expressly provides otherwise, 2) completion of the seventh year of age (can. 11).<sup>43</sup> The rights and duties of persons are influenced by various circumstances, such as domicile, canonical condition, which can be: clerical state, the laity, religious, marriage, and rite.

Domicile (can. 100–107) establishes the community or ecclesiastical circumscription to which one belongs, and thus also one’s ordinary and proper pastor. In addition to domicile, one’s dwelling is important as well in order to determine the rights and duties of the person.

Rite determines membership in a ritual Church. The faithful belong to the rite by baptism received in the Church of the parents, although baptized person who has completed 14 years of age can choose his own rite. After baptism one can change rite by concession (license) of the Holy See, or by marriage contracted with a person of another rite, or in certain cases by choice (can. 112).

Generally, the code covers only members of the Latin Church (can. 1). But there are canons that bind members of the Eastern Catholic Churches in matters of faith (e.g., can. 331–333, can. 336–337, can. 840), also when canons contain or explain the divine law (e.g., can. 1084 § 1, can. 1085 § 1). Canons like can.

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<sup>43</sup> In the analogical can. 12 of the 1917 code all who received baptism and fulfilled other above mentioned requirements were under merely ecclesiastical law. About the discussion regarding the change, see, M. Żurowski, *Prawo Nowego Przymierza...*, p. 34–35.

111, can. 112, can. 214, can. 350 § 1 and § 3, can. 372 § 2, can. 383 § 2, can. 450 § 1, can. 476, can. 479 § 2, can. 518, can. 846 § 2, can. 923, can. 991, can. 1015 § 2, can. 1021, can. 1109, can. 1248 § 1 concern directly the correlation with the Eastern Catholic Churches.

In this context, it must be remembered that can. 383 § 2 (cf. *CCEO* 1990 can. 193) orders the diocesan Bishop in exercising his pastoral office to be solicitous for all Christ's faithful entrusted to his care, even if he has the faithful of a different rite<sup>44</sup> in his diocese (*CD* 23). It means that taking his legislative action he must take into consideration members of other Catholic Churches *sui iuris*. The legal acts issued by Latin legislator can bind them also. Through both domicile and quasi-domicile they acquire local hierarch of the Church *sui iuris* in which the person is enrolled, unless they have their own exarchy (*CCEO* 1990 can. 916 § 1). The local hierarch of the Church *sui iuris* in question can be Latin legislator. This obligation corresponds with right of the faithful (can. 214; *CCEO* 1990 can. 17). Taking into consideration different rites requires proper knowledge of both codes: *CIC* 1983 and *CCEO* 1990.

Another factor is canonical status. It depends on the reception of the sacraments of baptism and holy orders or on taking vows. The change in condition is automatically followed by the change of some duties and rights. To give a full picture, it must be mentioned that defection from Catholic faith and abandonment of the Church does not exclude from submission to canonical laws (cf. can. 751).<sup>45</sup>

### 3.6.1.2. Non-Catholics

Persons who are non-baptized or persons baptized in non-Catholic Church, do not belong to the Catholic Church. Generally speaking, they are not subjects to church law. But, of course, they are subject to natural law, which binds every person. The divine positive law binds persons in question only when they are acquainted with it.

It must be noticed that sometimes the non-baptized can also be under church law. There is the right possessed by every man to be evangelized and therefore to be baptized (can. 748 § 1, can. 851). It also happens when they are married to Catholics (can. 1086, can. 1117, can. 1135). Other example of canons that bind the non-baptized is the Pauline privilege (can. 1143–1150). They can receive blessings, unless there is a prohibition by the Church (can. 1170). The

<sup>44</sup> Term *ritus* is equal in this place with expression: "Ecclesia ritualis sui iuris" (can. 111 § 2).

<sup>45</sup> Canons 1086, 1117 and 1124 of *CIC* 1983 included juridical effects of *actus formalis defectionis ab Ecclesia*. But due to difficulties with establishing, from both a theological and a canonical standpoint the definition and practical configuration of such a formal act, these effects were abolished by Benedictus PP. XVI, Litterae apostolicae motu proprio *Omnium in mentem* quaedam in Codice Iuris Canonici immutantur, 26.10.2009, *AAS* 102 (2010), p. 8–10.

non-baptized who acquire an ecclesiastical property must respect canonical law (can. 1290 ff.). Also, some canons from Book VII of *CIC* 1983, *De processibus* applies to the persons in question (e.g., can. 1476).

The next issue is connected with catechumens. Although they are not baptized, they are linked with the Church in a special way (can. 206 § 1). The Church has a special care for them and gives them special prerogatives which are proper to Christians (can. 206 § 2). Like the fact that as far as funeral rites are concerned, catechumens are to be reckoned among Christ's faithful (can. 1183 § 1).

Baptized non-Catholics can be subjects of canon law when they voluntarily submit themselves under church law. It happens when they are contracting marriage with Catholic spouse (can. 1117, can. 1124–1128, can. 1142, can. 1476, can. 1671, can. 1692), when Catholic ministers serve them (can. 844 § 3–5, can. 1170, can. 1183 § 3), or when they fulfill some task for the Church or within the Church (can. 463 § 3, can. 874 § 2).

### 3.6.2. Juridical Person

Canon law recognizes as subjects of right and duties also a juridical person (*persona iuridca*). There were some theories about the nature of the juridical person,<sup>46</sup> but the most accepted and used today is the one that treats such persons as persons of real existence, which law does not create but rather regulates (*reale personalities substratum*).<sup>47</sup>

A juridical person is a corporate body, that is, an aggregate of persons or things (can. 115 § 1), which has a life independent of that of the individuals who belong to it in a given moment. Thus, it is a juridical subject and acts by means of its representatives. The juridical person can acquire juridical personality by law or by decree of the competent authority (can. 114 § 1). Normally, ecclesiastical circumscriptions like, e.g., dioceses have personality by law, by the very fact of being constituted. Other corporate bodies can acquire it by singular decree of the authority and must have their own statutes (can. 94) approved by the competent authority.

Among the juridical persons there exists another distinction. Public and private juridical persons are distinguished principally in that the public ones are so constituted by the competent ecclesiastical authority and act in the name of the Church (can. 116 § 1). Private ones arise through the initiative of the faithful, who govern them on their own responsibility albeit under the supervision of the authority. They can only be entrusted to a public juridical person (can. 301 § 1). It must be added that sometimes church juridical

<sup>46</sup> For a short history, see: A. Gauthier, *Juridical Persons in the Code of Canon Law*, *Studia Canonica* 25 (1991), p. 79–81.

<sup>47</sup> G. Michiels, *Principia generalia de personis in Ecclesia*, Parisiis-Tornaci-Romae 1955<sup>2</sup>, p. 377.

personality is not equal to civil juridical personality. It depends on agreement between the Church and state.<sup>48</sup>

### 3.7. Subject Matter of Act of Law

The problem can be analyzed on two levels. One is a general level that represents the overall aim of canon law and the other one is a particular level, that is, a level that reflects a theme of a singular act of law or a theme of a scope of acts of law.

The general aim of canon law is placed inside the Church. It is included in Church's vocation, mission, and assignment.<sup>49</sup> It is salvation of souls (can. 1752).<sup>50</sup> It has general character and must be regarded as the fundamental principle of the entire law in the Church. There is no justification for law unless it refers to Salvation.

The proximate aim of a singular act of law or a scope of acts of law is to normalize a certain topic and give rules for a part of life. The subject matter of law can be anything that in optic of the legislator requires regulation with provision of his competences. The legislator must be very cautious and modest in determining what subject matter is to be regulated. If the regulation is not really necessary and it goes too far, that is, it extends into something that must not be regulated by church legislator, the law will be unjust and wrong. As a consequence, the law will not be obeyed.<sup>51</sup>

The legislator must avoid a stance of an administrative idealist. The essence of the stance is a naive thinking that anything can be changed by law and making law will itself bring expected change.<sup>52</sup> It manifests itself as unrealistic, striving for perfection and the urge to regulate everything. It brings danger of totalitarianism.<sup>53</sup> A position like this must be rejected. It does not mean that law in the Church will be fail. It is obvious that such unnecessary law would not be advantageous to the community but would instead end up doing harm to it. There is a danger that life of the users of law would be overregulated by too many acts of law or too many norms in the act

<sup>48</sup> See, for instance: Konkordat między Stolicą Apostolską i Rzeczpospolitą Polską, podpisany w Warszawie dnia 28.07.1993, Dz. U. of 1998 No. 51, item 318, art. 4.

<sup>49</sup> R. Sobański, *Kościół – prawo...*, p. 241.

<sup>50</sup> Cf. Ivo Carnotensis, *Epistola* 60, PL 162, col. 74.

<sup>51</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 197.

<sup>52</sup> S. Wronkowska, Z. Ziemiński, *Zarys...*, p. 134–135.

<sup>53</sup> R. Sobański, *Kościół – prawo...*, p. 208.



of law.<sup>54</sup> The situation can be called “colonization” of the community by law.<sup>55</sup> It deprives them of freedom and takes away possibility of being responsible for their own actions. Sometimes, it is underlined that *deregulation*, which is to be understood as a removal of regulations by limiting both the number and volume of legal acts, can be of help for the development of the community.<sup>56</sup>

Appropriate realm for regulation by law is external acts of man. “Homo autem, qui est legislator humanae, non habet iudicare nisi de exterioribus actibus, quia homines vident ea quae parent.”<sup>57</sup> Inner acts are not of interest to the legislator.<sup>58</sup> Even the Church has no direct power over inner acts of man and has no means to control it: “potest homo legem ferre, de quibus potest iudicare. Iudicium autem hominis esse non potest de interioribus motibus, qui latent, sed solum de exterioribus actibus, qui apparent.”<sup>59</sup> Still the Church can order some inner acts like, mental prayer (can. 246 § 3, can. 663 § 1), or assent of faith (can. 750) or a religious submission of intellect and will (can. 752). Mixed external-internal acts can be justly regulated by law when internal act is essential for external one, like in can. 1039, can. 388 § 1, can. 534 § 1. It must be pointed out here that if the law were to order an external act without ordering at the same time internal act directly correlated with the first one, it would be immoral.<sup>60</sup>

The subject matter of act of law can be good or morally neutral.<sup>61</sup> But the legislator must remember that even morally neutral matter in individual context can be good in community context (see: can. 200–203). The order must be possible to realize both morally and physically, because “Nemo potest ad impossibile obligari” (cf. can. 1095 no. 3).<sup>62</sup>

The range of law changes. It is a natural process. The new fields of life are regulated and other ones are deregulated.<sup>63</sup> For instance, there are in *CIC* 1983 the obligations and rights of all Christ’s faithful (can. 208–223). There were no distinctly and evidently formulated canons about it in *CIC* 1917. On the other hand, no chapter on the prohibition of books is present in *CIC* 1983 as it

<sup>54</sup> See more: Ch. Staughton, *Za dużo prawa*, transl. E. Gąsiorowska, *Ius et Lex* 1 (2002) no. 1, p. 167–175.

<sup>55</sup> Cf. J. Habermas, *Theorie des kommunikativen Handelns*, vol. II, Frankfurt am Mein 1981, p. 522.

<sup>56</sup> See more: J. Kochanowski, *Deregulacja jako pierwszy etap reformy systemu stanowienia prawa*, *Ius et Lex* 3 (2005) no. 1, p. 213–235.

<sup>57</sup> *ST*, I–II, q. 100, a. 9, co.

<sup>58</sup> F. Bączkiewicz, *Prawo kościelne...*, vol. I, p. 187.

<sup>59</sup> *ST*, I–II, q. 91, a. 4, co.

<sup>60</sup> R. Sobański, *Normy ogólne Kodeksu Prawa Kanonicznego*, Warszawa 1969, p. 53.

<sup>61</sup> For presentation of complexity of the discussion on law and morality, see: O. Höffe, *Prawo i molarność – pięć płaszczyzn problemu*, *Communio* – kolekcja, nr 9, 1994, p. 198–207.

<sup>62</sup> *RI* 6.

<sup>63</sup> Cf. R. Sobański, *Zasięg normy kanonicznej*, *Prawo Kanoniczne* 34 (1991) no. 3–4, p. 27.

was in the former code (*CIC* 1917 can. 1935–1405). Some fields of regulation can be changed, like in penal law in penalties for particular offences. In *CIC* 1917 there were 100 canons in the part titled: *De poenis in singula delicta*. In the analogical part of *CIC* 1983 there are only 35 canons on the matter.<sup>64</sup> The reason for such reduction can be: change of the legislator's mind, historical circumstances, law issued by civil authorities that regulates the matter duly according to church legislator, passing legislative competences to lower legislator and reservation of the matter by higher legislator.<sup>65</sup>

It must remain clear that every act of law in the Church aims at the general and ultimate goal, that is, the care of souls. It is not so visible when law deals with temporal goods of the Church. It is more observable when it regulates, for instance, administration of sacraments. But in both situations law brings order to the community of believers and helps them pursue their perfection and holiness, and aids them to grow and develop.<sup>66</sup>

When law both helps to gain fundamental aspiration for people and, in addition, answers people's needs and gives solution to their problems, its authority among users becomes greater. And contrary to this, if law does not pertain to matters of vital importance in the life of the faithful, it is not treated as a valuable law.

In summary, it can be said that any subject matter may be regulated in canonical norms unless it has no relation with faith. The legislator may regulate anything that is ordered by truth of faith and it is not regulated by other sources of norms.<sup>67</sup> It is because faith is giving ultimate borders and pattern of behavior both of individual and the community.<sup>68</sup> Christians by their life are "singulis sacramentum visibile huius salutiferae unitatis" (*LG* 9). Any element of their life that is connected with being witness for the world can be in optic of the legislator. Of course, the criterion of importance has to play its role. Law must be practical, as well.

There are some practical clues for the legislator. An act of law should concern certain range of subjects. No law can cover everything, but just a certain carefully chosen part of life. In choosing and limiting the range of law legislator can appeal to tradition, to previous act of law or he can also ask users of law what range of regulation they need or expect.

To the degree to which it is possible, an act of law should comprehensively regulate a matter. It means that no area of a problem should be left unregulated.

<sup>64</sup> Cf. *CCEO* 1990, in chapter: *De poenis in singula delicta* there are only 31 canons. It must be noticed that penal norms outside *CIC* 1983 and *CCEO* 1990 are growing.

<sup>65</sup> Cf. J. Syryjczyk, *Kanoniczne prawo karne. Część szczególna*, Warszawa 2003, p. 14–15.

<sup>66</sup> Cf. *Praefatio*, p. xxx.

<sup>67</sup> Cf. R. Sobański, *Przedmiot normy kanonicznej*, Śląskie Studia Teologiczno-Historyczne 21 (1988), p. 20 ff.

<sup>68</sup> R. Sobański, *Zasięg normy kanonicznej...*, p. 27–28.

It would not be good if more than one act of law regulated the same matter. An act of law should have one topic and there is no need to make another law with similar topic. For instance: decree on seminary should regulate comprehensively the entire life of the institution.

As it was said, acts of law should concern certain range of subject matter of law. They should be named and in clear way defined for the scope of objects of law to be determined. Law should be written in such a way that the limits to subject matter pointed above would be consequently preserved and kept. The range should neither increase nor decrease. Law should be written, in such a way, that there is no necessity to add many separate rules on execution of the norm. Exceptions are to be rare. For instance: a priest who celebrates a number of Masses on the same day may, apart from Christmas Day, retain for himself the offering for only one Mass. The other offerings he is to transmit to purposes prescribed by the Ordinary (can. 951 § 1). The matter can be in decree on stipends. It is not advisable that the matter would be in a decree on rules for raising money for charity.

## 3.8. Formulations in Act of Law

Law carries the message of the legislator to subjects of law. To pass the message correctly and provide correct understanding of this message, legislator should be aware that his document has to be formulated in a special way.

Analysis of the *CIC* 1983 allows for making a list of different types of formulations. They are small literary pieces of text. They are: literary forms and canons creating right and duty situations. All of them are typical for *CIC* 1983.

They are to be taken into consideration in process of finding the specific meaning of a canon, so legislator must know them, program them and use them correctly. The fact that they are used (rather intentionally) by the supreme legislator creates a requirement for lower legislators to use them also.

### 3.8.1. Literary Forms

There are in *CIC* 1983 many literary forms, which are defined as “small literary pieces widely differing from each other in nature.”<sup>69</sup> The application of the doctrine of literary forms to the laws of the church is new. The list of them

<sup>69</sup> L. Örsy, *Interpretation. Guiding Principles*, [in:] *Theology and Canon Law...*, p. 53.

was slightly modified in the realms of names of literary forms and numbers over the course of time.<sup>70</sup> Among literary forms, one can count:

1. **Dogmatic statements.** There are in the 1983 code statements of belief. Sometimes canons are not only based on the doctrine but they are expressions of the Church's faith, parts of the Creed. Usually, such statements are there to introduce practical dispositions.
2. **Theological opinions.** There are theological statements, which do not represent any article of faith, but are historically conditioned opinions of a theological school. While it could be argued that such opinions should not be in a book of laws, the laws which flow from them are not necessarily out of place. Then the legislator may feel compelled to use one of the accepted theological opinions as his point of departure.
3. **Statements of morality.** There are canons, which touch on issues of morality. A legislator must remember that it is not the business of the law to give final answers on disputed ethical issues
4. **Spiritual exhortations.** Some canons are exhortations, it means that they express what the legislator desires, but they do not create right and duty situations and should not be changed into binding obligations. But on the other hand, it must be remembered that the will of the legislator binds even if it is not a right and duty situation. He has power. He represents authority of Christ and His Church. Exhortations are norms for believer.
5. **Theories borrowed from philosophers.** There are canons with a metaphysical content. They offer the insights of philosophers to solve canonical problems. The legislator uses the metaphysical principles and categories as useful tools in handling and solving some canonical problems but does not really vouch for their ultimate correctness.
6. **Affirmations borrowed from empirical sciences.** There are canons, which contain scientific statements, e.g., from the field of psychology or psychiatry. The legislator has borrowed them. They present the state of information of the legislator at the time of the promulgation of the law.
7. **Canons creating right and duty situations.** The true legislative pieces, common with most of civil law, are the canons, which deal with right and duty situations. Some of these canons are directly concerned with establishing certain structures; others are primarily

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<sup>70</sup> Cf. L. Örsy, *The Interpretation of Laws...*, [in:] *The Art of Interpretation...*, p. 47–82; L. Örsy, *Christian Marriage, Glosae on Can. 1012–1015*, *The Jurist* 40 (1980), p. 282–348; L. Örsy, *The Interpreter...*, p. 33–37; L. Örsy, *Interpretation. Guiding Principles*, [in:] *Theology and Canon Law...*, p. 53–58.

norms of action imposed on all or some members of the community. The difference between norms for structures and norms for action is more nominal than real because, even in the case of structures, the law is concerned with actions that will either create or support them.

This list from 1 to 7 should not be seen as exhaustive. Even in the same category there can be nuances. Canon can contain several literary forms; a particular norm can represent more than one literary form. For example, can. 1055 § 1 contains a dogmatic statement, a theological opinion.<sup>71</sup>

Critically it can be said, that canons are not to be statements of the dogmatic teachings of the Church, but rather rules of behavior. Christian doctrine is not a proper subject matter for disciplinary legislation. When theological concepts and propositions are used to communicate a legal norm, they often lose much of their meaning and depth. Authoritative teaching is far too important an activity in the Church for it to be done accidentally, hidden in a legislative text.<sup>72</sup>

Commenting on theological opinions and statements of morality, it can be said, that canon law does not have to be completely deprived of them. Canon law is given to the Church because of faith and it is completely understandable that faith statements will be present in law. Still law is given to norm, not to proclaim or teach.

The legislator's task would be to use the form presented above intentionally and willingly. The usage depends on what the legislator wants to say. But the legislator must remember that some of literary forms, like points 1, 5, 6 can make the process of interpretation more difficult and the risk of misunderstanding is even greater. Canon law simply does not have the means to interpret non-legal texts, which come from the field of theology, philosophy, or any other science. Their meaning should be found with the method and in the context of the science from which they came.<sup>73</sup>

On the other hand, a situation in which the legislator does not strictly abide by the rule *ius non docet, sed iubet* is in the Church quite natural. He is not only the legislator for the community; he is also and above all teacher of faith. Part of his teaching work is making law. The same can be said about most subjects entitled to take legislative action. He deems it wise to present law not only as emanation of his will but as an order of faith. The urge to issue acts of law has its source in the legislator's vocation to spread the gospel. Legislative action makes part of the process of passing on faith. By legislative activity the legislator wants to help the people of God to adhere unwaveringly to the faith, to penetrate it more deeply with right thinking, and to apply

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<sup>71</sup> L. Örsy, *Interpretation. Guiding Principles*, [in:] *Theology and Canon Law...*, p. 57.

<sup>72</sup> L. Örsy, *Interpretation in View of Action...*, p. 591–592.

<sup>73</sup> L. Örsy, *Interpretation in View of Action...*, p. 593.

it more fully in their life (LG 12). Theological argumentation in acts of law can help to stimulate their interpretation, and to direct their application.<sup>74</sup> It is unimaginable for canon law not to have any relation to the dogmatic truth as, for example, sacraments or primacy of Supreme Pontiff in the universal Church. Some dogmas determine and direct law; without them canon law would not be a law of the Church.

### 3.8.2. Canons Creating Right and Duty Situation

During the process of renewal of the *CIC* 1983,<sup>75</sup> the first principle was that the new code had to have juridical character.<sup>76</sup> Typical legal form of expressing legal obligation is a canon creating rights and duty situations. Inside the already mentioned category no. 7 of literary forms, there can be found different forms as listed below.<sup>77</sup> The legislator must pay special attention to them, because they are the most suitable way of expressing his will.

1. **Exhortations** are communications emphatically urging someone to do something. For instance: schools should be valued (can. 796), the faithful should join approved associations (can. 298), and clerics should give superfluous funds to charity (can. 282 § 2).
2. **Admonitions** are authoritative counsels or warnings, like to use discretion in the use of the media (can. 666), to refrain from everything alien to the clerical state (can. 285), to avoid dangerous companions (can. 277),
3. **Directives** are official or authoritative instructions, like: to maintain communion (can. 209 § 1), to show pastoral care for your people (can. 383), to see that the word of God is proclaimed (can. 528),
4. **Precepts** are general rules intended to regulate something, like behavior. Examples can be: a precept to record the marriage (can. 1121), to hear the finance council (can. 1277), to take possession of the diocese (can. 382).
5. **Prohibitions** are rules of forbidding something: do not damage another's good name (can. 220), clerics are forbidden to assume public office (can. 285), do not sell church property without permission (can. 1291).
6. **Penalties** are kinds of punishment imposed for breaking a law: a confessor who breaks the seal of confession is excommunicated (can. 1388), a priest who strikes a bishop is interdicted and suspended (can. 1370).

<sup>74</sup> R. Sobański, *Metodologia prawa...*, p. 51.

<sup>75</sup> About preparatory work see: W. Góralski, *Kodyfikacja prawa w Kościele łacińskim po Soborze Watykańskim II*, Płock 1983.

<sup>76</sup> *Praefatio*, p. XXI.

<sup>77</sup> J. A. Coriden, *Introduction to Canon Law*, New York 1990, p. 32; L. Örsy, *The Interpreter...*, p. 38–40.

7. **Procedures** are official ways of doing something. Laws concerning procedures are established for the defense of rights, for making decisions more efficiently and safely. Dispensation from them is impossible because it does not concern the spiritual good of the faith. Examples can be canon that prohibits imposition of censure unless the accused has been warned (can. 1347), or canon that orders that the respondent must be notified of the trial (can. 1507).
8. **Constitutional elements**. The primary aim of such laws is not to prescribe a course of action, but to bring an institution into existence by determining its structures. For instance, canon which says that only those incorporated into Christ by baptism share his priestly, prophetic and royal offices (can. 204), or that the Pope and the bishops hold supreme authority in the church (can. 331, can. 336),
9. **Favors of law**. An obvious illustration could be can. 1127, that is, the privilege of faith enjoys the favor of law.
10. **Interpreting directions**. They give rules for interpretation of legal text. The code gives some directions on how to find the true meaning in can. 16–19, and in can. 27.
11. **Conflicting laws directions** help to handle real or apparent conflict among laws: can. 6, and also can. 22–23.
12. **Lacuna legis**. The rule about *lacuna* in can. 20 is a literary form in itself. It recognizes that there are situations, which cry out for a legal norm when none exists.

The canons that create right and duty situation should have priority in the legislator's work. They are true canons with legal norms. It is good to foster and develop the pure legislative side of canon law. It will help it to keep a proper distance and to avoid mixing with other documents of the Church.

But even among the listed types of canons that create right and duty situation there are some to which the value of strict binding cannot be attributed for sure. Commentaries disagree about binding force of some canons.

The situation can be interpreted as a weakness of canon law – it has no proper tools to explicitly and directly order something. On the other hand, canon law is a genuine law, but it is also law *sui generis*. The disagreement in question flows from its nature. Exhortations belong to genuine canonical pronouncements and encode genuine canonical norms. The specificity of these forms of ordering comes from the legislator's presumption that addressees of law due to their faith are eager to cooperate with the legislator. They are motivated by conscience to take freely directions given them by canonical law, even if it is not formulated in high-principled manner.<sup>78</sup>

<sup>78</sup> R. Sobański, *Nauki podstawowe prawa...*, vol. II, p. 102–109.

All this leads to the conclusion that formulations of act of law, although important, are not essential for binding force of law. Every kind of formulation is an address from legislator as a teacher of faith to people of faith. However canon law is formulated, it treats the same faith.<sup>79</sup>

### 3.9. Attitude to Law

Generally speaking, attitude of the users of law to law that binds them can be classified according to several typical models.<sup>80</sup>

The first is a stance of *i n d i f f e r e n c e*. People know that there is law. They are familiar with the fact of existence of such a phenomenon, but law is of no interest to them. They do not recognize law as a source of norms. They neither want to respect the law, nor to disrespect it. They simply do not treat law as something of importance to them.

The next two models have to do with the situations in which law is recognized as a law, that is, a source of norms, but in spite of the fact that it has a binding force, law is disrespected and defied. Such is the case in the attitude of *n o n c o n f o r m i s m*: norm is broken because it is law. It is a kind of anarchy. Another attitude is *n e g a t i v i s m*: law is rejected because it comes from a disrespected or rejected legislator.

Two other models depend on users' inspirations and motivations to obey law. The first main model is based on principal motivation. Law is treated as a source of norms that must be respected because they exist as a law. Within this model one can distinguish two stands. The first is *l e g a l i s m* and the second is *c r i t i c a l l e g a l i s m*. *L e g a l i s m* is an unquestioning approach to law. The norm is unconditionally accepted because it belongs to the system of law. In the second situation, the norm of the law is honored and obeyed because it is recognized as a just and proper norm of the system of law.

The second model based on motivation is a model in which motivation is stimulated by functionality of law. Also, here one can distinguish two approaches. The first one can be described as *c o n f o r m i s t*. It is when a user of law obeys norm due to its practicability and effectiveness in achieving aims significant for a user or for a community. The second approach is *o p p o r t u n i s t i c*. In this situation, a user of law acts according to a norm to achieve his own aim, but the same user of law can disrespect law, when its norms are not in accord with his goals. Someone goes along with law only because law can be of help to him.

<sup>79</sup> R. Sobański, *Metodologia prawa...*, p. 56.

<sup>80</sup> Cf. A. Pieniążek, M. Stefaniuk, *Socjologia prawa. Zarys wykładu*, Kraków 2003, p. 202–212; P. Sztompka, *Socjologia*, Kraków 2002, p. 277–278.



Taking into consideration the connection between law and faith, it seems that there are the following attitudes toward canon law.<sup>81</sup> In some measure they agree with attitudes presented above.

The first stance is a complete rejection of faith and, as a consequence, rejection of law. Someone is not interested at all in what Christianity has to offer. It is a stand equal to that of indifference. There can be a situation where someone rejects faith but accepts law in the limited measure, only as a practical tool, for instance, during election or juridical proceedings. It is a position of an opportunist. The next stance is when faith is fully accepted but law is treated by someone with reserve. There is a limited trust in law. As a result, the practicing of faith is far from the model presented in norms. It can be roughly equaled to the stand of conformist. The last possible stance is when faith is fully accepted and life of faith is lived according to canonical rules. It is a critical legalism.

### 3.10. Reception and Nonreception of Law

The question of reception of law has a long and a richly documented history in the Church.<sup>82</sup> It has been an object of many disputes. They began intensively in the 12<sup>th</sup> century with Gratian. An important voice in the discussion was F. Suarez. Presently, the matter of reception of law is of interest to many canon lawyers<sup>83</sup> and some theologians.<sup>84</sup> This interest shows how important the problem is. The legislator must not omit it.

<sup>81</sup> Cf. R. Sobański, *Kościół – prawo...*, p. 218–220.

<sup>82</sup> G. J. King, *The Acceptance of Law by the Community as an Integral Element in the Formation of Canon Law*, Washington 1979; G. J. King, *The Acceptance of Law by the Community: a Study of the Writings of Canonists and Theologians, 1500–1750*, *The Jurist* 50 (1997), p. 233–256.

<sup>83</sup> H. Müller, *Rezeption und Konsens in der Kirche: eine Anfrage an die Kanonistik*, *Österreichisches Archiv für Kirchenrecht* 27 (1976), p. 3–12; J. A. Coriden, *The Canonical Doctrine of Reception*, *The Jurist* 50 (1990), p. 58–82; J. M. Huels, *Nonreception of Canon Law by the Community*, *New Theology Review* 4 (1991), p. 47–61; R. Sobański, *Recepcja normy kanonicznej*, *Śląskie Studia Historyczno-Teologiczne* 23/24 (1990–91), p. 77–85; L. Ōrsy, *The Reception of Laws by the People of God...*, p. 504–526; R. Sobański, *Recepcja prawa w Kościele*, *Prawo Kanoniczne* 46 (2003) no. 3–4, p. 3–14; see also papers from a conference held in Salamanca, Spain in 1996. Originally published in English in *The Jurist* 57 (1997) no. 1.

<sup>84</sup> Y. Congar, *La "reception" comme réalité ecclésiologique*, *Revue des sciences philosophiques et théologiques* 56 (1972), p. 369–403; H. J. Pottmeyer, *Reception and Submission*, *The Jurist* 51 (1991), p. 269–292; W. Beinert, *The Subjects of Ecclesiae Reception*, *The Jurist* 57 (1997), p. 324–346.

### 3.10.1. Necessary Clarifications

The word *reception* means an action or process of receiving something sent, given, or inflicted or the way in which a person or group of people reacts to someone or something. The word here will be used in legal context and in reference to the Church reality.

The term has two connotations. Firstly, *reception* of law has endogenous sense, that is to say, the law comes from the same community, namely the Church, to which it is addressed. The term means here the process by which the Church as community or a smaller Church community accepts the law established by higher authorities, for instance, a reaction of a diocese to the Council's decrees. The second connotation of *reception* of law concerns an action that takes place between the ecclesiastical authority and the individual faithful.

The two meanings are connected because reception by the community has its beginning and consists of the reception of every single individual. *Communio*, after all joins people in one organism.

### 3.10.2. Essence of the Problem

Gratian stated that: "Leges instituuntur, cum promulgantur, firmanur, cum moribus utentium approbantur. Sicut enim moribus utentium in contrarium nonnullae leges hodie abrogatae sunt, ita moribus utentium ipsae leges confirmantur."<sup>85</sup> This dictum is not to be understood in the sense that the community's acceptance gives a binding value to the law. It means that agreement of the faithful is needed to establish law in full. The confirmation of law is done by approval of the law and its practice by the users.

A different point of view was held by F. Suarez. He argues against the necessity of reception saying that: "Dico vero primo: Pontifex potest obligare Ecclesiam ad acceptandum leges canonicas a se latas, et sufficienter promulgatas. Idemque est cum proportione de Episcopis. [...] Hinc ergo concludimus Christum ita dedisse hanc potestatem Vicario suo, ut per se posset valide et efficaciter operari sine dependentia a consensu populi [...] si enim lex non potest esse lex, nisi consentientie populo, profecto populus est conlegislator simul cum Pontifice, quod absurdissimum dictu est."<sup>86</sup> He insisted that the only elements necessary for the establishing of a new law are: power of the lawmaker, his will to make a law, and proper promulgation of the law. There is no room for the role of acceptance by users of law.

<sup>85</sup> D. IV, c. 3.

<sup>86</sup> F. Suarez, *Tractatus de legibus et Legislatore Deo*, Liber IV, cap. 16, 2.

The code says that law comes into being when it is promulgated – “Lex instituitur cum promulgator” (can. 7).<sup>87</sup> It cites only the first part of the fragment from Gratian. But it must be said that the Latin text uses word “instituo” the way Gratian did. It has a slightly different meaning than “constituo,” which could have been used, but it was not. The word “instituo” means: to ordain, to institute, to cause, to procure, to establish, to instruct<sup>88</sup> and the word “constituo” is more firm and means: to set, to determine, to make, to appoint, to constitute, to establish, to arrange.<sup>89</sup> It could be said, that “laws begin with promulgation but they are not fully constituted until they are received.”<sup>90</sup>

If the law is promulgated but it is not received or being received it is later on neglected, the law is lost and all efforts of the legislator are in vain. It remains an empty form.<sup>91</sup> The real importance, which full acceptance and observance of the law has, must not be underestimated, so that it may deploy all of its normative effectiveness.<sup>92</sup> Otherwise, the law can lose its legal significance and legal validity or at least will be ineffective, that is, it will not shape the community the way a legislator wished. Even the best law is useless if it is not received by the faithful into their hearts.

The process of reception can be compared to the process of building a cathedral. The lawmaker is an architect but the people are the builders. The cathedral would never exist without the laborers, no matter how good the design could be. In the same way, the living body of Christ would never be functioning without those who are putting the norms into practice. Reception is a part of the role of God’s people in the building of the Church.<sup>93</sup>

The process of the rule-making in the Church should be understood and practiced as a dialogue or dynamic interchange. It is true that: “A law is always a form of communication between the legislator and his subjects.”<sup>94</sup> It means that two sides are active: the legislator and the receivers. As is was noted, the lawgiver and receivers are linked together. They are members of the same Body of Christ. The givers of law are also receivers, and receivers should cooperate in the process of giving.<sup>95</sup> There exists, after all, a true equality among the members of the Church. Cooperation can increase influence of canon law

<sup>87</sup> In *CIC* 1917 can. 8 § 1 was analogical and it had the same content.

<sup>88</sup> Entry: *instituo*, [in:] L. F. Stelten, *Dictionary of Ecclesiastical Latin. With an Appendix of Latin Expressions Defined and Clarified*, Peabody 1995, p. 135, col. a.

<sup>89</sup> Entry: *constituo*, [in:] L. F. Stelten, *Dictionary of Ecclesiastical Latin...*, p. 56, col. b.

<sup>90</sup> J. M. Coriden, *The Canonical Doctrine of Reception*, *The Jurist* 50 (1990), p. 75.

<sup>91</sup> R. Sobański, *Normy ogólne Kodeksu Prawa Kanonicznego*, Warszawa 1969, p. 79.

<sup>92</sup> R. C. Lara, *Some Reflections of the Proper Way...*, p. 24.

<sup>93</sup> L. Örsy, *The Reception of Laws by the People of God...*, p. 506–507.

<sup>94</sup> J. M. Huels, *Nonreception of Canon Law by the Community*, *New Theology Review* 4 (1991), p. 49.

<sup>95</sup> L. Örsy, *The Reception of Laws by the People of God...*, p. 510.

on everyday life of Catholics, which is of great importance. In a word, reception of law is a task referring to both parties: the legislator and the faithful. They are both responsible for it.

### 3.10.3. Faith as Environment of Reception

Canon law is addressed to the community of believers. The ones who are going to live according to the norms are people of faith. The law expects to meet the sense of religious duty and requests an answer in action. It means that although reception is a natural process of interaction between law and people, in the Church, people gain additional motivation for welcoming the law and obeying it. Above all, the environment for reception is life in faith.

In the second place, other factors of environment of reception should be at least mentioned, for instance, the sociological and cultural ones. Law is given to the people of faith but they are still people living the faith in this world. The world's limitations and, at the same time, opportunities are applicable to process of reception and all together constitute environment of reception.

### 3.10.4. Stages of Reception

First of all, it must be said that the process of reception is quite complicated. It happens on many levels, e.g., psychological, theological, and interpersonal.<sup>96</sup> It also moves through certain stages.<sup>97</sup>

A pre-stage of reception is consensus. It is important for further reception. The consensus is an agreement for a law or a special shape of law. It is not essential for juridical ratification, but it is needed for further reception. Consensus is reached by active participation. It can be done through the articulation of values, needs, and discovery of strategies and the possibility of expressing one's own opinion. Preparation of reception is done by taking care of consensus. There are models of consensus, some of which are similar to the democratic models of governing, while others do not involve majority vote but the intersection of horizontal and vertical consensus.<sup>98</sup>

The first movement in receiving the law is to recognize that the law has been appropriately promulgated. Promulgation is the act of making a new law known to the community. A law comes into public existence when it is promulgated

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<sup>96</sup> See more: J. Joncheray, *The Agents of Reception from a Sociological Perspective*, *The Jurist* 57 (1997), p. 347–361.

<sup>97</sup> Cf. L. Örsy, *The Reception of Laws...*, p. 516–519.

<sup>98</sup> G. J. King, *Reception, Consensus and Church Law*, *Concilium* 5 (1992), p. 47–51.

(cf. can. 7). The broadcast must be done according to can. 8. If a law were not seen a valid act it could not be recognized as the source of norms.<sup>99</sup>

The second step is the quest for understanding why the law was announced. The people search the values that the legislator wants to promote, support, protect or even sometimes defend. At this stage, the inner meaning of the law is revealed to addressees of the norm. If this stage were omitted or the deeper sense of the norm were wrongly deciphered it could lead to frustrations and displeasure of the faithful in respecting the norms or it could bring the faithful to disobedience or insubordination.

The next point is a c c e p t a n c e o f l a w, that is, the action of consenting, agreeing to receive norms offered or ordered in faith by lawmaker. The canonists know that two things must be distinguished: *firmitas de iure*, that is, acceptance in the true sense of the word, a true acceptance of the act, agreement to the law, and *firmitas de facto*, that is, an obedience to law. The first one in this book means “acceptance of law”, the second is more like reception itself. Whenever there is a mention of “acceptance of law” it is used in *firmitas de iure* sense.

Of course, the sentence that church laws need not to be accepted by people to have the power and cause obligation (moral and legal), is only an empty expression. It should be underlined that there is no reception without acceptance of law. Nobody could be forced to act against conscience in the Church. This sentence puts another step of the reception on the horizon.

The law meets the conscience of the receiver and the norm asks for a response. It is the climax of the process of reception. The Second Vatican Council teaches that “supremam humanae vitae normam esse ipsam legem divinam, aeternam, obiectivam atque universalem, qua Deus consilio sapientiae et dilectionis suae mundum universum viasque communitatis humanae ordinat, dirigit, gubernat. Huius suae legis Deus hominem participem reddit, [...] Dictamina vero legis divinae homo percipit et agnoscit mediante conscientia sua; quam tenetur fideliter sequi in universa sua activitate, ut ad Deum, finem suum, perveniat. Non est ergo cogendus, ut contra suam conscientiam agat. Sed neque impediendus est, quominus iuxta suam conscientiam operetur, praesertim in re religiosa” (DH 3).<sup>100</sup> What is true of God’s law, must be true of church law.

<sup>99</sup> According to voluntarists following F. Suarez the step is the first and the last one. In their opinion the only elements required to establish law is the power of legislator, his will to make a law and legitimate promulgation. There is no room for other stages.

<sup>100</sup> “The highest norm of human life is divine law – eternal, objective and universal – whereby God orders, directs and governs the entire universe and all the ways of the human community by a plan conceived in wisdom and love. Man has been made by God to participate in this law [...]. On his part, man perceives and acknowledges the imperatives of divine law through the mediation of conscience. In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced

If the reaction of a person occurs with peace of mind and conscience, it means that the legislator made a law duly and properly answering the needs of the community. Reception is complete. The conflict and disturbances in mind and conscience of the receiver can have two possible sources. The first one is in the law itself. It could be made in a wrong way and be unsuitable for the community. The second source is the individual circumstances of the person. In any of the two cases, the conflict must be resolved and some action should be taken. If not, it can lead to a stalemate and no side will be able to perform its duty: neither to give the rules nor to follow them. In the first case, that of the unsuitable law, the legislator should change the law, write a new one or give an authentic interpretation of the law. In the second case, the receiver in the individual situation can apply *epikeia* or ask for dispensation.

The next step in the process comes about when the receiver of the norm takes it as his own and begins observing the norm on account of God, the Church, the legislator, and the law. No one knows if it would be successful but at least there is hope that a new attitude will enter the life of the people.

The very last step is an implementation of the law in the particular and personal events. The faithful live according to norms and have their lives changed in harmony with the mind of the legislator.<sup>101</sup> The implementation cannot mean passive acceptance of the norms and uncritical imposition and application.<sup>102</sup> The norms should be freely accepted with eagerness and joy as faith is.

From these stages of reception an important conclusion could arise: canon law and civil law can never be received in the same manner. The faith of the legislator and receivers is the factor that makes the difference. Of course, some stages are the same or at least similar in both realities, for instance: promulgation, understanding of necessity of new or changed law, implementation.

Full reception is, beyond a shadow of a doubt, a success of the legislator and a proof that his work was duly done. Thus, reception by the community belongs to the fullness of the law.<sup>103</sup>

### 3.10.5. Fruits of Reception

The fruits of reception of law are visible in the society. They are natural and supernatural.

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to act in manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious" (DH 3).

<sup>101</sup> More about the mind of legislator, see: P. Kroczek, *Co prawodawca miał na myśli – czyli czym jest: „mens legislatoris” i gdzie jej szukać?*, *Annales Canonici* 3 (2007), p. 187–198.

<sup>102</sup> L. Örsy, *Reception and Non-reception of Law a Canonical and Theological Consideration*, [in:] *CLSA Proceedings* 46 (1984), p. 69.

<sup>103</sup> L. Örsy, *Reception and non-reception of law...*, p. 68.

First of all, a reception is visible in obedience to law. Through the respect for a law, the life of the community is on proper track that leads to salvation. A law gave them a pointer for life in faith. But the reception cannot be reduced only to obedience.

Reception is also in full understanding of the matter of the teaching of faith contained in the norms of law. There is an example of failed reception in that it had bad consequences in understanding the teaching of the First Vatican Council. The Council's definition of papal primacy in jurisdiction and teaching has continuously been held responsible for the so-called absolutist view and exercise of papal primacy. Consequently, reception in the life of the Church reduced the teaching to a matter of obedience to the Pope. The council dealt with reception only in a limited sense.<sup>104</sup> Full reception of law bears fruits in full understanding of the matter of faith.

The members of the community are in unity with themselves and there is also the union between them and the legislator. There is no dissonance between them. In the third point some features of the community that lives according to the Holy Spirit could be presented as a result of reception: love, joy, peace, patience, kindness, generosity, faithfulness, gentleness, self-control (cf. Gal 5, 22–23).

### 3.10.6. Measuring Reception

In some degree the fruits of reception could be measured. Sociology, sociology of law or sociology of religion, to be exact, can help in measuring reception.<sup>105</sup> The sociology of religion is mainly but not only the study of the practices of believers. The variations or gaps between what one says and what one does, between what one desires and what one realizes in fact, between what the observer expects to find and what is actually discovered can give the legislator a view of how his law is received.<sup>106</sup> Gratian said: "Leges instituuntur, cum promulgantur, firmantur, cum moribus utentium approbantur. Sicut enim moribus utentium in contrarium nonnullae leges hodie abrogatae sunt, ita moribus utentium ipsae leges confirmantur."<sup>107</sup>

<sup>104</sup> H. J. Pottmeyer, *The plena et suprema potestas iurisdictionis of the Pope at the First Vatican Council and Reception*, *The Jurist* 57 (1997), p. 217.

<sup>105</sup> The basic methods are: observation, experiment, questionnaire, survey; see: A. Pieniążek, M. Stefaniuk, *Socjologia prawa. Zarys wykładu*, Kraków 2003, p. 130–149.

<sup>106</sup> J. Joncheray, *The Agents of Reception from a Theological Perspective*, transl. T. J. Green, *The Jurist* 57 (1997), p. 361.

<sup>107</sup> D. IV, c. 3.

The research carried in the twenties of the last century was meant to examine how the faithful observed canon law.<sup>108</sup> Today similar researches are carried out in some countries.

### 3.10.7. What is Nonreception?

Nonreception can be defined as “nonobservance of a law from its inception by the majority of the community.”<sup>109</sup> The nonreception does not automatically equal rejection of law. It is enough that the law would be ignored by the great part of the community. Rejection of law would be an opposition to *firmitas de iure*, that is, to acceptance, in the true sense of the word, of the law or an agreement to existence of the law. In case of nonreception, the community can agree to law in the sense that there is no denial, no protests; it is just that the community cannot receive it.

Nonreception is also not an attack of the community on a law or a lawmaker, or on the juridical dimension of the Church. Even if the law is not received, good will on both sides is present.

Nonreception of law is not disobedience of users of law. It is a reasonable act of the community approved by the legislator and an important way in the canonical system of adjusting law to reality.<sup>110</sup>

Nonreception of law must be distinguished from *intrinsic cessation*. They are both addressing the same situation, in which a legitimately enacted law is not observed by the community. The difference is that with nonreception a law is not observed from its inception, while an intrinsic cessation happens after some time of the law being active.

An additional clear statement must be made here. Not everything has to be receptive in the same way. There is a hierarchy of importance in doctrinal statements and the same is valid for the importance of norms. For instance, can. 752 calls for “*Non quidem fidei assensus, religiosum tamen intellectus et voluntatis obsequium*” for the teaching of the authority of the Pope or college of bishops even if they are not definitive. On the other hand, can. 753 calls for “*religioso animi obsequio adhaerere*” to the teaching of individual bishop.

<sup>108</sup> The outcome of the investigation showed that the life of Catholics in France did not meet the demands of the rules of church law. They were as separate as it was in some missionary states. For further reference, see: G. Le Bras, *Études de sociologie religieuse*, vol. 1, *Sociologie de la pratique religieuse dans les campagnes françaises*, Paris 1955; H. Desroche, *Areas and Methods of a Sociology of Religion the Work of G. Le Bras*, transl. E. L. Sheppard, *The Journal of Religion* 35 (1955) no. 1, p. 34–47.

<sup>109</sup> J. M. Huels, *Nonreception of Canon Law by the Community*, *New Theology Review* 4 (1991), p. 48. For J. M. Huels *non-reception* and *non-acceptance* mean the same thing. In this book, the terms have two different meanings. Acceptance is a necessary stage of reception.

<sup>110</sup> B. F. Griffin, *Introduction to the Jargon of Canon Law*, *The Jurist* 44 (1984), p. 25.



Next, can. 754 obliges to “obligatione tenentur servandi” the constitutions and decrees issued by authority for the purpose of proposing doctrine or of proscribing erroneous opinions; this is particularly the case of those published by the Roman Pontiff or by the College of Bishops. As it is easy to notice, *CIC* 1983 grades the obligation of faithfulness in the matter of faith. It should be transferred to obedience to canon law. The legislator must be aware that not to every norm the same attention would be paid.

### 3.10.8. Example of Nonreception

There are many examples of nonreception of laws<sup>111</sup> The well-known example is *Constitutio Apostolica Veterum sapientia*<sup>112</sup> promulgated by Pope John XXIII in 1962 on promoting the study of Latin. It is good to know that an apostolic constitution is the most solemn form of papal legislation, used only for matters of major consequence.

The deed in question consists in enforcement of norms requiring that all seminarians be taught the Latin language as a prerequisite according to a traditional curriculum. The major sacred sciences are to be taught in Latin. The professors should use textbooks written in Latin, and those professors who could not teach in Latin should be gradually replaced by those who could. In spite of the papal authority of this constitution the law was not received from its inception by the great majority of the Church.

Examples like this one could be multiplied.<sup>113</sup> Perhaps certain canons of the *CIC* 1983 would be treated the same, especially in context of many different cultures, and local determinants or conditions.<sup>114</sup>

<sup>111</sup> In the 1917 code there are many examples of legislation which the American Church did not receive: can. 356 demanded that every diocese hold a synod every ten years. This law was observed in the period immediately after the promulgation of the *CIC* 1917, but the custom was finally abandoned; can. 711 ordered that a Confraternity of Christian Doctrine and a Confraternity of the Blessed Sacrament be established in every parish but only a Confraternity of Christian Doctrine became widely rooted in Catholic life; can. 1128–1132 had legal process for separation which was rarely used in the American Church; can. 1520 required every diocese to have a finance council which was not totally received by the American Church. See more: B. F. Griffin, *Introduction to the Jargon...*, p. 24–25.

<sup>112</sup> Joannes PP. XXIII, *Constitutio Apostolica Veterum Sapientia* de Latinitatis studio provehendo, 22.02.1962, *AAS* 54 (1962), p. 129–135.

<sup>113</sup> For more examples of non-receipt laws, see: J. M. Coriden, *The Canonical Doctrine of Reception*, *The Jurist* 50 (1990), p. 81.

<sup>114</sup> Literature about the reception and nonreception of the code in different cultural settings, see: for Germany: W. Schulz, *Problem der Rezeption des neuen Codex Iuris Canonici in der Bundesrepublik Deutschland*, [in:] *Recht als Heildienst. Matthäus Kaiser zum 65 Geburtstag gewidmet von seinen Freunden, Kollegen und Schülern*, ed. W. Schulz, Paderborn 1989, p. 144–159; R. Puza, *Lattuazione del nuovo codice di diritto canonico in Germania*, *Quaderni di Diritto e Politica Ecclesiastica* 1 (1994), p. 159–178; for Spain: A. Motilla, *Aplicación y desarrollo del Código*

### 3.10.9. Reasons for Nonreception

There are some reasons of nonreception. Usually they are connected with motives behind anti-juridical movement in the Church. This way of thinking was criticized by Pope Pius XII in Litterae encyclicae *Mystici Corporis Christi*<sup>115</sup>: “Quapropter funestum etiam eorum errorem dolemus atque improbamus, qui commenticiam Ecclesiam sibi somniant, utpote societatem quandam caritate alitam ac formatam, cui quidem – non sine despicientia – aliam opponunt, quam iuridicam vocant.”<sup>116</sup> There can be pointed out some sources of the pernicious error of anti-juridical movement.

#### 3.10.9.1. Wrong Understanding of the Church and Its Structure

The rejection of canon law may have roots of an ecclesiological nature, which express positions unacceptable from a dogmatic point of view.<sup>117</sup>

The receivers must, first of all, see themselves as members of the same community to which the legislator belongs. Certainly, it is *communio*, but the community is hierarchical.<sup>118</sup> The task of lay members of Christ's faithful and sacred ministers who are to receive the law is to listen to the voice of the legislator with attention, loyalty, respect which should bring them to obedience. The community should judge suitability of law for specific time and place and try to be convinced that a legislator knows their situation very well and by a new law is trying to help them. Even if they do not understand clearly the significance of new law, they should use their sense of obedience to respect the new law, hoping that full appreciation for the new law and the legislator's effort would come later on. The users of law must remain in the position of “judges” of new law, who are opinionated and waiting for the legislation that will best suit their expectations.

The most genuine and profound reason for nonreception seems to be the uncritical acceptance of an identification of the code and ecclesial law with the acceptance, even if entirely implicit and unconscious, of an underlying positivistic conception of ecclesial law based on the fact that the Church

*de Derecho Canónico en España*, Quaderni di Diritto e Politica Ecclesiastica 1 (1994), p. 179–194; for France: J. P. Durand, *Echos de la mise en oeuvre en France du nouveau Code latin de droit canonique par la Conférence des évêques*, Quaderni di Diritto e Politica Ecclesiastica 1 (1994), p. 195–217; for the United States and Canada: J. H. Provost, *L'applicazione del Codice del 1983 in Canada negli Stati Uniti*, Quaderni di Diritto e Politica Ecclesiastica 1 (1994), p. 219–228.

<sup>115</sup> Pius PP. XII, Litterae encyclicae *Mystici Corporis Christi* de mystico Iesu Christi Corpore deque nostra in eo cum Christo coniunctione, 29.06.1943, *AAS* 35 (1943), p. 193–248.

<sup>116</sup> *AAS* 35 (1943), p. 224.

<sup>117</sup> R. C. Lara, *Some Reflections of the Proper Way...*, p. 27–28.

<sup>118</sup> See: G. J. Roche, *Hierarchy: from Dionysius to Vatican II*, *Studia Canonica* 16 (1982), p. 367–389.

is a society instead of communion. One suggests that: “Until we overcome such a canon law-norm [code] identification or express ourselves with other concepts, the identification of institutional law with legislative law, and unless we have a ‘theologically’ satisfactory understanding of the juridical dimension of the Church, we cannot have a real and correct reception of law in the Church even if other difficulties were overcome.”<sup>119</sup>

Sacred power of the legislator finds its foundation in the furthering of Christ’s plans regarding the community of the believers. To this, in the last instance, is connected every ecclesiastical norm, because, by its very nature, every canonical norm aspires to protect the *ordo Ecclesiae*.

### 3.10.9.2. Wrong Communication in the Community

Another reason of nonreception is wrong communication or even lack thereof in *communio*. Modern sociology offers tools to carry out observations and also to stimulate the different components of reception in the society of believers. There is still a lot of space to make good use of models of communications. After all, the community of Church is still a society of people. The internal processes are the same as in other societies; the specificity of faith notwithstanding.

What results is the incapacity of canon lawyers to make the law and its motives understandable to the users of law. It seems certain that the dialogue among the disciplines is needed. The law is not received because there is no dialogue in the community. Sometimes because the legislator does not want to participate, other times because the users of law do not want to participate, and finally, sometimes both parties are to share the blame.

### 3.10.9.3. Wrong Understanding of Law in the Church

But in the majority of cases, aversion to law comes from an inexact understanding of what law truly is and what its function is in the Church. There are those who perceive no more than a distorted, false and even very shallow concept of the law. This is perhaps the result of an arid, purely exegetical and verbalistic teaching method, and of an exclusively legalistic observance. Users of law can sometimes confuse law with a caricature of it, with juridicism and formalism, which are the sclerosis of the law. They presume to apply the law for the law’s own sake, thus losing sight of the common good and the transcendent finality of canon law. Others have a very reductive conception of canon law. They see nothing more in it than rules for exterior behavior, a kind of highway

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<sup>119</sup> C. R. M. Redaelli, *The Adoption of the Principle of Codification: Ecclesiological Significance with Special Reference to Reception*, transl. T. J. Green, *The Jurist* 57 (1997), p. 273–274.

code, whose importance logically is very secondary and whose observance becomes almost optional and arbitrary.<sup>120</sup>

#### 3.10.9.4. Wrong Impact of Tensions in the Church

The next possible cause of nonreception is lack of proper understanding of task of law in the Church. The positions connected with this cause may be presented as dialectic of contrapositions or tensions.<sup>121</sup>

##### 3.10.9.4.1. Charism and Canonical Norm

It is a position according to which juridical norms in the Church are more the result of clerical arbitrariness than a product of reasoning and faith. A radical doctrinal formulation of this position can be found in the theses of R. Sohm. His standpoint was based on the presumption that law demands that everyone be subject of norms willingly or by external force. The Church, on the other hand, being dependent on God's will and Word is spiritual, based on free obedience of faith that emanates from love. These two realities cannot be held together. R. Sohm summarized his opinion by saying that the nature of the Church and the nature of law are in contradiction.<sup>122</sup>

The position of the author has been widely criticized.<sup>123</sup> It has been pointed out that R. Sohm used an inadequate method. Firstly, he held an incorrect concept of the Church, seeing it only as a spiritual reality. He presumed that the early Church was a fully and only charismatic and non-judicial organism. Secondly, he misunderstood the law. He took the definition of law from a strongly positivistic approach.

##### 3.10.9.4.2. Pastoral Care and Legal System

Another reason for rejection of law is that pastoral works are said to be in antagonism with norms. It is claimed that some provisions in canon law are not pastoral. On the basis of this incompatibility law is rejected as something that hampers pastoral action.<sup>124</sup> This view sustains that pastoral activity, which requires mercy, understanding, and benignity, is incompatible with the norms of a legal system, be they substantial or functional.

<sup>120</sup> R. C. Lara, *Some Reflections of the Proper Way...*, p. 27–28.

<sup>121</sup> Cf. J. H. Casado, *Renewal and Effectiveness in Canon Law*, *Studia Canonica* 5 (1994), p. 9–10.

<sup>122</sup> R. Sohm, *Kirchenrecht*, vol. 1, *Die geschichtlichen Grundlagen*, Leipzig 1923, p. 700.

<sup>123</sup> See: Y. Congar, *R. Sohm nous interroge encore*, *Revue des sciences philosophiques et théologiques* 57 (1973), p. 263–294, and extensive bibliography on p. 287–294; R. Sobański, *Zarys teologii prawa kanonicznego*, Warszawa 1973, p. 33–38 where the author presents Catholic reactions on R. Sohm views; see also bibliography on p. 33, ft. 10.

<sup>124</sup> R. C. Lara, *Some Reflections of the Proper Way...*, p. 27 and p. 29.

At the root of this alleged incompatibility lies the lack of knowledge that although legal norms are general and abstract they are very flexible and really possess pastoral spirit, which knows how to adjust its decisions to the multiform circumstances and differing needs of individual cases. There is also a false supposition that canon law has a different, not so noble aim, comparing with the aim of pastoral care, which is to bring the faithful to God's grace.

#### 3.10.9.4.3. Freedom and Law

Another source of rejection of the law in the Church or of limiting its role is based on the thesis that, generally speaking, law and authority are oppressive forces, restricting human freedom, violating human dignity and blocking human progress. Canon Law is seen as an unwarranted interference in personal freedom.<sup>125</sup>

According to this stance there is a choice: either freedom or obedience to law. This view ultimately means that freedom is lawless, and that, in order to be free, man needs to be liberated from law.<sup>126</sup>

Canon law is not directed to mortifying freedom, but to helping it by preserving and defending. The obedience which canon law demands is nothing more than the mature expression of responsible freedom, which leads the individual to assume voluntarily what lawful authority proposes for the common good and also one's own sake.<sup>127</sup> It must be clearly said that law is not only compatible with freedom, but that a mutual necessity for law and freedom exists in the Church. A good law and authentic freedom are never opposed to each other.<sup>128</sup>

#### 3.10.9.4.4. Sanctity and Law

Another point of tension is a wrong understanding according to which the law in the Church has nothing in common with sanctity. The position sees no implicit relation between various parts of legislation and the pursuit of sanctity.

This mistaken understanding can be overcome with explanation that the divinely established Church and its law are in easily deducible connection.<sup>129</sup> The very fundamental concept of canon law is the idea of its sacredness. Among the descriptive terms used for law one frequently finds the expression "sacri canones." The qualifying term "sacred" is used because the persons who

<sup>125</sup> J. C. Barry, *Law in the Post-Conciliar Church*, *Studia Canonica* 5 (1971), p. 260.

<sup>126</sup> C. Burke, *Authority and Freedom in the Church*, San Francisco 1988, p. 11–12.

<sup>127</sup> R. C. Lara, *Some Reflections of the Proper Way...*, p. 28–29.

<sup>128</sup> K. Ikechi, *Law and Freedom in the Church Society: Their Compatibility and Mutual Necessity*, *Philippine Canonical Forum* 3 (2001), p. 156 and p. 178–179.

<sup>129</sup> L. Motry, *The Connotative Value of the "Sacred Canons"*, *The Jurist* 1 (1941), p. 51–52.

legislate are sacred, the matter itself is sacred or refers to things or persons that are sacred, and ultimately, the very purpose of canon law is sacred.<sup>130</sup>

#### 3.10.9.4.5. Love and Law

Many consider law in the Church as something totally unnatural to Christianity. Insofar as it is present in the Church today, it is a foreign element brought into it from the surrounding secular culture. There are also accusations of legalism.<sup>131</sup> The reaction against legalism has brought with it a reaction against all law in the Church.

Laws are necessary to practice love. They are signposts placed there by God's Love, pointing out the way his Love wants us to follow; and the way our love wants to follow so as to come to Him.<sup>132</sup> Also the process of making church law is strictly connected with love and it can be called "a small participation in the great love of God that presently and perpetually creates the Christian community."<sup>133</sup>

#### 3.10.9.4.6. Faith and Law

Another stance must be here shortly analyzed. Lack of faith can be a reason for weakening of the fundamental characteristic of obligatoriness of the canonical norm or even of rejection of law. There is an opinion that law does harm to true spiritual dimension of the Church.<sup>134</sup>

It is sufficient to see law's activity in life to explain to the faithful the importance the rules and norms they must obey. The fruits of law substantiate its existence. When the beneficial character of law is presented clearly, it becomes obvious that there is no contradiction between the Church of love and the Church of law.

### 3.10.9.5. Wrong Law

The other reason for nonreception is connected with its features. It concerns act of law. If act of law does not measure up to the most basic and fundamental requirements given by techniques of legislative drafting, it will not be recognized as law at all or rejected due to its internal failures.

#### 3.10.9.5.1. Unclear Law

The law is unwanted, because it is not understood. The legislator who wants to be accepted and understood must make clear laws. What is not understood

<sup>130</sup> G. Michiels, *Normae generales...*, vol. 1, p. 7.

<sup>131</sup> J. C. Barry, *Law in the Post-Conciliar Church*, *Studia Canonica* 5 (1971), p. 260–266.

<sup>132</sup> C. Burke, *Authority and Freedom in the Church*, San Francisco 1988, p. 50.

<sup>133</sup> L. Örsy, *The Creative Role of Constitutional Law in the Church*, *Studia Canonica* 1 (1968),

p. 324.

<sup>134</sup> Cf. M. Lejeune, *Demythologizing Canon Law*, *Studia Canonica* 21 (1987), p. 5–17.

is rejected. Of course, an unclear law is still an act of law, but the hardship of realizing it can cause its rejection and in turn non-reception.

#### 3.10.9.5.2. Pointless Law

Law, which is not relevant to reality, is rejected. After all, the already mentioned *Constitutio Apostolica Veterum Sapientia* was not directly rejected. Nobody was against the law, in the sense that it met with acceptance. How could one say “no” to the first sentence of the Constitution: “*Veterum Sapientia, in Graecorum Romanorumque inclusa litteris, itemque clarissima antiquorum populorum monumenta doctrinae, quasi quaedam praenuntia aurora sunt habenda evangelicae veritatis, quam Filius Dei, gratiae disciplinaeque arbiter et magister, illuminator ac deductor generis humani, his nuntiavit in terris.*”<sup>135</sup> It seems that the majority of the subjects of this law accepted the values that the law promoted.

The reason that the law was never implemented was that the subjects could not live according to it as an ordering rule. The executory provisions simply did not match the contemporary world and culture where living languages played the major role. Church institutions were not able to implement the law and measure up to its requirements. It was simply completely impractical and became pointless at that time.<sup>136</sup> In result the law became a dead letter.

#### 3.10.9.5.3. Unorthodox Law

One more situation can be discussed, namely a presumption that legislator’s law is not correct in theological or moral dimension. The receivers having the supernatural sense of faith and of mores (*consensum de rebus fidei set mortum exhibet*) given them by the Holy Spirit can reject the law. The Second Vatican Council teaches, that “*Universitas fidelium, qui unctionem habent a Sancto, in credendo falli nequit, atque hanc suam peculiarem proprietatem mediante supernaturali sensu fidei totius populi manifestat, cum ‘ab Episcopis usque ad extremos laicos fideles’ universalem suum consensum de rebus fidei et morum exhibet*” (*LG 12*<sup>137</sup>). Probably unorthodox law would not be even accepted and would not reach the point of being implemented as a norm in life.

<sup>135</sup> *AAS* 54 (1962), p. 129: “The wisdom of the ancient world, enshrined in Greek and Roman literature, and the truly memorable teaching of ancient peoples, served, surely, to herald the dawn of the Gospel which God’s Son, the judge and teacher of grace and truth, the light and guide of the human race, proclaimed on earth.”

<sup>136</sup> *Cf. RI* 25.

<sup>137</sup> *LG 12*: “The entire body of the faithful, anointed as they are by the Holy One, cannot err in matters of belief. They manifest this special property by means of the whole peoples’ supernatural discernment in matters of faith when ‘from the Bishops down to the last of the lay faithful’ they show universal agreement in matters of faith and morals.”

Canonical dimension of coherence between *sensus fidelium* and the teaching of the Church is presented in can. 750, likewise on lower level of theological sureness in can. 753. Concretization of obedience in faith by the subject of law appears in can. 212 § 1. It orders that Christ's faithful, conscious of their own responsibility, are bound to show Christian obedience to what the sacred Pastors, who represent Christ, declare as teachers of the faith and prescribe as rulers of the Church. Also can. 754, orders that all Christ's faithful are obliged to observe the constitutions and decrees which lawful ecclesiastical authority issues for the purpose of proposing doctrine.

There is a presumption that the legislator who is a teacher of faith cannot be wrong. Having the legislator who occupies the *cathedra* it is certain that law written by him is theologically and morally correct. What is more, he must take care of the theological accuracy of his work. It must be added that the incorrect law would not bind and in a situation in which the legislator does not hold the teaching office, his law would simply not be accepted. Of course, when the legislator is a bishop who teaches in communion with other bishops, due to theological reasons, the situation of incorrect teaching is only a speculative hypothesis.<sup>138</sup>

The conclusion is that: *sensus fidei* works powerfully in doctrinal matters. A faithful surely can use it also in making practical decisions that are connected with the practice of faith.<sup>139</sup> "Sensus fidei implies that the faithful have the capacity to understand and judge the value behind a law and, by accepting that value, they can receive the law."<sup>140</sup> Indeed, the very reception of the law is a sign that the law contributes to the salvation of souls. The opposite can be said as well: when the law is not received, it may be a sign that the community may not have recognized the value behind it.<sup>141</sup>

<sup>138</sup> Cf. H. Legrand, *Reception, sensus fidelium, and Synodal Life: an Effort at Articulation*, transl. T. J. Green, *The Jurist* 57 (1997), p. 416–418.

<sup>139</sup> L. Örsy, *Reception and Non-Reception of Law a Canonical and Theological Consideration*, [in:] CLSA Proceedings 46 (1984), p. 69.

<sup>140</sup> If the *sensus fidelium* is invoked correctly, it never means that the teaching office is opposed to the rest of the faithful. *Sensus fidelium* refers to all the faithful. In an informative article R. Gaillardetz describes how the transmission of faith ought to take place in a dynamic, interactive process: it is the dialectics of witness and verification. All members of the faithful are to take part in it. See: R. Gaillardetz, *An Ecclesiology of Communion and Ecclesiastical Structures: Towards a Renewed Ministry of the Bishop*, *Église et théologie* 24 (1993), p. 179–180. See also: P. Crowley, *Catholicity, Inculturation and Newman's sensus fidelium*, *Heythrop Journal* 33 (1992), p. 161–174.

<sup>141</sup> M. Wijlens, „*Salus animarum suprema lex*“..., p. 586.



### 3.10.10. What after Nonreception?

Attention must be paid to one important thing. The rules on custom in *CIC* 1983 effectively establish a kind of legal recognition of the non acceptance of law. If a law is not accepted by the community, and if this non-acceptance is tolerated by the legislator, and if this non-acceptance continues for thirty years, then the legality of the contrary custom is recognized. Now the custom, even though contrary to the law, has legal force in the community.

It means that nonreception, although an unwanted situation, it is not a great disaster for the Church. Canon law has means to overcome the crisis and build something new on the ruins of law.

The legislator has some ways to provide for reception. First of all, he can start an action to promote law. He can add penalization to the law. If the law was not received because it was not accepted, he can popularize the aims of the law, clarify his motives. The receivers on their side can re-think the message from the legislator. They can open themselves to new norms.

In summation, it can be said that a good cooperation between the legislator and recipients should be built on mutual confidence and trust that the lawgiver and receivers of law have the same supernatural aim, that is, salvation of souls. The conviction can be increased by proper teaching of ecclesiology.

## 3.11. Action of Act of Law

Act of law is a text. But the ultimate sense of any legal text is not existence for itself but in life of addressees of act of law. Act of law gains its sense when it is obeyed and applied.<sup>142</sup> Sometimes applying law is forced by urge to obey it. It happens, for instance, when law places a requirement of obligatory penalty. Of course, no act of law stands in isolation. Actions of act of law always take place in cooperation with other acts of law.

### 3.11.1. Obeying

Obeying law means that one's behavior is in accord with the norms from the act of law. It includes committing ordered act and abandoning prohibited act. Obeying law includes acts pointed directly and indirectly. The latter situation concerns acts instrumentally necessary to perform directly ordered or prohibited act.<sup>143</sup>

<sup>142</sup> R. Sobański, *Metodologia prawa...* p. 114 ff.

<sup>143</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 232.

The conduct in both cases can be mindful, when subject of law wants to obey norms and follow them in life. This kind of obeying law requires knowledge of act of law. It is necessary especially when some conventional regulations are to be obeyed (e.g., can. 1108 § 1).

Obeying law can be also unconscious, when someone lives according to faith, and he does not know that at the same time his pattern of behavior is ordered by law.<sup>144</sup> It can happen not only in case of canon law, but also in civil law, when its acts of law order something, which is perfectly in accord with the common sense or sense of moral duty.<sup>145</sup>

### 3.11.2. Applying

Application of law means making usage of norms of law.<sup>146</sup> It is the moment when legal norm and life meet together in a judicial or administrative decision. Law is applied to the facts.<sup>147</sup>

The problem is stated in the question: What legal consequences follow legal case, that is, concrete situation, event, or fact that has relation to law? Relation to law means that law is applicable to legal case due to certain features, which are known as elements of legal case. To answer the question, the situation or fact must be linked with general norm, which is coded in legal articles. As a result, one gets an individual norm for a concrete addressee.<sup>148</sup>

Application of norms can be done both: obligatorily and willingly. Obligatory appliance of law concerns the bodies with authority and administrative and juridical power.<sup>149</sup> Usually they are obeying norm that orders to apply other norm, but it could also be that norm gives right but does not order to use it (e.g., can. 125 § 2). Those who voluntarily apply law are mainly members of the community and all who are entitled to use law in their interest. The action they take is foreseen but not ordered as obligatory.<sup>150</sup>

<sup>144</sup> For instance, obligation to receive holy communion at least once a year (can. 920 § 1).

<sup>145</sup> See, for instance: Ustawa z dnia 25.02.1964 *Kodeks rodzinny i opiekuńczy*, Dz. U. of 1998 No. 51, item 59, as amended (*Polish Family Law*), art. 95 § 2 orders that children are to obey their parents.

<sup>146</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 242.

It must be noticed that English canonical literature also speaks sometimes of *implementation of the law*, which can have a twofold meaning: the reception of a law by the community, and judicial or administrative decisions, see: M. Wijlens, "*Salus animarum suprema lex*"..., p. 560, ft. 3.

<sup>147</sup> Entry: *Apply*, [in:] *Black's Law Dictionary...*, p. 116.

<sup>148</sup> R. Sobański, *Teoria prawa kościelnego...*, p. 145–152.

<sup>149</sup> More about application of law by organ of power in the Church, see: R. Sobański, *Teoria prawa kościelnego...*, p. 244–250.

<sup>150</sup> More about application of law by the faithful, see: R. Sobański, *Teoria prawa kościelnego...*, p. 242–244.

Applying law is always a conscious and intentional behavior. It is planned. Its aim is not applying that which is ordered and can be applied, but rather its ultimate aim is exactly the same as the aim of canon law – salvation of souls. Applying law is a realization in concrete situation of general and abstract norm interpreted from act of law.

## 3.12. Obligations from Act of Law

Generally speaking every act of law claims that users of law obey it directly. Acts of law are given to members of the community who are conscious of their position, duties and rights. They must familiarize themselves with the act of law, remove obstacles and use all possible means to act according to its norms. The factor that urges addressees of law for such action is the nature of law and of norm flowing from it, which is obligation (*obligatio*) to fulfill own duties or respect rights of others. Canon law creates not only legal but also moral obligation.<sup>151</sup> It is due to its connection to faith and necessity to practice faith.

### 3.12.1. Kinds of Obligation

Canonical norms bind under sin (*ad culpam*).<sup>152</sup> That is *forum internum*.<sup>153</sup> There are no norms established by church legislator without a recall to conscience. “Certum est omnem legem ecclesiasticam qua talem proxime et essentialiter inducere, praeter obligationem juridicam coram auctoritate sociali ecclesiastica, aliquam obligationem moralem seu vinculum quo subditorum voluntas in conscientia et coram Deo constringitur, ita ut legis transgressor peccet et a Deo punitionem mereatur.”<sup>154</sup> It means that whoever fails to observe canon law commits a sin.<sup>155</sup> There is no explicit mention about it in *CIC*

<sup>151</sup> There is quite contrary opinion concerning the moral obligation in regard to civil law, cf. J. Raz, *The Authority of Law: Essays on Law and Morality*, Oxford 1979, p. 250: “I shall assume that there is no general obligation to obey the law, not even the laws of a good and just legal system.”

<sup>152</sup> For an interesting exception, see: *Liber Constitutionum et Ordinationum Fratrum Ordinis Praedicatorum*, iussu Fr. Carlos A. Azporiz Costa magistri Ordinis editus, Romae 2010, p. 129, no. 281: “Leges nostrae et ordinationes superiorum non obligant fratres ad culpam sed ad poenam, nisi propter praeceptum vel contemptum.”

<sup>153</sup> Canon law knows: *forum internum sacramentale* (e.g., can. 508, can. 1079 § 3, can. 1357), and *forum internum extrasacramentale* (can. 1079 § 3, can. 1080 § 1, can. 1082). See more: H. Pree, “*Forum externum*” und “*forum internum*” (c. 130), [in:] *Handbuch des Katholischen Kirchenrechts*, ed. J. Listl, H. Schmitz, Regensburg 1999<sup>2</sup>, p. 156–157.

<sup>154</sup> G. Michiels, *Normae generales...*, vol. 1, p. 290.

<sup>155</sup> With provision of *epikeia* and other typical for the canonical system of law institutions and means.

1983 because it was considered unnecessary. The obligation in question does not come exclusively from positive law but from divine law on which as on fundament the Church is built.<sup>156</sup>

But breaking the rules can cause possibility of punishment on *forum externum*. Act of law can bind under the penalty (*ad poenam*). Some clarification must be made here – there are no purely punitive norms (*leges mere poenalis*) in universal canon law, that is, laws which bind only under the threat of penalty – “omnes leges poenales in Codice Juris Canonici contentae indubitanter dicendae sunt simul morales ut supra exposuimus.” It is not so sure in case of “leges juris particularis, de quibus a legislatore explicite declaratur eas «non obligare ad culpam, sed tantum ad poenam».”<sup>157</sup>

### 3.12.2. Rescinding and the Variables of Obligation

Act of law duly promulgated and after *vacatio legis* is generally speaking binding all to whom it is addressed. But in certain circumstances there is a reduction of obligation to obey act of law. It means that act of law no longer creates right-duty situation. Sometimes the obligation exists but it is changed by some factors.

Canon law knows some instruments for achieving this lessening of obligation. They are almost exclusively specific to the law of the Church. They have a long tradition in the Church and have been many times presented in canonical literature.<sup>158</sup> They can be called the canonical techniques of making law flexible.<sup>159</sup>

These circumstances and factors can exist in canon law because of the specific aim and nature of canon law. Law in the Church is to serve people of faith, and canon law has as the main goal the realization of supernatural aim of the faithful, which is the salvation of their souls. Along this principle, every act of law and consequently every norm finds its aim and sense of existence.<sup>160</sup> Consequently, no act of law has a supreme position. Observance

<sup>156</sup> “Quaestio tandem movetur de legis obligatione in conscientia seu sub peccato. Est qui proponit mentionem in ipsis legibus de obligatione sub peccato vitandam esse, quia Codex I. C. ad ordinem iuridicum Ecclesiae pertinet et non debet sermonem facere de peccato. Plerique concordant in admittendo Codicem leges quidem ferre debere, sed non debere statuere obligationem legum sub peccato. Caeterum, ut notat Ill. mus secretarius coetus, obligatio legis in conscientia, non provenit ex ipsa lege positiva, sed ex lege divina, vi cuius Ecclesia, ergo et eius ordo canonicus, imponitur” [abbreviation as in the original text], *Communicationes* 16 (1983), p. 144.

<sup>157</sup> G. Michiels, *Normae generales...*, vol. 1, p. 314–315. For example of the rule see: R. Sobański, *Teoria prawa kościelnego...*, p. 251–252, ft. 21.

<sup>158</sup> R. Sobański, *Normy ogólne Kodeksu Prawa Kanonicznego*, Warszawa 1969, p. 56–62.

<sup>159</sup> As called this H. Pree, *Le tecniche canoniche di flessibilizzazione del diritto: possibilità e limiti ecclesiali di impiego*, *Ius Ecclesiae* 12 (2000), p. 375–418.

<sup>160</sup> Cf. G. May, A. Egler, *Einführung in die kirchenrechtliche Methode*, Regensburg 1986, p. 210–213.

of norms from any act of law, even the most important ones in the system of law, is not of absolute character. At the center of the law stands a faithful who wants to be right before God.

This theme must be mentioned in discussion about acts of law. It must be underlined that no text of act of law is the ultimate determinant of right and duty situation. The legislator must be aware of it. Some of the instruments can be directly used in legislator's work; others must be taken into consideration during the making of the law.

### 3.12.2.1. Doubt (*dubium*)

Doubt is a lack of certainty. This is in strict sense "status mentis haerentis inter duas sententias sibi contrarias evidentiisque objectiva carentes."<sup>161</sup> There are two kinds of doubt connected with alternative interpretations of a law – a doubt of law (*dubium iuris*) or fact – a doubt of fact (*dubium facti*). The first occurs when it is impossible to achieve moral certainty concerning the law's (1) meaning; (2) extent of its application; (3) legitimate promulgation and force; or (4) revocation. The *dubium facti* refers to a doubt about some concrete fact that pertains to the law's applicability.

Each of the doubts is supported by objective reasons, which lead to uncertainty. The doubt must be positive, founded on reasons pro and con. The doubt must also be probable, that is, the reasons pro and con are sound.

Due to doubt, act of law is revoked. The doubtful law does not oblige. This is true as regards the moral and legal obligation. In case of the types of doubt no. 1 and no. 2 the rule is *lex dubia non obligat*. In case of no. 3 and no. 4 it is *lex dubia lex nulla*.

When there is a doubt of fact, the ordinary may dispense with provision of some rules. The power to dispense is broader in some respects than the typical rules for dispensation (can. 85–93), with some restrictions (can. 86, can. 87 § 1, can. 291, can. 690 § 2, can. 767 § 1, can. 1078 § 3, can. 1091 § 4).<sup>162</sup>

The reason for this is that the legislator does not want the community to be in confusion about its obligations, but intends the law to give clear directions for ordering ecclesial life. In case of doubt, he can solve the situation by making new law or by authentic interpretation of the doubtful law.

### 3.12.2.2. Ignorance (*ignorantia*) and Error (*error*)

Ignorance is a lack of proper knowledge or a total absence of knowledge. Error is a mistaken judgment and it is based on insufficient knowledge or it

<sup>161</sup> G. Michiels, *Normae generales...*, vol. 1, p. 414.

<sup>162</sup> J. M. Huels, *Canon 14*, [in:] *New Commentary on the Code...*, p. 67–69.

is an erroneous application of one's knowledge.<sup>163</sup> The two are related. Error may result from ignorance. Jurisprudence knows other situations related to ignorance and error like: inattention (*inadvertentia*), oblivion (*oblivio*).<sup>164</sup>

The principle is that ignorance or error about invalidating or disqualifying laws does not impede their effect unless it is expressly established otherwise (can. 15 § 1). The two kinds of act of law are to protect common good and order, and they cannot depend on knowledge of members of community.<sup>165</sup> Ignorance or error about a law, a penalty, a fact concerning oneself, or a notorious fact concerning another is not presumed. It is presumed about a fact concerning another, which is not notorious until the contrary is proven (can. 15 § 2). Consequences of ignorance and error are to be judged according to moral criteria and in penal law according to can. 1323 no. 2 and no. 7, can. 1324 § 1 no. 2 and no. 9, can. 1325.

### 3.12.2.3. Canonical Equity (*aequitas canonica*)

The Roman law doctrine of canonical equity has come to influence church law.<sup>166</sup> In Roman law, it was present in many ways and under various titles, like: *aequitas*, *aequum et bonum*, *utilitas*, *humanitas*, *benignitas*, *ratio naturalis*, and in a great measure *bona fides*. It appears almost everywhere in Roman law.<sup>167</sup> But two general senses are the most visible: (1) a virtue or a quality which was actually rooted in human law; or (2) a benign interpretation of law by means of which rigidity of positive law was corrected and the claims of natural law asserted.<sup>168</sup> Especially the second sense connected mainly with lenient interpretation of law was significantly present.<sup>169</sup> Equity was a method of interpretation to omit what is severe in law, what could take law away from objective justice, as Ulpian notices: "In summa aequitatem quoque ante oculos habere debet iudex, qui huic actioni addictus est."<sup>170</sup>

<sup>163</sup> J. M. Huels, *Canon 15*, [in:] *New Commentary on the Code...*, p. 69; R. Sobański, *Kanon 15*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 65–66; H. Heimerl, H. Pree, *Kirchenrecht: allgemeine Normen...*, p. 42. Canonical doctrine has roots in Roman law," see: D. 50, 17, 42; D. 50, 17, 206. This tradition is in *RI* 13: "Ignorantia facti, non iuris, excusat, and *RI* 47: "Praesumitur ignorantia, ubi scientia non probatur."

<sup>164</sup> R. Sobański, *Normy ogólne Kodeksu Prawa Kanonicznego*, Warszawa 1969, p. 58; F. Bączkiewicz, *Prawo kościelne...*, vol. 1, p. 203.

<sup>165</sup> R. Sobański, *Kanon 15*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 66.

<sup>166</sup> P. Felici, *Oratio Aequitas romana et aequitas canonica*, *Communicationes* (1981), p. 246–251.

<sup>167</sup> C. K. Allen, *Law in the Making*, Oxford 1958, p. 377.

<sup>168</sup> M. Amen, *Canonical Equity before the Code*, *The Jurist* 33 (1973), p. 4–16.

<sup>169</sup> P. G. Stein, *Equitable Principles in Roman Law*, [in:] *The Character and Influence of Roman Civil Law: Historical Essays*, ed. P. G. Stein, London 1998, p. 19 ff.

<sup>170</sup> *Dig.* 13.4.4.1.

All that has been written above refers to natural equity. It is present in modern systems of law.<sup>171</sup> There is also canonical equity. It has a long history in canon law.<sup>172</sup> The natural equity was enriched by Christian thought on God's love. It can be said that canonical equity is equity *par excellence* in that it is inspired by the spirit of mercy, goodness and finally charity, which constitutes together with the substance of canon law one of the most essential elements of Catholicism.<sup>173</sup>

The term "canonical equity" can be defined as follows: "a superior justice to the positive law, which on account of the spiritual general or particular well-being mitigates the severity of law".<sup>174</sup> It can be said that the canonical equity is an expression of natural equity that should be characteristic of every law and in particular of church law. The natural genesis of the canonical institution in question is seen in the codes. In the 1917 code, the term "aequitas" appeared six times: can. 20, can. 144, can. 192 § 3, can. 643 § 2, can. 1455, can. 1833 no. 2. Only in can. 20 is there "aequitas canonica."<sup>175</sup> In *CIC* 1983 seven canons contain the word "aequitas"<sup>176</sup>: can. 19, can. 221 § 2, can. 271 § 3, can. 686 § 3, can. 702 § 2, can. 1148 § 3, can. 1752.<sup>177</sup> But, only two of the seven directly mention "aequitas canonica" (can. 19 and can. 1752).

It would be hard to explain the precise distinction between *aequitas*, *aequitas naturalis* and *aequitas canonica*. Nonetheless, it is most reasonable to presume that the drafters of the code have not selected the terms or expressions arbitrarily,

<sup>171</sup> In modern legal systems equity serves to balance the rule of positive law. It is an application of objective justice, which is an ideal for law in a concrete case. It is done by judges, administrators, or superiors, see: *Equity in the World's Legal Systems. A Comparative Study*, ed. R. A. Newmann, Brussels 1973; H. E. Yntema, *Equity in the Civil Law and the Common Law*, *The American Journal of Comparative Law* 15 (1966–67) no. 1–2, p. 60–86.

Good summary is given in a quotation: "Equity does not want the norm of law to be broken, but wants it to be bent to the various contingencies of fact so as to correspond to its function and to its purpose. Where the norm is lacking, the demand that a new norm, adequate to the case not foreseen by the legislator, be laid down by the judge makes itself felt in the name of equity," G. Del Vecchio, *Philosophy of Law*, transl. T. O. Martin, Washington 1953<sup>8</sup>, p. 283.

<sup>172</sup> M. Amen, *Canonical Equity before the Code*, *The Jurist* 33 (1973), p. 4–24; F. J. Urrutia, *Aequitas canonica*, *Periodica* 73 (1984), p. 33–88; J. J. Coughlin, *Canonical Equity*, *Studia Canonica* 30 (1996), p. 403–435; R. Sobański, *Ślusznosc w prawie*, *Państwo i Prawo* 8 (2001), p. 3–12; V. R. Uy, *The Principle of Equity in the Code of Canon Law*, *Philippine Canonical Forum*, 7 (2006), p. 65–106.

<sup>173</sup> C. Lefebvre, *Les Pouvoirs du juge en droit canonique: contribution historique et doctrinale à l'étude du canon 20 sur la méthode et les sources en droit positif*, Paris 1938, p. 212.

<sup>174</sup> Ch. Lefebvre, *Équité*, [in:] *Dictionnaire de Droit Canonique*, ed. R. Naz, vol. v, Paris 1953, col. 400 ff.

<sup>175</sup> Entry: *aequitas*, [in:] A. Laver, *Index verborum Codicis Juris Canonici*, Roma 1941, p. 19.

<sup>176</sup> Entry: *aequitas*, [in:] X. Ochoa, *Index verborum ac locutionum Codicis Iuris Canonici*, Roma 1983, p. 17.

<sup>177</sup> For exegetical commentary on these canons, see: V. R. Uy, *The Principle of Equity...*, p. 77–104.

but intended certain significance for each to approximate its proper meaning and usage. For this purpose, whatever is found significant to approximate its proper meaning and usage in the code will be adapted and employed.<sup>178</sup>

The purpose of *aequitas canonica* is not just to satisfy the demand of some higher justice, but to serve the *salus animarum*. The institution of canonical equity usually is presented in the context of application of canonical norm, or explanation of theological dimension of canon law.<sup>179</sup> It is because equity means application of the law to a concrete case with mercy and compassion. The spirit of ecclesial law necessarily demands such an application. A decision during application of norm has to be made in accord with the letter and spirit of the law, with fairness, impartiality, honesty and rational and consistent reasons. Because of that it will be regarded as just and equitable.<sup>180</sup> It is a juridical principle available to those vested with discretionary authority to interpret and apply law.

But the principle in question is important for the legislator, as well. It must be also presented while discussing the drafting of the law. First of all, the service of souls is an ultimate justification for change in old law and for new legislation. It can legitimize developments in law and remove long lasting legal traditions. Secondly, the legislator must form law according to the principle in question, knowing that his law will be interpreted and applied according to objective justice and its superstructure, that is, canonical equity. It must be underlined that canonical equity works in both ways. It requires the correction of the letter of the law in order to conform to the demands of the gospel and it correspondingly demands that equitable laws be faithfully observed.<sup>181</sup> The two directions are important and must be taken into consideration by the legislator.

#### 3.12.2.4. *Epikēia*

First of all, *epikēia* (*epieikeia*, gr. ἐπιείκεια)<sup>182</sup> is both a moral institution and a legal one. It is widely discussed in moral theology,<sup>183</sup> because it works

<sup>178</sup> V. R. Uy, *The Principle of Equity...*, p. 77–104.

<sup>179</sup> See, for example: R. Sobański, *Zarys teologii prawa kanonicznego*, Warszawa 1973, p. 105–141.

<sup>180</sup> A. Mendonça, *Justice and Equity: at Whose Expenses?*, [in:] *The Art of the Good and Equitable*, ed. F. C. Easton, Washington 2002, p. 186.

<sup>181</sup> Cf. F. J. Urrutia, *Administrative Power in the Church according to Code of Canon Law*, *Studia Canonica* 20 (1986), p. 273.

<sup>182</sup> Different spelling can be observed.

<sup>183</sup> L. J. Riley, *The History, Nature and Use of Epikēia in Moral Theology*, Washington 1948; J. Fuchs, *Theologia moralis generalis*, vol. 1, Romae 1971<sup>2</sup>, p. 138–140; J. Mahoney, *Making of Moral Theology: a Study of the Roman Catholic Tradition*, Oxford 1987, p. 231–235.



in *forum internum*. It is also a point of interest for canonist. It is not a formal canonical institution.<sup>184</sup>

St. Thomas Aquinas underlined that *epikeia* should be used when common good is in danger.<sup>185</sup> He connected *epikeia* with justice and considered *epikeia* as a virtue. The virtue orders to sacrifice legal justice in the name of objective justice. He wrote about that: “Si vero iustitia legalis dicatur solum quae obtemperat legi secundum verba legis, sic epieikeia non est pars legalis iustitiae, sed est pars iustitiae communiter dictae, contra iustitiam legalem divisa sicut excedens ipsam.”<sup>186</sup>

Another significant voice in development of the doctrine came from F. Suarez.<sup>187</sup> He considered *epikeia* as allowing the legislator, a superior, a judge, or an individual person to determine through an act of the practical intellect that a situation did not belong under the verbal formula of a law. He wrote that: “omnis enim epikeia est legis interpretation: non vero e converso omnis interpretatio legis est epikeia.”<sup>188</sup> For F. Suarez “epikiam esse partem iustitiae.”<sup>189</sup> It means that F. Suarez understood equity to be an adjustment of legal justice, a part of it.

*Epikeia* can be used in three cases. First is when a law lost its aim and observing act of law would cause harm in certain singular case. Second is when acts of law are in the collision, they prescribe something quite opposite, and it is impossible to observe them in the same time. The solution is to follow that act of law, which brings more good. The last case is when act of law is not to be obeyed because of physical (e.g., lack of vital force, lack of freedom, lack of necessary tools) or moral impossibility (when observing of the law would be possible only with great difficulties caused not by act of law, but by circumstances).<sup>190</sup>

As it was presented, the *epikeia* is based on the assumption that the legislator gives rules that are general and universal and it is impossible for him to predict or foresee all circumstances in which the individual would find himself. The lawmaker cannot foresee all possible cases that may come under the law, and it is therefore reasonably presumed that were the present circumstances known to the legislator he would permit the act. Based on *epikeia*, an individual can say that a general norm does not bind him in concrete situation. So, *epikeia* is not a way to get rid of a burden of norms or to omit requirements of norms. It simply is the way to realize the *mens legislatoris*. In formulating

<sup>184</sup> There was a postulate to make it formal, see: E. Corecco, *Il valore dell'atto "contra legem"*, [in:] *La norma en el Derecho Canonic...*, vol. 1, p. 859.

<sup>185</sup> It is important to remember that for St. Thomas Aquinas: *Epieikeia, quae apud nos dicitur aequitas*, *ST*, II-II, q. 120, a. 1, co.

<sup>186</sup> *ST*, II-II, q. 120 a. 2 ad 1.

<sup>187</sup> F. Suarez, *Tractatus de legibus et Legislatore Deo*, Liber VI, cap. 6–8.

<sup>188</sup> F. Suarez, *Tractatus de legibus et Legislatore Deo*, Liber II, cap. 16, 4.

<sup>189</sup> F. Suarez, *Tractatus de legibus et Legislatore Deo*, Liber VI, cap. 6, 6.

<sup>190</sup> R. Sobański, *Normy ogólne Kodeksu Prawa Kanonicznego*, Warszawa 1969, p. 60–62.

private judgment about whether a law should not be observed in a particular case, the individual must take into account the gravity of the law, as well as, the circumstances at hand that may excuse from observance. It is important to remember that certain categories of laws would not be subject to the use of *epikeia*, for instance: ecclesiastical law including divine law, invalidating and disqualifying laws, and constitutive laws, disciplinary laws and generally speaking law which not obeyed would cause harm to *salus animarum*.<sup>191</sup>

It can be said that *epikeia Christiana* is a virtue that helps to reach through literal law to its spirit, which is always that of supernatural justice.<sup>192</sup> *Epikeia* is not present directly in canon law. It has been sometimes postulated to characterize it as a legal rule.<sup>193</sup> It is a moral principle appropriate to individuals in discharging from the parameters of a rule a certain case otherwise within it.<sup>194</sup>

### 3.12.2.5. Contrary Custom (*consuetudo contra legem*)

Custom, as it was mentioned, is the source of norms in the Church aside from acts of law. It must be remembered that the legislator can at any time approve legal custom and if he does it directly, the custom is changed into act of law (cf. can. 23).<sup>195</sup> If the custom is not changed into act of law it is still law. The legislator, knowing system of norms that binds the community, must know also its customs.

Another specific feature of canon law that must be taken into consideration by the legislator is a contrary custom. The essence of contrary custom is not the abrogation of a law. Contrary custom does not apply where a law has been fully established and then has fallen into desuetude. The essence of contrary custom is abandonment of obeying or applying law in force, or acting against law in force.<sup>196</sup>

But *CIC* 1983 allows for the possibility of establishing customs contrary to the law, and they can attain the force of law. Contrary custom can be approved by the competent legislator. It seems that silent approval done by the legislator is enough to fulfill the requirement.<sup>197</sup> It happens by factual approval, for instance, when the legislator does not raise an objection to the contrary custom, or he is following it.<sup>198</sup>

<sup>191</sup> F. Bączkowiec, *Prawo kościelne...*, vol. 1, p. 205.

<sup>192</sup> R. Sobański, *Zarys teologii prawa kanonicznego*, Warszawa 1973, p. 138.

<sup>193</sup> E. Corecco, *Il valore dell'atto "contra legem"*, [in:] *La norma en el Derecho Canónico...*, vol. 1, p. 859.

<sup>194</sup> F. J. Urruita, *Aequitas canonica*, Periodica 73 (1984), p. 40.

<sup>195</sup> R. Sobański, *Kanon 26*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 83; different view presents: H Socha, *Münsterischer Kommentar...*, 26.

<sup>196</sup> R. Sobański, *Kanon 26*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 84.

<sup>197</sup> H. Socha, *Münsterischer Kommentar...*, 26.

<sup>198</sup> R. Sobański, *Kanon 26*, [in:] *Komentarz do Kodeksu...*, vol. 1, p. 84.

Another way in which it is possible to acquire the force of law by contrary custom is when contrary custom has been lawfully observed for a period of thirty continuous and complete years. Contrary custom prevails over a canonical law, which carries a clause forbidding future customs (can. 26), only when it is centenary or immemorial custom. The mentioned period of thirty years starts counting at the moment when the majority of the community started acting according to the way contrary to law. The period stops by breaking the custom in question. It is done, for instance, by: going back to behavior according to law, lack of will to create legal custom, or intervention of the competent legislator, who enacts law that repeats the law or norm to which the custom was contrary. The legislator must remember about possible special clause in act of law forbidding future customs against law. As it was said, only centennial or immemorial customs can prevail over a canonical law, which carries that clause. A prohibition of the future customs does not affect legal customs already existing. It affects factual custom already in existence that has not yet attained force of law.<sup>199</sup> Lawgiver can use the clause as a useful tool to protect system of law against custom not according to his mind.

In sum, it can be said that the legislator must be aware of the situation in the community, its way of life and behaviors. In a word, he must watch all that can become a base for a custom, especially contrary custom.

### 3.12.2.6. Dispense (*dispensatio*)

Presenting dispense one should start with Greek word *oikonomia* (οἰκονομία) and analysis of the meaning and its significance in the Church.<sup>200</sup> The fundamental meaning of the word in the context of canon law designates the obligation of church leaders to decide ecclesiastical questions in accordance with God's plan to give the salvation to the world. The aim of the rule is the creation of "a house of God," that is, the Church.<sup>201</sup>

Sometimes obeying norms of law in circumstances of time and place could be harmful to the good of the persons or good of the Church. In such situations a different action would be required, like dispense.<sup>202</sup>

<sup>199</sup> J. M. Huels, *Canon 26*, [in:] *New Commentary on the Code...*, p. 91.

<sup>200</sup> There are many publications about *oikonomia*, see for example: T. Schüller, *Die Barmherzigkeit als Prinzip der Rechtsapplikation in der Kirche im Dienste der salus animarum*, Würzburg 1993; G. Richter, *Oikonomia: Der Gebrauch des Wortes Oikonomia im neuen Testament, bei den Kirchenvätern und in der theologischen Literatur bis ins 20. Jahrhundert*, Berlin-New York 2005; H. Müller, *Barmherzigkeit in der Rechtsordnung der Kirche?*, *Archiv für katholisches Kirchenrecht* 159 (1990), p. 353–367; J. H. Erickson, *Sacramental "Economy" in Recent Roman Catholic Thought*, *The Jurist* 48 (1988), p. 653–667.

<sup>201</sup> J. Meyendorff, *The Byzantine Legacy in the Orthodox Church*, Crestwood 1982, p. 34–35.

<sup>202</sup> Good presentation of the understanding of dispense in classical period of canon law, see: J. Brys, *De diespasatione in iuro canonico*, Brugis 1925.

Gratian pointed out that “Aliquando enim pro necessitate vel ecclesiae utilitate mutilantur et laxantur precepta canonica.”<sup>203</sup> Rufin, who made glosses to Gratian wrote: “Est itaque dispensatio, iusta causa faciente, ab eo, cuius interest, canonici rigoris casualis facta derogatio.”<sup>204</sup> Similarly Ioannes Teutonicus. The canonist noticed, that “Dispensatio est iuris communis relaxation facta cum causae cognitione ab eo, qui ius habet dispesandi.”<sup>205</sup> *Dispense* means that prohibited action is permitted under extraordinary circumstances or omitting ordered action is justified. The starting point for act of dispensation is always the good. To achieve the good, the liberation from obligation of law is needed.

In *CIC* 1983 dispensation means the relaxation of a merely ecclesiastical law in a particular case (can. 85). Only merely ecclesiastical law can be dispensed. Divine law (positive and natural), and ecclesiastical law that is built on God's law binds always. No one can dispense from it.<sup>206</sup> There are other limitations, mentioned in *CIC* 1983, which can be found in the authentic interpretation.<sup>207</sup>

Dispense can be granted, by those who have executive power, within the limits of their competence, and by those who either explicitly or implicitly have the power of dispensing, whether by virtue of the law itself or by lawful delegation (can. 85). Dispense is not valid if the requirements of competency are not fullfield. To give dispensation a just and reasonable cause must be present in view of the circumstances and seriousness of the law (cf. can. 90). The good stands above the law and the good is a kind of determinant of the will of the competent ecclesiastical authority. Giving dispensation is his duty.

Generally dispensation relates to the validity or invalidity of certain acts or to the capacity of certain person to act legally. At other times, its use only reflects the gravity of the rule being relaxed, without however any consequences touching upon validity.

<sup>203</sup> Causa 1, questio 7, canon 23.

<sup>204</sup> *Summa Decretorum*, ad c. 6, C. 1, q. 7.

<sup>205</sup> Glossa ad v. plerisque, c. 6, C. 1, q. 7.

<sup>206</sup> There is an opinion, worth mentioning, that the traditional doctrine of immutability and indispensability of the norms of *Ius Divinum* must be revised. H. Pree, *The Divine and the Human of the Ius Divinum*, [in:] *In Diversitate Unitas*, ed. W. Onclin, Leuven 1997, p. 40: “A certain legal formulation of *Ius Divinum* should never be a hindrance in concretizing the will of God. The dispensation may be closer to God's will than the rigid application of the letter of the law. Sometimes dispensation of a norm of the *Ius Divinum* would not be a violation of the will of God, but would rather mean compliance with the spirit of law instead of its letter. The reason for this lies in the proper concept of the concretization of God's will. Each level of concretization includes a greater degree of reality, for which the legal norm was formulated or the decision in an individual case is made”; cf. R. Sobański, *Metodologia prawa...*, p. 62–63.

<sup>207</sup> For instance, the authentic interpretation of can. 87 § 1, see: Pontificia Commissio Codici Iuris Canonici Authentice Interpretando, Responsiones ad proposita dubia, 14.05.1985, AAS 77 (1985), p. 771: “D. *Utrum extra casum urgentis mortis periculi Episcopus dioecesanus, ad normam can. 87 § 1, dispensare valeat a forma canonica in matrimonio duorum catholicorum.* R. *Negative.* The response was approved by the Pope on 5.07.1985 and promulgated on 1.08.1985.”

Dispensation is a wise legal provision of necessary accommodation. It is the general law being adjusted to the specific case. It cannot be denied that in the actual canonical system of the Church dispensations are a widespread practice.<sup>208</sup> By this institution, canon law allows for adaptation of the requirements of law to concrete situation and by this it helps to achieve supernatural aim. The relatively large number of canons dealing with dispensations implies something about the nature of those laws and the nature of these dispensations. The legislator at one and the same time creates laws presumably with a view toward the common good, and yet provides so many possibilities of dispensing from those laws, sometimes in order to provide for the individual good, but sometimes for another common good. He must take possibility of dispensation of his law into consideration. There is no need to be discouraged because of the possibility of dispensation. Dispensation and its usage is a perfectly normal legal instrument. It must never be understood only as lesion given to act of law. But still the legislator must abstain from making law and counting on dispensation. The legal maxim that “dispensatio est vulnus [...] quia quasi vulnerat ius commune”<sup>209</sup> deserves to be a point of consideration.

### 3.12.2.7. Dissimulation (*dissimulatio*) and Canonical Tolerance (*tolerantia canonica*)

Dissimulation and canonical tolerance are quite similar instruments but not identical.<sup>210</sup> Dissimulation happens when it seems that superior of the community does not pay attention to the discipline. He pretends that he is not interested in observance of the act of law by members of community. He is not trying to take any action to impose or restore respect for the norms of law. The legislator does it silently by pretending that he sees nothing. He does not abolish the law, he does not put the law on hold, he does not want to give dispensation, but he purposely dissembles that he is not aware of the situation. He is doing this because by intervention he can neither hamper the situation nor stop it, so the best he can do is to pretend that nothing happens.<sup>211</sup>

Canonical tolerance is a situation when the competent ecclesiastical authority expressively or silently allows disobedience of the act of law or allows application of a contrary law, for instance, a civil one. By canonical tolerance

<sup>208</sup> J. J. Koury, *Hard and Soft Canons Continued: Canonical Institutes for Legal Flexibility and Accommodation*, *Studia Canonica* 25 (1991), p. 352.

<sup>209</sup> L. de Miranda, *Manuale praelatorum regularium*, vol. II, Romae 1612, q. 2, art. IV.

<sup>210</sup> M. Coronata, *Institutiones iuris...*, vol. I, no. 108; G. Michiels, *Normae generales...*, vol. II, p. 680–681. For further reference, see: G. Olivero, *Dissimulatio e tolerantia nell'ordinamento canonico*, Milano 1953; S. Paździor, *Dyssymulacja a dyspensacja*, [in:] *Plenitudo legis dilectio...*, p. 517–541.

<sup>211</sup> F. Bączkiewicz, *Prawo kościelne...*, vol. I, p. 263.

supervisor tries to omit bigger evil that could happen. The ecclesiastical authority is not abolishing the law; rather he just tolerates the fact that law is not obeyed.<sup>212</sup>

Neither dissimulation nor canonical tolerance can be equated with silent approval.<sup>213</sup> The effect of dissimulation and canonical tolerance is the same: act of law is not obeyed and the legislator plays a significant part in this situation.

### 3.12.2.8. Permission (*permissio* or *licentia*)

This tool for flexibility of law allows for an action against the act of law, but it does not release from the duty of the law. The permission is needed for valid or decent action against the law. The permission can be evidently given by a superior who does not have the power of jurisdiction, which belongs to another superior. Another possibility is that permission can be obtained as a supposition on the part of the users of law (*licentia praesumpta*).<sup>214</sup>

At the first look, two important differences are noticeable between the permission and dispense. First is that dispense requires a positive act of superior and it cannot be supposed by subordinate. The second is that dispense is relaxing the duty of norms, permission is not.

### 3.12.3. Limits of Rescinding and the Variables of Obligation

All these correcting act of law factors help the faithful to live in harmony and peace according to church law, without risking the breaking of the written rules. These factors give to the acts of law a flexibility that is not visible in the legal text. The lawgiver must have this in mind while making law.

Flexibility, of course, has to have its measure and limitations.<sup>215</sup> Law would not be a law in the sense of a set of norms, if it could be as elastic as one wills. Of course, the first and the most important limit is the rule, which is the basis of flexibility of canon law. That is *salus animarum*. Too flexible law would do harm to itself. At this moment it would be completely useless. If canon law were not for salvation of souls, it would not be church law, and the community with such a law would not be Christ's Church.

The second limitation flows from the principles of Catholic faith, which are dogmatic truths and Christian morality. Any technique of making the law

<sup>212</sup> Cf. G. Michiels, *Normae generales...*, vol. 1, p. 106–107.

<sup>213</sup> H. Socha, *Münsterischer Kommentar...*, 13.

<sup>214</sup> F. Bączkiewicz, *Prawo kościelne...*, vol. 1, p. 262.

<sup>215</sup> H. Pree, *Le tecniche canoniche de flessibilizzazione...*, p. 391–393.

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flexible has this limit: interpretation or application of the law must not cross the line of heresy.

The next restriction is divine law (natural and positive). All law must be always coherent with these laws, if not it has no binding power. The law in question is an ultimate horizon of all legislative activity of a man. Besides divine law certain categories of law never could be a subject to the use of *epikeia* or excusing causes. The elements of the set are: invalidating and disqualifying laws as well as constitutive laws. Some disciplinary laws are so important that they never admit of any excusing causes.

Another kind of limitations of flexibility of law are the factors that can harm *bonum commune*. The elements of the group are, for example as follows: disrespect, shock, scandal and spiritual harm, disorder or damage to public order.

The legislator is to oscillate between two polarized stances that are required in law. First is a precise law that guarantees confidence in law. The second is flexible law that provides adequacy of law to changeable reality. Making flexible law is not a mistake unless precision is needed, and *vice versa*. The decision in which direction to go belongs solely to the legislator. Responsibility is his.





# Conclusions

At the end of the book it is worthwhile to draw some conclusions that will be useful for the legislator in the Church. Although they will be given in short and simple form, that is, in imperative sentences, which are not a regular academic form of speaking, it must be underlined that they are the outcome of analysis presented in the book. The used form is justified by genuine *Regulae iuris*, which show that the simplicity and wisdom do not contradict each other.

## 1. Principles of Legislation

The lawgiving activity takes place within the Church itself. It does not come to it from the outside. It flows naturally from the Church's mission to teach. The exercise of authority in the Church, and that includes the legislature, has its roots in love. When it fails to rely on love, it is no longer genuine ecclesiastical authority. Acting in accordance with love, church legislator is capable of turning his work into real service to Christ and the Church.

The following principles of legislation are formulated in the direct speech. They are suggested to the legislator as postulates. The aim of formulating them is to give the general guidelines, which should govern the legislator's work. Following them creates a chance for legislation to become an art.

### 1.1. Community

#### 1.1.1. Remember the Role of the Law in the Church

Canon law must always be written in the context of the mission of the Church to help people reach salvation. The history of salvation continues in the Church and by the Church. The Church has its own tool for doing this. It is law. The law did not come from outside but it was born inside the Church. The awareness of the believing community was never split into theological and legal one but rather their practice of faith naturally included obeying the rules of law.

The legislator must remain vigilant with regard to the salvific purpose of law. The ruler of the community must have as an object of his interest not only the norms that govern the Church but the Church itself. Respect for the specificity of the community of believers is of essence in making law that will penetrate the life of believers.

#### 1.1.2. Respect Dignity of Users of Law

The dignity has its foundations in the creation of man and his vocation to union with God. Law is to protect the dignity of a man and of a Christian and to promote development of a person in every dimension. The legislator must understand the dignity on both the individual and community level. The legislator must respect addressees as free men and their rights as rooted in human nature and in fact of baptism.

#### 1.1.3. Be Open before Making Decisions

The legislator should listen to the voices of the community and before making any decision always consult those who have knowledge or experience he may need. The field of the potentially useful knowledge is vast. The legislator should be open to use for the sake of the whole community.

#### 1.1.4. Be Mindful of the Double Membership of Faithful

The legislator must remember that faithful are also subjects of state law. He must not duplicate norms and put double burdens on them, unless it is necessary for good order in the community or for protection of the matters of faith. On the other hand, the legislator can rely on civil law and treat its rules as *nomocanons*. They can be of help in solving problems inside the Church. He does not have to feel like he is the only one responsible for his people. Civil authorities are to serve the community, of course, in different dimensions of life.

#### 1.1.5. Take into Consideration the Community you Serve

Legislation must not be isolated from life of the community. It is to serve the community and thus it must respect those who are subjects of law: circumstances of their life, their needs, their expectations. All in all, the legislator is for them and not *vice versa*. The lawmaker must abstain from thinking that his will is the measure of religious matter.

### 1.1.6. Take Care of Acceptance and Reception of Law

Law without implementation in the life of the community is just an empty text. To live, law needs to be accepted and received. The deeper these processes go into the life of the community and individuals the better. Church legislator is responsible for both: acceptance and reception. Creating an act law is not his only point of interest.

The Church legislator must presume and support acceptance and reception. At the same time, he must promote them by his teaching about faith and law. Canon law must be seen as a part of the Church's teaching. After all, canon law includes the articles of faith and serves the realization of faith in life.

### 1.1.7. Listen to Voices of the Community after the Law Comes into Force

The legislator must listen to the community after the law is in force. In case of difficulties in understanding law, applying or obeying it, the church legislator is obliged to help the community by authentic interpretation, or amends.

If law is not received but instead is widely ignored and later on completely forgotten, one can truly say it does not function as a law because it does not bind the community as the legislator intended.

## 1.2. Legislator and His Activity

### 1.2.1. Get to Know Yourself

The legislator as an acting person remains under the influence of very many factors. They create very complex mixture of stimuli. In order to know how the legislator will react to them all, it is necessary for the legislator first to come to know himself. It includes an awareness of his intellectual horizon, philosophical and theological background, scope of knowledge, and personal characteristics.

### 1.2.2. Acquire Proper Knowledge

The legislator must be a very wise and knowledgeable man. To work responsibly he must acquire proper knowledge both in law theory and subject matter of law. If he cannot obtain proper knowledge, he will fulfill this principle by asking for help from those who know more.

### 1.2.3. Be Responsible

The full awareness of importance of his work must lead to an awareness of responsibility for the faithful. The responsibility is not only a professional

one, that is, connected with the office, but it is the responsibility before God for the Flock.

#### 1.2.4. Be Prudent

The legislator at every stage of his work must admit to himself that he can be wrong. Before the final decision, he must try to look for all pros and cons of the new law. By doing this, he will thoroughly estimate the results of the chosen law solution and its alternatives.

#### 1.2.5. Remember Being a Servant and Ruler

Hierarchical authority is a service directed toward the spiritual welfare of personality of the leader, attention to the common good, and commitment to the spiritual goal for which the Church exists.

#### 1.2.6. Be a Herald of Freedom

The aim of the law in the Church is to provide the faithful with a guide to real freedom. It is only in salvation that man attains perfect freedom, for then he will stop searching. But he cannot do it by himself. He needs the guidance of the Church. The Church needs to use the law to provide this guidance. Therefore, law made by rational, free leaders of the Church, is needed to guide man to salvation.

#### 1.2.7. Be Consistent

Effective governance is a governance people can rely on. What once seemed proper ought not suddenly to be presented as improper, nor should an opinion once adopted be changed to the detriment of another. Indeed, legal consistency is a characteristic of the Church's legislation, and should mark the service of those in diocesan governance.

#### 1.2.8. Be Timely

If justice delayed is justice denied, then unnecessary delay in any aspect of governance can be harmful to people. Law sets various time limits to enforce timely governance and even if no limits are specified, sensitivity to the rights of persons calls for prudent timeliness.

#### 1.2.9. Be Man of Faith

Faith in the legislator's activity plays a major part. All his efforts and activities have to have origin in faith in order for him to be a good shepherd to those

entrusted to him. All solutions and orders in law are to be established due to faith. It is ultimately the faith, which decides what is good and valuable, and what must be present in law.

#### 1.2.10. Be Fortright

The Church exists to bear witness to the gospel, to be a light to the nations. As with its teaching on social justice, so with forthrightness, the Church must practice what it preaches if it is to be a credible witness. Respecting proper confidentiality and preserving the privacy of others is important, but it cannot be an excuse for obscurantist practices or secretive governance. There is a standard pattern in the code encouraging forthrightness: norms require promulgation of laws, publication of judicial acts, sentences, and administrative acts. The truth, after all, has nothing to fear from being proclaimed.

#### 1.2.11. Think with the Church

Church law is to be written in light of the teaching and new way of thinking characteristic of the Second Vatican Council. *Sentire cum Ecclesia* is to resonate with the mystery of Christ as this is presented through the teaching, witness, and tradition of the Church.

#### 1.2.12. Be Understanding

The church lawgiver must understand that there could tensions between general norm of the law and unique features of the situation of an individual. In such circumstances, many institutions which assure flexibility of canon law should be applied. The lawgiver must be aware of them while drafting law.

#### 1.2.13. Make Law with Love

Legislative activity in the Church is a regulation, with the help of the legal tools, of life of the Community. This life is lived by men of faith. The realization of the rules of faith by the community originates from love for God and neighbor and must lead to love. It can be justly said that the foundation of the life of the Church is love and respect for law.

### 1.3. Law

#### 1.3.1. Respect Specificity of Canon Law

Law in the Church has its specific character. It is seen in the fact that law is one of the forms of teaching the faith by the Church. Canon law is faith

in legal form. It can be said that law as a phenomenon would still exist in the community of believers even if canon law did not have a legal form known from jurisprudence. Canon law makes sense only in connection with faith.

### 1.3.2. Take Care of the Theological Correctness of Law

Canon law is an ecclesiastical reality and, therefore, a theological reality. The Church is the primary subject of theology. Canon law cannot be properly understood without theology. It cannot properly exist. Findings of theology create the framework for norm: for its scope and form. Being a canonist inescapably involves being a theologian.

### 1.3.3. Respect the Canonical Tradition

Remember, there is a great wisdom to be gained from the canonical tradition. Considering the past, legislator can learn from previous errors and thus lead the community in a better way. The legislator is called to profit from the experience of his predecessors. Law in the Church cannot be only an outcome of individual mental activity. It must be rooted in history of canon law.

### 1.3.4. Be Oriented in Canonical Schools

There is a great opulence of traditions and schools in canon law. The legislator has to be versed in them even if he belongs to one of them. Standing in the position of lawgiver, the legislator should free himself from sectarian thinking. Even if he considers his school better, being versed in different schools he will be able to choose what is best for the community. It will also help him to admit that he can be wrong and other proposed solution might be better.

### 1.3.5. Respect all Sources of Legal Rules

Written law is only one of the sources of law. The legislator must avoid duplicating some rules. Before taking legislative action, the legislator must pay attention to custom and legal custom and treat them as equivalent sources of norms. The community can regulate its life successfully without new acts, and sometimes, an act of the legislator can be harmful to the natural process of regulation.

### 1.3.6. Create Possible Law

Laws are made for God's people, not the people for laws. Indeed, no one expected to do the impossible. The acts of law are to be tools in reaching the benefits intended by law, not blockades on the way to them.

### 1.3.7. Take Care of Legal Quality of Law

Legal quality of canon law is never to be put aside. The community deserves the best form of law. Law is used as tool for such a great aim – salvation. Make the aim and the means fit together perfectly. Canon law does not need any exclusive canonical theory of law that is specially created and meant for it. The legislator can use findings of civil jurisprudence. Of course, he must be critical in his openness to them.

Unfortunately, canon law knows neither body nor procedure to check or evaluate acts of law, if act of law is coherent with system of law or if it is internally coherent. This situation puts on the legislator's shoulders even greater responsibility.

### 1.3.8. Create a Form of the Law Adequate to Its Importance

In today's church law, problem of form of law is not a well sorted issue. Anyway, there are some rules as to how to give an adequate form to the act of law, including the possible formulation inside the text so that the matter would be treated, as needed.

### 1.3.9. Take Care of Correct Translation

Being the legislator for a multilingual community imposes additional duties. One of them is responsibility for the correct translation of law. Even the best act of law is dead when addressees of law do not understand it.

### 1.3.10. Change Law only as Needed

Canon law is an organically developing ministry, not a closed system of laws or fixed set of uniform rules. It is a theologically driven project of Church leadership that strives to maintain both Christian freedom and good order. Law has to have ability to update its rules in an ongoing and orderly manner. Without the ability in question law cannot advance the mission of the Church.

But the legislator must not be driven by desire for change at any price. Even an old act of law when it is in use and provides good order in the community must not be changed on the basis that it is old. Change just for the sake of change weakens authority of law and of the legislator, as well.

## 2. Postulates *de lege ferenda*

Here is a good place to give some remarks and formulate postulates *de lege ferenda* about legislation in the Church.

## 2.1. Set of Rules of Lawgiving

There are some rules for the legislator in the Church. But what seems to be missing is their proper systematization. From the analysis of the problem, it seems that there is room and real need for the authorized by the Church set of rules for proper lawgiving. It could be formulated as an act of law or just a drafting manual. It can be done on a universal level and, in more detailed manner, by conferences of bishops or authorities in particular Churches.

## 2.2. Wider Consultation and Dialogue in Making Law

The next problem is dialogue and consultation process in legislation. Communion is the formal principle of the Christian community. Therefore, it is also the formal principle of all of its structures and juridical institutions.

It is advisable to invite wider participation of the priests or laypersons in process of making law. The final work due to its nature and complexity must be given to special commission of canonists, but the direction of rules can be consulted with the faithful to allow them to use their wisdom, prudence and God's gifts. The laws will have great value for the Church as the community, and will enjoy great authority when the People of God are more involved in the process in question. It seems that the consultation of the faithful in doctrinal matters is valid for legislation, as well. And conversely, a policy that neglects the consultation in question can do harm to the community, and to law itself. It is true that the better the participation in the rule-making process, the more likely the positive reception and effectiveness of the rules. The principle of consulting is not only a pragmatic strategy, but, first of all, it is a theological imperative.

Dialogue, of course, with all respect to power position of the legislator, seems to be the key to the Ecclesiology of Communion. One-way communication model in the Church should be rejected. Dialogue means mutual communication in which the partners – their experience and their judgment – are taken seriously. This does not exclude the official authority of the pastors and the obedience due to them, but it requires the pastors to exercise their authority in dialogic fashion. As the Second Vatican Council teaches, the Church stands forth as a sign of that brotherhood which allows honest dialogue and gives it vigor. Both pastors and the faithful can engage in dialogue with ever abounding fruitfulness.

There is a deep sense of community in the Church at all levels. It exists in the whole Church, among laymen, priests, and bishops. They all have to take a substantial part in planning the laws for God's people. The procedure



regarding legislation should be a good example to the point. Making law should not be restricted to higher hierarchy or only to clerics.

The present code and current legislation in the Church is a product of *novus habitus mentis*. It represents new approach to law in the Church and all lower law should follow it. The 1983 code takes an important and significant step in this direction, for example, with the recognition of the Christian faithful as the primary subject of the Church's life and with development of a catalogue of the Faithfull's rights and duties. On legislative level a strengthening of the position of the people of God in this process is still to be completed. I can be said that the present discipline on that shows evidently that the Council went further than the code.

The voice for more active participation of laity in law life of the Church, also on the level of governance, was indeed included in *novus habitus mentis*. An important part of the role of laity in the life of the Church can be also its role in legal dimension of the Church. There was an exaltation of the important role of all the faithful, not only the ordained ones. Comparing current law with *CIC 1917*, there is a significant step forward in just and adequate representation of lay faithful in the Church institutions, for instance, in diocesan synod. The former code did not provide for any lay delegates to the synod. Today it can be said that maybe it is time to open the doors to laity and allow them to play their role on the diocesan level in a more visible and productive manner, for instance, as members of the diocesan pastoral council.

The future of canon law and legislation is unknown. There is a need to do the following: observe the present, use imagination, and be ready to make needed changes. This, in brief, is a method of work for every legislator. Careful observation of the present in its multifarious and variegated forms will yield no penetrating insights unless it is supported by the gift of the Spirit whose assistance for legislator is indispensable in proper reading of the signs of time. Use of imagination must be motivated by the supernaturally infused virtue of love for the Christian community. Only sincere love for the Church will direct the imagination toward that which is best for the believing community. Readiness to make changes is born of the deep conviction that the Lord continues to cultivate His vineyard through the hands of His human coworkers. All of it must meet in the person of the legislator who, while open to the divine assistance, must employ the best of his human capacities in bringing about this particular shape of order, which most fully resonates with what is good for the present-day Christian community. Thus, legislation appears to be an art – the application and the expression of human creative skill and imagination in the name and at the service of Christ's Body on earth.



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## Abbreviations

- AA – Sacrosanctum Concilium Oecumenicum Vaticanum II, Decretum *Apostolicam actuositatem* de apostolatu laicorum, 15.11.1965
- AAS – *Acta Apostolicae Sedis*, Romae 1909–
- ASS – *Acta Sanctae Sedis*, Romae 1865–1908
- CCEO 1990 – *Codex Canonum Ecclesiarum Orientalium* auctoritate Ioannis Pauli PP. II promulgatus, 1990
- CD – Sacrosanctum Concilium Oecumenicum Vaticanum II, Decretum *Christus Dominus* de pastoralis episcoporum munere in Ecclesia, 28.10.1965
- CIC 1917 – *Codex Iuris Canonici* Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus, 1917
- CIC 1983 – *Codex Iuris Canonici* auctoritate Ioannis Pauli PP. II promulgatus, 1983
- CLSA – Canon Law Society of America
- Cod. – *Codex Iustinianus*
- C.Th. – *Codex Theodosianus*
- D. – *Decretum magistri Gratiani*
- DH – Sacrosanctum Concilium Oecumenicum Vaticanum II, Declaratio *Dignitatis humanae* de libertate religiosa, 7.12.1965
- Dig. – *Iustiniani digesta*
- DS – H. Denzinger, A. Schönmetzer, *Enchiridion symbolorum, definitionum et declarationum de rebus fidei et morum*, ed. P. Hünermann, Bologna 1995
- Dz. U. – Dziennik Ustaw Rzeczypospolitej Polskiej (the Journal of Laws of the Republic of Poland)
- DV – Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio dogmatica *Dei verbum* de Divina revelatione, 26.11.1965
- GS – Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio pastoralis *Gaudium et spes* de Ecclesia in mundo huius temporis, 7.12.1965
- Inst. – *Iustiniani institutiones*
- LG – Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio dogmatica *Lumen gentium* de Ecclesia, 21.11.1964
- OT – Sacrosanctum Concilium Oecumenicum Vaticanum II, Decretum *Optatam totius* de institutione sacerdotali, 26.10.1965

- Periodica* – *Periodica de re morali, canonica, liturgica*; from 1991: *Periodica de re canonica*
- PG* – J.-P. Migne, ed., *Patrologiae cursus completus*, Series Graeca, vol. 1–CLVI, Paris 1857–1866
- PL* – J.-P. Migne, ed., *Patrologiae cursus completus*, Series Latina, vol. 1–CCXXI, Paris 1878–1890
- PO* – Sacrosanctum Concilium Oecumenicum Vaticanum II, *Decretum Presbyterorum ordinis de Presbyterorum ministerio et vita*, 7.12.1965
- Praefatio* – *Praefatio to Codex Iuris Canonici* auctoritate Ioannis Pauli PP. II promulgatus, 1983
- RI* – Bonifacius PP. VIII, *De regulis iuris*, 3.03.1298, [in:] *Liber sextus decretalium*, [in:] *Corpus Iuris Canonici*, vol. II, Lipsiae 1881, col. 1122–1124
- ST* – Thomas Aquinas, *Summa Theologiae*, [in:] *Opera omnia iussu impensaue Leonis XIII P. M. edita*, Ex Typographia Polyglotta S. C. de Propaganda Fide, Romae vol. IV–XII, Romae 1888–1906

Abbreviations of the books of the Bible are taken from *The New American Bible*, New York 1991, p. [42].

Others abbreviations are used according to popular English dictionaries and in accord with common canonical usage.

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## Streszczenie

### *Sztuka legislacji: zasady prawodawstwa w Kościele*

Prawodawstwo rozumiane jako działalność organu stanowiącego ustawy wymaga wykorzystania wielu bardzo specyficznych umiejętności. Z tego powodu bywa ona nazywana „sztuką legislacji”. Jedynie prawodawca, który posiada wysoki stopień wiedzy merytorycznej dotyczącej regulowanego zagadnienia, jak również posiada kompetencje prawnicze potrzebne do prawidłowego pisania tekstów ustaw może podejmować właściwe decyzje prawodawcze. Dzięki nim stanowione prawo może być takie, jak je scharakteryzował Gracjan: „honesta, iusta, possibilis, secundum naturam, secundum consuetudinem patriae, loco temporisque conueniens, necessaria, utilis, manifesta quoque, ne aliquid per obscuritatem inconueniens contineat, nullo privato commodo, sed pro communi utilitate ciuium conscripta” (D. IV, c. 2). Prawodawca stoi więc przed wielkim wyzwaniem w wykonywaniu swojego zadania.

Obecnie większość obowiązujących w systemie prawa kanonicznego norm jest zawarta w aktach prawnych. Ich autorem jest kompetentny prawodawca powszechny lub prawodawca partykularny. Biorąc pod uwagę rolę prawa w Kościele, a mianowicie to, że jest ono niezbędnym narzędziem Kościoła w prowadzeniu wiernych do zbawienia, stanowienie prawa jest zadaniem niezwykle odpowiedzialnym.

Celem niniejszej książki jest przedstawienie teorii dotyczącej prawodawstwa wraz z techniką legislacyjną, która może znaleźć zastosowanie w praktyce prawodawców kościelnych.

Pierwszy jej rozdział został zatytułowany *Church as Legislator (Kościół jako prawodawca)*. Punktem wyjścia dla rozważań na temat prawodawstwa kościelnego musi być sam Kościół jako *matrix legis*. Nie można bowiem zmierzyć się z zagadnieniem sztuki legislacji dokonywanej w Kościele bez przybliżenia przyczyny sprawczej tego prawa, czyli samego Kościoła. To w Kościele powstaje i w nim obowiązuje prawo kościelne. Jest ono stanowione ze względu na misję, którą Kościołowi powierzył Jezus Chrystus. Zrozumienie mechanizmów powstawania tego prawa, jego celu i funkcji jest w pełni możliwe tylko poprzez uprzednią dogłębną znajomość kościelnej wspólnoty.

Mając obraz Kościoła jako podmiotu dokonującego legislacji, można przybliżyć sam proces stanowienia prawa. Dotyczy tego zagadnienia następna część książki zatytułowana *Legislation as Activity of Legislator (Prawodawstwo jako działalność prawodawcy)*. Można powiedzieć, że stanowienie ustaw to postępowanie bardzo skomplikowane, wieloetapowe, na które wpływ mają liczne i bardzo różnorodne czynniki. Istotną rolę odgrywa w nim umiejętność tworzenia tekstu prawnego. Dlatego poruszony został problem technik legislacyjnych, które powinny być znane prawodawcy kościelnemu. Umiejętność poprawnego formułowania tekstu normatywnego jest bowiem niezbędna do skonstruowania prawidłowego brzmienia ustawy i następnie skutecznego jej stosowania.

Konsekwentnie, po przedstawieniu ustawodawcy oraz procesu ustawodawczego w trzeciej części książki zatytułowanej *Law as Product of Legislation (Ustawa jako produkt prawodawstwa)* przedstawiono ustawę jako wynik działalności prawodawczej. Została podana w nim klasyfikacja ustaw kościelnych, zagadnienie ich hierarchii oraz charakterystyka kościelnego aktu normatywnego. Określony został także zakres podmiotowy oraz przedmiotowy regulacji, jakich może dokonywać prawodawca kościelny. Otwiera to drogę do wielopłaszczyznowego przedstawienia ważnego dla prawodawcy zagadnienia, jakim jest recepcja prawa w Kościele.

Książkę kończą wnioski przedstawione w *Conclusions*. Zostały zawarte w nich konkluzje z przeprowadzonych analiz i przedstawionych opisów. Prezentowane postulaty mają postać imperatywnych zdań, które mogą być praktyczną wskazówką dla prawodawcy kościelnego przy podejmowaniu czynności legislacyjnych.

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# Zusammenfassung

## *Gesetzgebungskunst: legislative Prinzipien in der Katholischen Kirche*

Wird die Gesetzgebung als Kompetenz eines den Vorgang der Gesetzgebung betreibenden Organs verstanden, so ist der Einsatz vieler spezifischer Fähigkeiten erforderlich. Man bezeichnet das auch manchmal als Kunst der Gesetzgebung.

Nur ein Gesetzgeber, der über ein großes, wesentliches Wissensniveau zu dem bestimmungsbedürftigen Thema verfügt und der die gesetzlichen und zum korrekten Verfassen von Gesetzen nötigen Kompetenzen besitzt, kann richtige legislative Entscheidungen zur Verabschiedung von Gesetzen treffen. Dadurch können die geschaffenen Normen den Sinn behalten, der von Gratian bestimmt worden ist: “*honesta, iusta, possibilis, secundum naturam, secundum consuetudinem patriae, loco temporique conueniens, necessaria, utilis, manifesta quoque, ne aliquid per obscuritatem inconueniens contineat, nullo privato commodo, sed pro communi utilitate ciuium conscripta*” (D. IV, c. 2). Der Gesetzgeber steht wohl vor einer großen Herausforderung, indem er seinen Aufgaben nachkommt.

Zur Zeit beinhalten Rechtsakte die Mehrheit der im kanonischen Rechtssystem gültigen Normen, deren Autor ein öffentlicher oder partikularer Gesetzgeber ist. Wenn man die Rolle des Rechts in der Katholischen Kirche berücksichtigt, nämlich die Tatsache, dass das Recht als ein Kirchenwerkzeug der Führung aller Gläubigen zur Erlösung dient, muss man betonen, dass die Gesetzgebung eine sehr verantwortungsvolle Aufgabe ist.

Der Zweck dieses Werkes ist es, die legislative Theorie inklusive der legislativen Technik darzustellen. Diese Theorie kann praktisch von katholischen Gesetzgebern verwendet werden.

Das erste Kapitel hat den Titel *Church as Legislator (Kirche als Gesetzgeber)*. Der Ausgangspunkt der Überlegungen zum Thema: kirchliche Legislatur muss die Kirche selbst sein als *matrix legis*.

Man sollte die Frage der in der Kirche verfassten Gesetzgebungskunst nicht angehen, ohne Erklärung der Triebkraft dieses Rechtes, nämlich der Kirche selbst. Das Kirchenrecht entsteht und gilt eben innerhalb der Kirche. Es wird in Hinsicht auf die Mission bestimmt, die der katholischen Kirche von Jesus Christ anvertraut worden ist.

Um sowohl die Entstehungsmechanismen dieses Rechtes als auch seine Ziele und Funktionen richtig und vollständig zu verstehen, muss man vorher ein umfangreiches und gründliches Wissen von der kirchlichen Gemeinschaft erobern.

Wenn man die Kirche als ein gesetzgebendes Subjekt betrachtet, kann man das legislative Verfahren genauer erklären. Dies betrifft den nächsten Teil dieses Buchs unter dem Titel *Legislation as Activity of Legislator (Gesetzgebung als Tätigkeit des Gesetzgebers)*.

Man kann annehmen, dass das Verfassen von Gesetzen ein sehr komplizierter, mehrstufiger Vorgang ist, der durch zahlreiche und vielfältige Faktoren beeinflusst wird.

Eine wichtige Rolle spielt dabei die Fähigkeit dazu, einen Gesetzestext zu schaffen. Deswegen wird die Frage der legislativen Techniken besprochen, in denen sich ein kirchlicher Gesetzgeber gründlich auskennen sollte. Die Fähigkeit, einen normativen Text korrekt zu formulieren, ist unerlässlich, um eine ihrer Bedeutung nach korrekte Version dieses Gesetzes zu verabschieden und dessen erfolgreiche Verwendung zu sichern.

Nachdem in den zwei ersten Teilen des Buchs der Gesetzgeber und das legislative Verfahren vorgestellt worden waren, wird das Gesetz im dritten Teil – unter dem Titel *Law as Product of Legislation (Gesetz als Produkt der Gesetzgebung)* – als Ergebnis der legislativen Tätigkeit dargestellt. Hier wurde sowohl die Klassifizierung der kirchlichen Gesetze als auch ihre *Hierarchie* und Charakteristik des kirchlichen, normativen Aktes angegeben. Ebenfalls wurde hier nicht nur der Subjekt- sondern auch der Objektbereich von Regulierungen bestimmt, die von dem kirchlichen Gesetzgeber gestaltet werden können. Dadurch wird die für den Gesetzgeber wichtige Frage der Rechtsrezeption in der katholischen Kirche auf neue und vielfältige Weise dargestellt.

Das Werk endet mit den Schlussfolgerungen im Teil *Conclusions*. Das sind Folgerungen aus den durchgeführten Analysen und dargestellten Beschreibungen. Die präsentierten Postulate werden durch den imperativen Satzstil gekennzeichnet und können einen praktischen Tipp für den kirchlichen Gesetzgeber bei legislativen Tätigkeiten anbieten.



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## The Art of Legislation: the Principles of Lawgiving in the Church

This book deals with the problem of legislation in the Catholic Church. Inasmuch as the subject matter has never been comprehensively presented as a main topic, the book represents a novum in canonical literature.

It sets forth theoretical background for the practical process of legislation and proposes some principles of lawgiving, including the techniques of legislative drafting. The author demonstrates how the expression “art of legislation” captures well the complex demands posed by the task of legislative action in the area of canon law.

