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**SOCIAL ASPECTS OF THE CHURCH
WARRANTING ACCOMODATION IN
CANON LAW AND A BETTER
UNDERSTANDING AMONG CANON
LAWYERS**

BY
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Most Reverend Bishops, esteemed Fathers, honored guests, fellow canonists and canon law students, ladies and gentlemen. It is truly an honor and a delight for me to be here with you again.

As I did on my first visit with you last year, I want to thank the Canon Law Society of Nigeria, and in particular its president Msgr. Pius Kii, for extending to me an invitation to meet with you today, and to thank my friend Mary Jo "Mama" Gretsinger of Kaduna and Bp. Martin Uzoukwu of Minna, whose assistance helped make my visit possible. I am, as before, overwhelmed at these kindnesses and am honored that they thought I might have something worth sharing with you today.

Our convention topic this year is Church governance and a number of excellent papers have been prepared to examine several specific and important points thereof. In my remarks, however, I want to take a somewhat different approach by looking not so much at specific governing issues, but rather, by considering the wider question of what *kind of society* the Catholic Church is, doing this, in order to help us think through how some "aspects" or "characteristics" of that society might be better served by canonical laws that take those social aspects into more formal consideration. Such matters are, I think, especially important now as we approach what could be a very significant time of the evolution of codified canon law. Let us begin by setting the historical stage for these remarks.

Almost exactly a century ago, as we know, a revolution in canon law took place. After living for close to 700 years under a system of officially *collected* canon law, principally the *Quinque Libri Decretalium*, or the Five Books of Decretals, organized by St. Raymond Peñafort and promulgated by Pope Gregory IX in 1234,¹ after, I say, nearly seven centuries of being ruled by *collected* canon law, the Catholic Church, in 1917, received her first *Code of Canon Law*, the Pio-Benedictine Code ordered by Pope St. Pius X, organized by the genius Pietro Cardinal Gasparri, and promulgated by Pope Benedict XV even in the midst of the world's first global war.² This shift from a system of officially *collected* canon law to one of officially *codified* canon law was a momentous one for the Church but, if we were to compare our 2,000 year old Church to a grown man in his fullness of years, that is, to someone about 80 years old, then the short 100-year life span of codified canon law covers hardly

five per cent of that lifetime, meaning that codified canon law, while not quiet still in its infancy, is yet only in its toddler years in terms of Church history. But even with only a few decades with which to look back over the effects of the codification of Church law, we can still see that what Pope St. Pius X and Benedict XV wrought represented a revolution in the organization and operation of canon law, a revolution that is still unfolding around us, one that has not always gone smoothly. We should expect there to have been bumps in the path of the Church's shifting over to codified law from collected canon law—as indeed there have been—and we should expect there to be more detours in the future—as there certainly will be.

In any case it is to that future, the future of codified canon law, that I wish to look with you today: for, if canon law, specifically *codified* law, is really to be able to serve as St. John Paul II wanted it to serve, namely, as an organizing principle for the fostering of "faith, grace, charisma, and especially charity in the life of the Church"³, and if canon law, specifically *codified* law, is really to serve as so many figures over the centuries have wanted it to serve, that is, as a "Mirror of Justice" for the Church and the world, then we must, I think, pay more attention to several considerations concerning certain *sociological* aspects or characteristics of the Church *herself* in order to improve codified canon law in such a way that it better helps to direct the Church, her members, and her mission.

Moreover, what we are discussing now is, I think, useful regardless of whether the Church stays with her nearly exclusively Roman-continental, or 'civilian', styled system of codified canon law (which I think is unlikely),⁴ or significantly modifies that civilian-style system (as I think is quite possible),⁵ or abandons it almost completely for something more like the common law tradition (which, in fact, the *Quinque Libri Decretalium* resembled in many respects and which I think is conceivable, albeit not in our lifetimes). In short, *any* legal system or blend of legal systems that the Church chooses to use for her governance needs to understand better some key aspects of the Church herself as a society in order to serve that ecclesiastical governing function more effectively.

So, regarding what we as canonists must know about the Church herself in order to advise on the legal system that serves that Church, the first point to bear in mind is, I think, the simple and obvious one that the Church—whatever she is doctrinally, such as the Mystical Body of Christ (CCC 774, 779) or the Spouse of Our Lord (CCC 796)—the Church is also a society of *human beings*. That is, the Church is not simply large group of people with something in common (such as the fans of a football team have championship hopes in common or the victims of a flood have suffering in common), but rather a *society* that shares, among many things, an organizational spirit and structure. In order for us to proceed to some later points *about* that society known as the Church, however, it might help us to recall first a model of the Church as a society that was very prominent in ecclesiology for many centuries, namely, the "perfect society" model of the Church,⁶ a model that was sidelined after the Second Vatican Council, but which contains nevertheless some elements of truth that might be useful to us now.

The "perfect society" model of the Church did not, of course, imply that the Church, or her members at any rate, were "perfect" in the sense of flawless or sinless. Rather, the "perfect society" model of the Church argued—and I think it argued correctly—first, that the Catholic Church was a *complete* society in itself (possessed of everything, thanks to Christ, that she needed to survive till the end of time and to thrive in carrying on the mission that Christ left her); and second, that she was oriented to a higher good than the otherwise legitimate earthly common good pursued by the State. As I said, I think these two points (her self-sufficiency and her higher goals) are demonstrably true, but, insofar as this "perfect society" model has been eclipsed in the last half century by more theological conceptions of the Church (mostly, as a 'communion of believers'⁷), I mention this older model just to underscore that viewing the Church *as a society* goes very far back in ecclesiology.

Now, therefore, as we turn to look more closely at that society known as the Catholic Church, and examine her not as a doctrinal or theological reality, but rather, as a sociological one, we sense that purely secular and profane observations could help be of help in understanding her and her laws better. If a given legal system is really going to be helpful to the society in which it operates, that legal system must appreciate and be adapted to certain foundational aspects of that society. Consider:

The world has known a number of great legal systems, the Code of Hammurabi, the Torah of the Jews, the Digest of Justinian, the Decretals of Gregory IX, the common law of England, the Code Napoleon, the Xeer of Ethiopia, and so on. To this day scholars turn to these venerable legal systems for insights into the operation of law in general. But at the same time, and as much as one respects the sophistication of, say, Hammurabi and the Torah, and as generally effective as we think these legal systems were in their times, no one suggests that the success of, say, the Code of Hammurabi, means that his law should be re-promulgated and applied today in Nigeria, Canada, or the US for the simple reason that Nigerian, Canadian, and American *society* differ so extensively from the society that existed between the Tigris and Euphrates rivers of the 18th century BC. This fact allows me to reinforce an important, but easy-to-overlook point: namely, that law, if it is to serve its society well, must be aware of and *adapted to* the specific society it intendeds to serve. Thus, canon law must be suited to the Church that it serves, and we canon lawyers must be experts in, or well acquainted with, ecclesiology if canonistics, and we who serve in it, are to advance the mission of the Church.

I turn now to considering with you four aspects or characteristics of the Church—not the four theological marks of the Church (One, Holy, Catholic, and Apostolic) that we hold as a matter of belief—but rather, four *sociological* aspects of the Church as a society that I think canon law (and those who are, as we in this room are, responsible for helping to bring canon law to life in the Church) need to appreciate about the Church in order to understand better, and to be able to explain to others better, exactly how codified canon law best works in the Church. Besides helping us to improve the efficiency of canon law in the Church, understanding these four points will help us to prevent disappointments among the faithful regarding what they sometimes see as failures of Church law—the word “failures” to them meaning operations of the Church that do not resemble what they are used to seeing in civil law.⁸

HIERARCHIC

So, the first point about the Church as a society that I think needs to be more deeply appreciated by her laws and lawyers is that the Church is, by her nature, and by the will of Christ, hierarchically organized.⁹ To put it another way, hierarchy is hard-wired into the Church. But to

appreciate the *canonical* significance of this hierarchic organization, some foundational points need to be made.

Most modern Western societies and many other political societies around the world modelled on Western nations, assume, at least in theory, some form of “social contract” for their foundation, that is, deep within the political and cultural psyche of these peoples is the notion that, at some distant time in the past, in some way or another, an amorphous people (living, as a Hobbesian would say, lives that were “solitary, poor, nasty, brutish, and short”,¹⁰ or as a Lockeian¹¹ might more gently say, living personally unsatisfactory and incomplete lives) came together and entered in a “social contract” with each other in order to form a thing called government and, in exchange for surrendering to this government some (but only some!) of their rights—rights they supposedly enjoyed in a Lockian or Hobbesian “state of nature”—the people would form a government and grant it a certain degree of authority over their lives, this being done in pursuit of peace, order, and as a means for securing justice among themselves.

In other words, under social contract theory, government and its laws are, as it were, *set up by the people* and are to be kept on a short leash that, in theory at least, the people can revoke if the government does not serve their interests (or what the members of that society perceive as their interest). Moreover, the rights that are not turned over to the government are, in theory, retained by the people who formed that limited government.¹² Thus in brief, *law itself* is generally seen as an instrument for *controlling and limiting governing authority* and, if that governing authority abuses its powers under law, the people (usually by an election) can revoke their government’s power or at least transfer it to others more worthy of holding it.

But, as attractive as many elements of social contract theory is, and however well it does explain many aspects of the operation of law in modern democratic civil societies, social contract theory is not, I repeat *not*, at the foundation of ecclesiastical structure and it is *not* at the basis for how law operates in the Church.

As we all know, after Jesus rose from the dead and ascended to his Father, the apostles gathered in prayer for nine days and emerged on

Pentecost proclaiming Christ as the Son of God and calling for the baptism of believers.¹³ But, notice, here is what did *not* happen at the inauguration of the Church: A group of simple men, deeply impressed with the words of a loving, insightful, rabbi, did not discover in each other a common attraction to this rabbi's message and decide that, in order to pursue "a more perfect union among themselves and to secure for themselves and their prosperity the blessings"¹⁴ of good order, decide to form a community, an *ecclesia*, that, over time, grew into this thing called the "Catholic Church". The nine days of prayer leading up to Pentecost was not a sort of mini-constitutional convention with the disciples deciding what governing authority should be delegated to a small group of leaders called "apostles".

No, instead *the Holy Spirit* filled with life that nascent thing called the Church that Jesus, and Jesus alone, as the Son of God, had set up on Peter and the Apostles (Acts II; Mt XVI: 16 ff.). In other words, *supreme authority in the Church comes not from the consent of the believers as proto-citizens, but from Christ himself as the Son of God who invested the power to govern the Church in a hierarchy consisting of, to use our modern terms, a pope and bishops originally chosen by Christ and later to be handed down to their successors (1983 CIC 33). All authority, including legal authority, in the Church comes not from the people, or believers, but from God, and that authority is to be used in accord with his Word and as his chosen rulers think best. Even when that hierarchy decides to share some of its ruling authority with priests, deacons, and lay persons (1983 CIC 129), that sharing does not alter the fundamental authority of the hierarchy, and thus no, as it were, "ecclesiastical constitutional convention" can later come along and thank the pope and bishops for their many centuries of good, even heroic, service, but tell them that, after 2,000 years (or 3,000 or 10,000!) the Christian faithful have reached a sufficient level of maturity so as to rise and reassume control of "their" Church for them to govern as they fit! Because it is not *their* Church, it is Christ's, and it is not *they* who had original authority over the society of believers, it was and is and always will be the hierarchy.¹⁵*

In any case, the fact that hierarchy is a non-negotiable, given, aspect of the Church as a society means that the canon law which governs that society *must* be written in such a way as to reinforce and uphold and

facilitate the exercise of authority in the Church by popes, bishops, and others to whom they entrust a measure of the authority, principally pastors and religious superiors. Moreover, recognizing the hierarchic aspect of the Church will (upon our explaining this aspect of the Church to them) help the Christian faithful to understand better that what often looks like canon law 'unfairly' (in their minds) favoring bishops over priests, pastors over faithful, and superiors over members, is in fact a sign of fidelity by the Church toward the will of her Founder. Canon law often *looks* like it favors popes and bishops,¹⁶ we must explain to others, precisely because Christ set up his Church that way.

RELIGIOUS

The second aspect of the Church as a society that I want to look at because it can impact how canon law should be organized and applied is that the Church is a "religious", specifically a *creedal*, society. In other words, what binds believers together is, in large measure, that they hold in common certain matters of belief.¹⁷ Thus, matters of *doctrine* (largely made by assertions of the intellect, not choices of the will) take on special significance in the society known as the Catholic Church. But perhaps it is easier to explain what it means to say the Church is a "religious" society bound together by beliefs by showing what kind of society the Church is not.

Throughout history, most human societies have been organized around common economic or military interests. People band together because they realize that a community, and specifically an organized community, improves their life by making possible, among other things, the division of labor and more efficiency in work, while other communities come together out of desire to protect themselves from violence by others or, unfortunately, sometimes by the desire to take by force what belonged to others. Either way, whether bound by common economic or military interests, or by a combination of the two, such interests are reflected in the very structure and laws of society. Great nations of commerce such as England developed sophisticated structures and laws for, say, the enforcement of contracts; meanwhile cities prizing military prowess, such as ancient Sparta, were organized around martial values, and most nations reflect both kinds of interests in their laws, of course.

But the Christian faithful are *not* primarily united around common economic interests or military concerns; what brings believers together is *faith* in the words and teachings of Our Lord and trust in the truth of his message. As a Catholic graced to travel the world, while I recognize an incredible array of human commonalities such as honoring educational achievement or improving public health among my fellow Catholics, what I instantly recognize and what I am constantly moved by is the immediate mutual awareness, among my fellow Catholics, that we believe in the same Divine Son of God Jesus Christ and that we want to know Him better and to share his Truths more widely.

So then matters of *belief* are very important for the Church—even if secular society regards such “head-questions” as being relatively unimportant, even trivial—and thus the Church’s legal system has to give notable protection to creedal and doctrinal matters even if the State and civil society regard such matters as tempests in teapots—and perhaps even as violations of individual liberty of conscience.

This, what I call, “religious” or “creedal” aspect of the Church means that canons on doctrine, teaching, preaching, evangelization, the content of catechesis, and Catholic education at all levels, must be and indeed are very important in the Church. Moreover, the “religious” or “creedal” aspect of the Church means that discrepancies in the content of one’s personal belief must be corrected by Church authority and implies that departures from norms of *belief* must be countered and, at times, even punished.¹⁸ Seen in this light, for canon law, canon lawyers, or Church leaders to neglect or to ignore doctrinal aberrations in the Church is not simply to fail in some administrative responsibility, it is to disregard a matter *fundamental* to the well-being of the society known as the Catholic Church due to her religious character.

VOLUNTARY

The third aspect of the Catholic Church as a society that must be appreciated by those responsible for designing and implementing her system of canon law is that the Church is a **voluntary** organization, by which I mean especially that there are few, perhaps even no, mechanisms by which the Church can *force* a member of the Christian faithful to remain within her communion and to bend to her laws.¹⁹ Unlike the state that can eventually, in the end, compel compliance with

its laws by force (arrest, imprisonment, confiscation of property, and so on), the Church has no jails or prisons, she has no armed enforcement or police division, and—at least in regard to 99% of her members—she has no significant financial sway over them by way of employment or economic dependence.

This fundamentally voluntary aspect of the Church means that when it comes to enforcing canon law the methods of enforcement used in the Church must be those that do not rely on the possibility (however remotely it is actually employed even by civil governments) of physical coercion. So what means of enforcement do appear in Church law?

Well, among the various means of enforcement that exist within the Church, as a society whose members seek *communion* with one another on a voluntary basis, perhaps the severest penalty that can be imposed for violating the obligations of that communion is, literally, the “ex-communication-ing” of a member, or excommunication (1983 CIC 1331). A right-thinking member of the faithful senses (even if this sense is never quite articulated) that a shared ecclesial association with others is vitally important to that member and, if threatened with being ‘ex-communication-ed’ from other believers, usually recoils from that prospect by ceasing (or not even beginning) such behaviors as could result in his or her excommunication. More than once we know or surmise that an excommunicated Catholic, upon formal threat or actual visitation of that sanction, has said that being recognized as a Catholic in good standing was more important to him or to her than was holding to some certain condemned view or taking some certain illegal action, and therefore chose (notice, voluntarily) not to endanger that unity.²⁰ In other words, the censure achieved exactly its purpose, namely, the personal reform of the offender.²¹

But another implication of the Church being, from a sociological perspective, a voluntary society is that, because physical coercion is non-existent in the Church, and because even financial pressure is virtually non-existent, the powerful modeling role of a “good example” being given by Church leaders and other members takes on additional importance.²² This, in two ways, first, those entrusted with responsibility for Church government must, simply *must*, lead by example—here, by giving the example of following the law themselves.²³

Second, the damage of uncorrected bad examples among the Christian faithful, what is known in classical moral theology as "scandal", takes on additional gravity not just morally (which scandal always threatens) but as a matter of maintaining good Church order itself. The avoidance, or at least minimization, of scandal to other believers is what lies at the heart, I suggest, of Canon 915.²⁵

ESCHATOLOGICAL

The fourth and final aspect of the Church as a society that I wish to comment upon today (and I am sure we could identify several other social aspects of the Church than these four, but time is shorter than study) is that the Church is *oriented toward the eschaton*, that is, the Church does not see her fulfillment as something that can be fully experienced or realized in this life. To that extent, ecclesiastical success is not generally measureable in human terms, but rather, is seen as something largely to be achieved in the world to come and is thus not cognizable in this life or assessable according to human criteria. This point, as have the others, has serious implications, I suggest, for how the Church is structured and how her laws should work.

Perhaps the most important consequence of the eschatological aspect of the Church is that the normal criteria for assessing good civil government (such as the observable maintenance of a transportation infrastructure, improving literacy rates among the people, raising general levels of health and nutrition) are not applicable to, or even available to, the Church in her governing mission. The Church can, to some extent, count how many Catholics there are in a region or how many baptisms took place, but she cannot measure how *holy* her people are. She can count how many couples are married in the Church, and she can track how many of those marriages are regarded as matrimonial sacraments, but she cannot assess how *happy* those couples are or how sincerely or effectively they model Jesus to their children (*pace* 1983 CIC 226 and 1136!)

Thus, in terms of measuring the success or failure of the methods by which she pursues say, the graces of baptism or the benefits of observing the canon law on marriage, the Church is working in large measure in the dark. Unable to read souls, she must trust in her own fidelity to the Word of God (something that, in large measure, can be *terminologically*

assessed using, say, professions of Faith, but not measured in terms of its personal impact) or her own compliance with her laws, but even then, all she can do hope and pray that those Words and practices have achieved their goals.²⁶

NEGATIVES OF THESE FOUR ASPECTS

Now, having outlined four sociological aspects of the Church that seem important for canon law and canonists, we should pause briefly and ask, Is there a negative price to be paid, in term of governing, within a Church marked by these four social aspects? In other words, without questioning the "given-ness" of these four social aspects of the Church, is there any downside to them in terms of canon law? I think there might be.

Granting that the four aspects of the Church outlined above have either been placed there by Christ himself (such as the hierarchic structure of the Church) or are inescapable consequences of her character and mission (such as her sensitivity to creedal issues, the basic voluntariness of her communion, and the location of so many of her ultimate values in the eschaton), and conceding that these four aspects of the Church as envisioned by our Lord are realities to be appreciated and worked within, part of our appreciation of these aspects means admitting, also, that they have, in a certain sense, some negative repercussions or implications for us.

For example, the absolutely-required hierarchic aspect of the Church, protected as it is by numerous canons (e.g. Canons 331 and 336) means that, when a weak or bad pope assumes the Chair of Peter, as has certainly happened more than once in Church history, there is not much (not nothing, but not much) that the rest of the Church can do about it. The personal immoralities of, say, so many Borgia popes were a humiliation to be borne by the Mystical Body of Christ; and the concomitant weakening of the Church's witness to the world under such popes could only be addressed by additional prayers and penances by the Christian faithful. At still other times in Church history, when popes might have been negligent in the performance of the duties, only additional efforts undertaken by others (notably bishops,²⁷ but also other clergy,²⁸ religious,²⁹ and scholars³⁰ who were aware of the issues) can help to fill the void in teaching and in the maintaining of discipline—

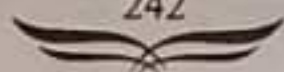
t even they can only help; the special wounds created by papal failings in the Church remain especially visible.

For the religious or creedal aspect of the Church risks ecclesiastical authority being exercised over what are, upon closer inspection, not so much matters of doctrine but more simply matters of prudence, and occasionally maybe even matters of conscience. For example, not every inclination to voice one's orthodox views necessarily rests on herodox doubts or denials as envisioned by Canon 751. Sometimes, one's silence on this theological point or that might come across to others as being an implicit challenge to orthodoxy, but Church practitioners guard against lightly substituting for, say, the prudential decisions of local Churches the curial preferences of Roman dicasteries. A concrete example might be that ecclesiastical sanctions for canonical crimes involving manifestation of "will, doctrine, or knowledge" (1983 CIC 100) cannot be punished unless such manifestations are perceived by superiors, and Canon 18 demands strict (that, is the narrow) interpretation of that and all penal norms.

Recognition of the voluntary aspect of the Church and recognizing that enforcement of canon law cannot take the form of physical coercion, and unfortunately lead to a despair about enforcing ecclesiastical discipline in any meaningful way, and from despair over enforcement, it is just a short step to abandonment of, say, one's responsibility for ecclesiastical discipline contrary to Canon 392.

Finally, the fact that much of the Church's vindication rests on consequences only apparent in the next life can lead to an excessive legalism or at least to a pastoral indifference bordering on contempt for the actual reception of the Word that is being preached and the sacraments that are being offered.

These difficulties, considered singly or together, should not deter us from recognizing in our canon law, and from turning to the good of the Church, the four aspects of the Church-*qua*-society that we have outlined above, and, moving to the final part of my remarks, I want to suggest some areas of canon law that can be improved for the benefit of the ecclesial community itself and the legal system that serve it.



APPLICATIONS OF THE FOREGOING

When we met together last year, I spoke of the rise of antinomianism in the Church (and yes, in the State as well, but our concern was primarily for the Church) and I urged a renewed effort by us as canonists to enter more deeply into our own areas of legal specialization and to make greater efforts toward showing others the wonderful fruits that Church law and discipline has to offer the faithful. Inspired, in fact, by my meetings with canon law students at the Catholic Institute of West Africa last year, I returned home and increased my own efforts to make my website, Canonlaw.info,³¹ even more useful to researchers around the world than it seemed to have been already and I again look forward to your comments on those improvements.

But now, I would like to look at a few specific areas of Church law where we can, I think, by taking the sociological aspects of the Church law discussed so far more seriously, help canon law to serve the Church more effectively and, in turn, to create the environment wherein "faith, grace, charism, and especially charity in the life of the Church" can flourish. I am mindful of time here, so I have left a more detailed discussion of these observations for the footnotes of my paper.

First, taking the hierarchic governing of the Church as a non-negotiable datum of Church life, and in light of the great advances made over just the last hundred years or so toward understanding the role of the papacy in the Church better,³² I urge greater attention be given now to two primarily *episcopal* institutes impacting Church governance, first, the concept of collegiality, specifically the operation of the college of the bishops under Canon 336, and second, an augmentation of the role of the Synod of Bishops especially per Canon 343.³³ Both of these canons contain, I think, the seeds for some kind of increased, perhaps more autonomous role for bishops enjoying full communion with the Holy See. Only time will tell here.

To take the religious, specifically the creedal, aspect of the Church more seriously would support us, for example, in exploring more deeply just how many *theological* opinions already recognized by scholars as being, saying "theologically certain", or "commonly thought", might actually already be *doctrinal* assertions taught with *infallible certainty* as either primary or at least as secondary objects of infallibility. The potential for



canonical development in this area is huge and requires, perhaps, a bit more in the way of explanation.

Recall that when Canon 750 of the 1983 Code of Canon Law was promulgated it consisted on just one, historically well-attested paragraph, one canonizing the obligation of Catholics to *believe* with divine and Catholic faith those matters asserted as primary objects of infallibility. It was not until some 15 years later, in 1998, that St. John Paul II, in his m.p. *Ad tuendam fidem*,³⁴ added a second paragraph to Canon 750 outlining, for the first time in universal law, the canonical obligation of Catholics to *hold definitively* those matters infallibly asserted as secondary objects of infallibility. This new papal law, along with the "Doctrinal Commentary" offered by then Cdl. Ratzinger,³⁵ gives us several new insights into what infallible assertions of both types (primary and secondary) look like and into what other exercises of "authentic magisterium" might look like. This development, in turn, might help us recognize that the doctrinal assertions upon which the Church depends for articulating her identity might be rather more numerous than cautious theologians have been willing to admit for the last several hundred years.³⁶ Recognizing, therefore, what could be many more points upon which Catholics should look as being doctrinally settled issues, might give hierarchic authority more confidence in asserting these matters and could give a greater sense of urgency to pastors who are teaching these topics to their charges.

To take the *voluntary* aspect of the Church more into account means, for example, I suggest, not trying to impose purely ecclesiastical laws on Catholics who have, to our sadness, "walked away". I think a prime example of trying to impose purely ecclesiastical law on Catholics least likely to abide by it, is the attempt to impose canonical form for marriage on Catholics who have, in fact if not by a rigid interpretation of law,³⁷ defected from the Church. Why should millions of Protestant Christians marrying each other with no advertence whatsoever to "canonical form or marriage" enjoy the spiritual benefits of sacramental marriage³⁸ while Catholics who have acted (unfortunately, but actually) in accord with the voluntary character of the Church and left her visible communion, be deprived of the grace of matrimony due to their failure to follow canonical form, itself a purely formal (and in my opinion, outdated)³⁹ requirement of ecclesiastical law?

I think, in other words, that a deeper appreciation of the voluntary aspect of the Church means that we need to reconsider what I suggest is an excessively narrow understanding of the ability of a member of the faithful to defect from the Church, in short, to make our canon law more respectful of the practical ability of Catholics to leave our communion without pretending to hold them bound by purely ecclesiastical laws such as canonical form. Attempting to enforce basically unenforceable laws breeds contempt for law itself.⁴⁰

Finally, to take more into consideration the *eschatological* aspect of Church as a society, could mean several things for Church law and pastoral practice. It could mean something as simple as letting well conceived pastoral programs have more time to develop and take root than they are often allowed these days, that, in other words, the pressure to show results (as if the kind of results that really matter to us *can* be shown, or at any rate shown quickly) is even possible. Holiness, to which all the faithful are called by Christ, by chapter five of *Lumen gentium*,⁴¹ and at least indirectly by Canons 210 and 1752, usually *takes time*. We should leave pastoral programs in place long enough to try to see signs of holiness in the wake of such programs.

At the same time, appreciating better the eschatological aspect of Church society could mean backing off in western canon law from some long-held institutions assumed by many to be important for assuring compliance with certain penal laws, for example, by reducing, nay eliminating, from Western canon law—just as they have already been eliminated from Eastern canon law⁴²—automatic, *latae sententiae* penalties.⁴³

Automatic sanctions, whatever historical justification one might find for them in older days of limited mobility and communications,⁴⁴ have always blurred the distinction between the internal forum of sin and the external forum of conduct. As a practical matter—and I have seen this happen virtually every time a canon enforced by an allegedly automatic penalty is violated—the conversation about the delict immediately shifts from the wrong very likely committed by the offender to the intricacies of the canonical application of *latae sententiae* sanctions by the Church. Thus the teaching moment, a moment aiming at both the reform of the individual offender and at the protection of the wider

community against scandal, is lost in a flurry of technical canonical arguments.

If canon law were, however, to appreciate better that the success or failure of many aspects of the Church's mission cannot be measured in this life, it would more likely content itself with bringing about good ecclesiastical order in *this* world, including the kind of good order achieved by applying grave penalties (such as excommunication) only after an observable trial that is focused on behavior, that is, as something better pursued only by the *ferendae sententiae* process (as preferred by Canon 1314!)⁴⁵ and as exclusively used in all the Eastern Catholic Churches now.

CONCLUSION

It is time to conclude these remarks and return to the hard work of technical canonical analysis that is being presented by the other papers at this conference. What to take from my paper can be summed up as follows:

The Church, whatever else she is, is a human society that partakes of many elements of other human societies, including in her need for not just any system of rules, but for a legal system that recognizes and respects several aspects or characteristics of her as a society, including the fact that: hierarchy is hard-wired into her structure; that she is, as a religious society, very sensitive to disturbances in her creedal system; that she is, as a practical matter, a voluntary society bereft of the typical means of coercion and enforcement enjoyed by civil societies; and that her fulfillment and final triumph is not something that can be measured by human or earthly scales. Notwithstanding that each of these sociological aspects of the Church carry their own complications, they each, if properly understood, can highlight certain matters and suggest certain methods that canon law can and should address more efficiently—perhaps even by spending *less* time addressing them than in the case at present—in order to make the Church's legal system serve the Church, her members, and her mission more effectively.

I invite you, as canonists and others concerned with advancing the mission of the Church, to reflect on my suggestions, to call attention to the weaknesses in my observations and arguments, or to help me

explain better where I might be right about some things, in order the help us help canon law to help the Church become the "Mirror of Justice" that we all wish her to be.

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ENDNOTES:

¹ An original and/or critical edition of Gregory's *Quinque Libri Decretalium* does not exist but accepted as the standard version of QLD is A. Friedberg, ed., *CORPUS IURIS CANONICI EDITIO LIPSIENSIS SECUNDA POST AEMILII LUDOUICI RICHTERI, PARS SECUNDA, DECRETALIU COLLECTIONES, DECRETALES D. GREGORII P. IX COMPILATIO* (various publishers, most recently Lawbook Exchange, 2000) in 928 columns. See generally P. Torquebiau, "Corpus Iuris Canonici", *Dictionnaire de Droit Canonique* IV (1949): 610-644, esp. "Les Décretales de Grégoire IX", at coll. 627-632.

² See generally *Codex Iuris Canonici Pii X Pontificis Maximi, iussu digestus, Benedicti Papae XV, auctoritate promulgatus*, as amended, *Acta Apostolicae Sedis* 9/2 (1917) 11-521. The process of developing the 1917 Code is sketched in the Preface to the 1917 Code.

³ John Paul II (reg. 1978-2005), ap. con. *Sacrae disciplinae leges* (25 jan 1983), AAS 75/2 (1983) vii-xiv. I will abbreviate canonical citations from the Johanno-Pauline Code as "1983 CIC". Also, I will be citing the *Catechism of the Catholic Church* (2d ed., 1997) as "CCC".

⁴ One must grant, of course, that a classical Roman legal model, one protecting the legislative supremacy of an 'emperor-like' pope (see 1983 CIC 16), is very consistent with the Petrine Primacy notion bequeathed to the Church by Christ (see Matthew XVI: 18, and XVIII: 18).

⁵ A quiet, almost unnoticed, example of this might well be found in Francis (reg. 2013-), ap. con. *Vultum Dei* (29 jun 2016), AAS 108 (2016) 835-861, which includes the remarkably broad assertion that: "With reference to canon 20 of the Code of Canon Law, and after a careful study of the above 37 articles, with the promulgation and the publication of this Apostolic Constitution *Vultum Dei quaerere*, the following are derogated: 1. Those canons of the Code of Canon Law that, in part, directly contradict any article of the present Constitution". This sort of blanket derogation from *all canons of the Code* that might contradict an individual papal decree is highly unusual under codified canon law, raising new questions about the operation of, say, Canons 6 § 1 n. 2 and 21 besides the mentioned Canon 20.

⁶ See, e.g., Leo XIII (reg. 1878-1903), enc. *Immortale Dei* (1 nov 1885), *Acta Sanctae Sedis* 18 (1885) 161-180, Eng. trans. in C. Carlen, ed., *THE PAPAL ENCYCLICALS*, in 5 vols. (Pierian Press, 1981) II: 107-119, who underscored the perfect society model of the Church several times, esp. in n. 10 ("[the Church] is a society chartered as of right divine, perfect in its nature and in its title"); in n. 27 (it is wrong to "treat the Church with such arrogance that, rejecting entirely her title to the nature and rights of a perfect society"); and in n. 35 ("it is to be understood that the Church no less than the State itself is a society perfect in its own nature and its own right"). Indeed, as Leo noted in *Immortale* fn. 22, his predecessor (Bl.) Pope Pius IX had in 1869 scored the denial of the Church's nature as perfect society as a theological error. A good contemporary overview of the "perfect society" model of the Church is available in Avery Dulles (American Jesuit, 1918-2001), *MODELS OF THE CHURCH. A CRITICAL ASSESSMENT OF THE CHURCH IN ALL ITS ASPECTS* (Doubleday, 1974) esp. 31-42.

⁷ The best orientation to understanding the post-conciliar notion of the Church as communion is, I think, Congregation for the Doctrine of the Faith (Ratzinger), *let. Communionis notio* (28 mai 1992), *Acta Apostolicae Sedis* 85 (1993) 838-850, and sources cited therein. Among many excellent treatments of ecclesiology, I recommend Charles Journet (Swiss prelate, 1891-1975), *THEOLOGY OF THE CHURCH* (Ignatius Press, 2004) 472 pp., being an English translation of Journet's *Théologie de L'Église* (1958/1987).

⁸ I think Msgr. Kii makes a similar point when he noted in his Presidential Address (at p. 13) that "laity (who are used to having matters decide on majority vote) feel sidelined in ecclesiastic administration."

⁹ See esp. CCC 874-879. I grant that this hierarchic aspect of the Church that a sociologist might find in her largely coincides with that "mark" of the Church we recite in Creed, namely, that the Church is "Apostolic." But I am making a different point.

¹⁰ "In such condition there is no place for industry, because the fruit thereof is uncertain, and consequently no culture of the earth, no navigation nor the use of commodities that may be imported by sea, no commodious building, no instruments of moving and removing such things as require much force, no knowledge of the face of the earth, no account of time, no arts, no letters, no society, and which is worst of all, continual fear and danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short." Thomas Hobbes (English philosopher, 1588-1679), *Leviathan* [1651], rev. Martinich and Battiste (Broadview Press, 2010) XIII.9.

¹¹ Several passages from John Locke (English philosopher, 1632-1704) *Two Treatises of Government*, circa 1680s, illustrate this point, including:

- To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.
- Men being, as has been said, by nature, all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent.
- A liberty to follow my own will in all things where that rule prescribes not, not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man, as freedom of nature is to be under no other restraint but the law of Nature.

- To avoid [a] state of war [all against all] ... is one great reason of men's putting themselves into society, and quitting the state of nature: for where there is an authority, a power on earth, from which relief can be had by appeal, there the continuance of the state of war is excluded, and the controversy is decided by that power.

¹² See, e.g., Constitution of the United States of America, Amendment X (1791): "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Emphasis added.

¹³ See generally Acts II.

¹⁴ Constitution of the United States of America (1788), Preamble: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

¹⁵ If I may be permitted an aside, recognizing that fundamental authority in the Church runs, to use a vernacular phrase, "from the top-down" and not "from the bottom-up", goes far in explaining why, I suggest, the political notion of "subsidiarity"—for all of its strengths, especially in its admirable facilitation of individuals taking more responsibility for their own welfare and actions—might ultimately be inconsistent with the hierarchic aspect of the Church. Subsidiarity, one must recall, is a mechanism for keeping the exercise of power in a governed society closer to the (real or presumed) sources of that power, namely, the people. Thus in modern democratic states, subsidiarity finds important support in the social-contract theory of the popular foundation of the state. But, as we just recalled, the foundation of the Church was *not* a movement by believers, it was by an action of Christ coming from His Father and acting in His Spirit. If, therefore, subsidiarity is to find a role in the Church—and that is quite possible—it has to find support in something *other* than keeping the exercise of governing power closer to the supposed source of governing power (the faithful) because the source of power in the Church is at her Head, not at her feet. For a brief overview of the place of subsidiarity in the life of the Church and a discussion of the limitations on this concept in ecclesiastical discourse, see, e.g., Patrick Granfield (American Benedictine, 1931-2014), *THE LIMITS OF THE PAPACY: AUTHORITY AND AUTONOMY ON THE CHURCH* (Crossroad, 1987) esp. 123-132.

¹⁶ A classic example of this canonical deference to bishop's governing authority over even a pastor's can be found in the canons controlling the process for removing or transferring pastors—even a pastor guilty of no wrong-doing. If a bishop follows the process set up in Canons 1740-1747 or in Canons 1748-1752, the *bishop's* desires about the transfer or removal will be successful. Numerous similar examples of this 'hierarchic preference' in canon law can be found, of course.

¹⁷ To be sure, Canon 205 lists common sacraments and respect for ecclesiastical governance as marks of full communion with the Church, but my focus is on the necessary commonality of a profession of faith that is actually listed first in both the canonical and the conciliar discussions (see *Lumen gentium* 14) of this matter.

¹⁸ Also, because belief is largely an internal response to the Word of God, and because it is often only by external negation of belief that one can tell whether this sociologically important quality is present (or absent) in a person, Church law must recognize that difficulties will be faced in enforcing norms against those members of the faithful who might harbor deficient beliefs.

¹⁴ Obviously, by baptism one is incorporated into the Church of Christ (1983 CIC 204 § 1) and, as baptism can be received by those below the age of reason without personal consent, one could become Catholic without consent (*pace* 1983 CIC 748 § 2). But one cannot remain in full communion (as defined by Canon 205) without free choice.

²⁰ An example of the importance of communion for believers would be found in the 1998 "Statement of Reconciliation" signed by then-excommunicated Sri Lankan theologian Tissa Balasuriya reciting, among other things, that "I value my communion with the Church and with its pastors" See *L'Osservatore Romano* English Edition (21 jan 1998) at 2.

²¹ See, e.g., 1983 CIC 1312, 1347, and 1358.

²² Consider the words of Pope Francis in *Evangelii gaudium* (2013) 150 (citing in part St. Paul VI): "For all these reasons, before preparing what we will actually say when preaching, we need to let ourselves be penetrated by that word. This has great pastoral importance. Today, people prefer to listen to witnesses, they 'thirst for authenticity' and 'call for evangelizers to speak of a God whom they themselves know and are familiar with, as if they were seeing him'."

²³ I need hardly add, by their giving the example of following law that, in most cases, favors their authority over that of most others!

²⁴ See CCC 2284-2287.

²⁵ See 1983 CIC 915. The literature generated on Canon 915-916 is immense. I have collected much of it on this page of my website, Resources for Understanding and Applying Canon 915, available here: <http://www.canonlaw.info/canonlaw915.htm>.

²⁶ The notion of "*ex opera operato*" in regard to the effect of sacraments, of course, is an obvious and welcome relief to this 'pastoral uncertainty' that marks so much of Church work.

²⁷ See 1983 CIC 336 and 375.

²⁸ See 1983 CIC 275, 276, 1008.

²⁹ See 1983 CIC 573, 607, and 673.

³⁰ See 1983 CIC 218 and, perhaps even more clearly, Eastern canon law: CCEO 606, § 1. Theologians, with their deeper understanding of the mystery of salvation and with their expertise in the sacred and related sciences as well as in current problems, have the role and duty, faithfully complying with the authentic magisterium of the Church, and, of equal importance, utilizing their freedom, to illumine the faith of the Church, to defend it, and to contribute to doctrinal progress. § 2. In the investigation of theological truths and in giving expression to them they are to be concerned for the building up of the faith community and are to cooperate skillfully with the bishops in their teaching office. § 3. Those involved in theological studies in seminaries, universities, and faculties of studies should strive to cooperate with those well versed in other fields of learning by sharing their insights and resources.

³¹ See <http://www.canonlaw.info/>.

³² One need look no further than the First Vatican Council and its amazing development of the Church's articulation of extraordinary papal infallibility. See Vatican I (1869-1870), *con. Pastor aeternus* (18 iul 1870), *Acta Sanctae Sedis* 6 (1870-1871) 40-47, esp. chap. 4 thereof.

³³ The complete, or nearly-complete, newness in codified law of these provisions is immediately recognizable by comparing them to Pío-Benedictine Code.

³⁴ John Paul II (reg. 1978-2005), *m.p. Ad tuendam fidem* (18 mai 1998), AAS 90 (1998) 457-461.

³⁵ Cong. for the Doctrine of the Faith (Ratzinger), "Nota doctrinalis professionis fidei formulam extremam enucleans" (29 jun 1998), AAS 90 (1988) 544-551; available in English

as the "Doctrinal Commentary on the Concluding Formula of the *Professio fidei*" (29 jun 1998), *L'Osservatore Romano*, Weekly English Edition (15 jul 1998) 3-4.

³⁶ See generally Ludwig Ott (German priest, 1906-1985), FUNDAMENTALS OF CATHOLIC DOGMA, Lynch trans., (Herder, 1957) at 9-10 for an explanation of the theological grades of certainty. Consider, moreover, two examples of assertions that might enjoy more certitude than the ecclesiastical tradition yet accords them. (1) I think that the assertion that 'marriage is by its nature limited to a union between one man and one woman' is taught with infallible certainty at least as a *secondary* object of infallibility and might, upon investigation, be found actually to be asserted infallibly as a *primary* object of belief as well, and certainly about such the degree of certitude such assertions enjoy would go far, I think, in removing the sometimes tentative tone that Church leaders use in defending traditional teaching on marriage; or again, (2) the ecclesiastical death penalty debate would be greatly impacted by establishing whether the moral liceity of the justly administered death penalty is taught *infallibly* by the Church (probably as a secondary object of infallibility). See, e.g., Edward Feser & Joseph Bessette, BY MAN SHALL HIS BLOOD BE SHED: A CATHOLIC DEFENSE OF THE DEATH PENALTY (Ignatius, 2017) esp. pp. -. Many other examples can be adduced dealing with assertions currently regarded as merely (if I may use that term) "sentential communis" by theologians.

³⁷ See Pontifical Council for Legislative Texts (Herranz), *circ. let. missae omnibus Conferentiis Episcopalibus (variis linguis exaratae) quoad verba 'actus formalis defectionis ab ecclesia catholica' et quaedam epistulae respicientes ipsarum litterarum* (13 mar 2006), *Communicationes* 38 (2006) 172-174 (in English). The re-imposition of obligatory canonical form on such Catholics, a requirement not present in the text of the 1983 Code as originally promulgated, was brought about, of course, by Benedict XVI (reg. 2005-2013), *m.p. Omnium in mentem* (26 oct 2009), AAS 102 (2010) 8-10.

³⁸ See generally 1983 CIC 1055 § 2.

³⁹ I am not alone in questioning the value of retaining canonical form for marriage nor is it a recent question. See for example: J. Barry, "The Tridentine form of marriage: is the law unreasonable?" *The Jurist* 20 (1960) 159-178; G. Gallen, "Proposal for a modification in the juridical form of marriage" *The Australasian Catholic Record* 38 (1961) 314-328; L. Orsy, "De forma canonica in matrimonii mixtae religionis" *Periodica* 52 (1963) 320-347, and J. O'Connor, "Should the present canonical form be retained for the validity of marriage?" *The Jurist* 25 (1965) 66-81.

⁴⁰ See, e.g., Thomas Aquinas (Italian Dominican, 1225-1274), *Summa Theologiae* 1^a-11^a, Q. 96, art. 2.

⁴¹ Second Vatican Council, Dogmatic Constitution on the Church *Lumen gentium* (21 nov 1964), *Acta Apostolicae Sedis* 57 (1965) 5-75, Eng. trans. A. Flannery, ed., VATICAN COUNCIL II: THE CONCILIAL AND POST-CONCILIAL DOCUMENTS (Catholic Book Publishing, 1975) 350-426.

⁴² See CCEO 1402 § 1 and 1408.

⁴³ Automatic sanctions have generally been retreating in the Church since Bl. Pius IX (reg. 1846-1878), *con. Apostolica Sedis moderationi* (12 oct 1869), *Acta Sanctae Sedis* 5 (1869) 287-312.

⁴⁴ See generally, Elisabeth Vodola (American scholar, 1949-), EXCOMMUNICATION IN THE MIDDLE AGES (University of California, 1986) esp. 1-38.

⁴⁵ During the post-conciliar canonical revision process interest was shown in eliminating *latae sententiae* sanctions entirely from Western law. See Pontificia Commissio Codicis Iuris Canonici *Recognoscendo, "Principia quae Codicis iuris canonici recognitionem dirigant"* *Communicationes* 1 (1969) 77-85, Eng. trans., Canon Law Society of America, CODE OF CANON LAW, LATIN-ENGLISH EDITION, NEW ENGLISH TRANSLATION, (Canon Law Society of America, 1999) xxxvi-xxxvii, esp. Principle n. 9.