



# The Role of Canon Law in the Catholic Tradition and the Question of Church and State

**This paper answers questions such as "What is Canon Law?" and "What are its sources, uses, and its theological basis in the Roman Catholic Church?" Fr. Laschuk, the Judicial Vicar for the Archdiocese of Toronto, also explores Christian and canonical understandings of the proper relationship between church and state and between civil and canon law. This paper is the second in a series of three papers published by the Cardus Religious Freedom Institute on the intersection of civil and canon law.**

REV. ALEXANDER LASCHUK

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# 1. Theological Foundations

The early Christians had a complex relationship with law. The evangelical traditions were critical of the described observance of the Mosaic law, and we hear in the gospel, “Woe to you, scribes and Pharisees, hypocrites! for you tithe mint and dill and cumin, and have neglected the weightier matters of the law, justice and mercy and faith; these you ought to have done, without neglecting the others” (Matt 23:23).<sup>1</sup> At the same time, Jesus is explicit that he did not come to abolish the law and is clear in saying, “Think not that I have come to abolish the law and the prophets; I have come not to abolish them but to fulfil them. For truly, I say to you, till heaven and earth pass away, not an iota, not a dot, will pass from the law until all is accomplished” (Matt 5:17–18).

Saint Paul, as well, offers reflections on the role of law in the life of a Christian. So, while the first part of the Letter to the Romans exalts law, “So the law is holy, and the commandment is holy and just and good” (Rom 7:12), Paul later talks about the “end of law,” and one reads in that same letter, “For Christ is the end of the law, that every one who has faith may be justified” (Rom 10:4). St. Paul also is critical of those who follow the law, writing, “All who rely on works of the law are under a curse” (Gal 3:10). He also writes, “Now it is evident that no man is justified before God by the law; for ‘He who through faith is righteous shall live’; but the law does not rest on faith, for ‘He who does them shall live by them’” (Gal 3:12). Despite these theological hesitations, however, the early Christians quickly recognized that any society requires rules to ensure the proper conduct of its members. It is from this basic understanding that we get that system of laws in the Church which we today call canon law.

## 2. What Is Canon Law?

Canon law is most simply the rules and ordinances governing the Christian community. The word is not uniquely from the Christian tradition and has as its source the Greek *κανών* (Arabic: *نونان*; Hebrew: *הנק*), which is simply a standard of measure. Regulations that we now recognize as early forms of canons quickly developed in the Church. Already by the second century, manuals of conduct began to emerge. One of the earliest of these, the *Didache* (ca. 100 CE) offers clear guidelines for liturgical practices and some basic elements of Church governance.<sup>2</sup> Other disciplinary works followed, such as the *Didascalia apostolorum* (ca. 230 CE).<sup>3</sup> A study of the early Christian text in fact demonstrates that in the period of the early Church, and more especially after Constantine legalized the Christian religion with the Edict of Milan in 313, the Christian communities found it necessary to organize themselves in a more formalized fashion. As the Church structures

developed in their formality and as conflict emerged between Christians, the laws that governed them necessarily needed to advance. What was the relationship between a more preeminent ecclesiastical see and a neighbouring bishop? How were apostates, heretics, and schismatics to be reconciled with the Church of Christ? These and many other questions quickly led to the development of canons.

## SOURCES OF CANON LAW

The most fundamental source for all of the Church's law is that which is contained in Scripture, especially the New Testament. The New Testament provides numerous clear instructions for various aspects of Christian life. The Gospels provide instructions on topics such as baptism and the Eucharist (Matt 28:19; Luke 22:19; 1 Cor 11:23–25), marriage (Matt 19:3–10), the payment of clergy (Luke 10:7–12), the Church's judicial authority (Matt 18:15–17), and relations with the state (Matt 22:17–22). Saint Paul's writings offer even more guidelines for the Christian community, including: the payment of clergy (1 Tim 5:17), requirements for ordination (1 Tim 3:1–13), how to handle accusations against clergy (1 Tim 5:19), and how to relate with non-Christians (1 Tim 5:9–10). Many of these norms are later developed into legal language in future canonical collections. Canon law, in fact, can be understood in a sense to be simply applied theology.<sup>4</sup>

Canon law develops in a more formalized sense following the first three centuries of the Christian Church. Prior to the time of legalization, we cannot speak of much in terms of a Church-state relation, beyond the simple facts of persecution or non-persecution. After legalization, and especially as theological disputes emerged dividing the Church, the Roman emperors begin holding ecumenical councils (from the Greek οἰκουμένη γῆ, the inhabited world). These were councils where bishops from various local churches were present, understood as representing the entire Church. While the ecumenical councils were called in response to theological questions, the bishops present also used the opportunity to issue legislation addressing various issues facing the churches. While local councils often also issued canons, these ecumenical canons had a special authority because of the fact that they were issued by the οἰκουμένη and were thus seen as binding on all Christians. These ancient canons, called the Sacred Canons in the Christian East, form the common canonical foundation of the Church in both East and West.<sup>5</sup> This canonical tradition was taken up into the civil law of the Roman Empire, where it was a normative part of civil law for centuries.

The Code of Justinian (529), for example, has as its very first title the definition of the state Church as that of Nicene Christianity.<sup>6</sup> The fifth title of this same first book decrees the suppression of heresies.<sup>7</sup> In fact, if one examines the initial twenty titles of the first book of the *Codex*, the first

thirteen concern ecclesiastical topics, while the remaining seven concern imperial privileges and general norms of legal interpretation. For the Romans living in the empire, canon law *was* civil law. Future redactions of Roman law, such as the *Ecloga* of Leo III the Isaurian, maintained this practice. In fact, the inseparability of canon and civil law far outlasted the Roman Empire: it even remained the case for centuries after the fall of Byzantium, as the civil law of the Ottoman Empire placed Christians in a millet system where they were judged, primarily, by their historical Christian laws well into the nineteenth century.<sup>8</sup>

In the West, the canons of the ecumenical councils were taken up into various canonical collections and especially distilled through the writings of the Roman pontiffs. This formed a genre of canonical sources called decretals.<sup>9</sup> In the twentieth century these writings were codified by the Holy See into a single volume, the *Code of Canon Law*.<sup>10</sup> The process of codification reflected the changing reality of the Church in the modern world and the complexity of using all of the gathered sources contained in the *Corpus iuris canonici* in a logical and effective manner. This complex task was made even more complicated by the growing body of canonical legislation not only from the Council of Trent but also decrees from the developing offices of the Roman curia. These texts were simply not gathered or gatherable into a single volume.<sup>11</sup> As a result, just as nation-states completed legal codes in the nineteenth century, it was determined that it was time for the Church to update its legal system in a systematic and codified manner. This was a process that had its first movements already at the Vatican Council (1869). The process of codification and the reform of canon law led to the issuance of three codifications of canon law in the twentieth century: the 1917 *Codex iuris canonici*, a revised 1983 *Codex iuris canonici*, and the 1990 *Code of Canons of the Eastern Churches*.<sup>12</sup> These canonical collections are understood as universal, exclusive, and authentic collections of law.

However, canon law should not be considered as an exclusively “Catholic” thing. There is no shortage of books by Eastern Orthodox writers on the topic, and the Sacred Canons remain a very living system of law for these Christians, despite being over a millennium old.<sup>13</sup> This is a method with its own challenges, recognizing that using fifteen-hundred-year-old canons as a modern system of law can, at times, be inadequate.<sup>14</sup> Outside of the Christian East, canon law also finds itself used in some Reformation communities, foremost among them the Church of England.<sup>15</sup>

## ROLE OF CANON LAW IN THE CATHOLIC TRADITION

The Church has, at various times in its history, been described as a *communitas perfecta*, a perfect and supreme society that has as its goal the promotion of salvation of humanity.<sup>16</sup> A society in this understanding is an

organization of members united for a common end. It is called perfect because it is complete in itself; that is, the Church does not require any external agencies in order to achieve its end of promoting salvation.<sup>17</sup> Like any organization, the Church is governed by rules that enable it to achieve its end, and this is the most basic function of canon law. What is this end? While civil law is focused on temporal happiness (*felicitas*), canon law focuses on one's eternal happiness (*beatitudo*).<sup>18</sup> Canon law has as its supreme law and end the salvation of souls.<sup>19</sup>

John Paul II promulgated the revised *Codex iuris canonici* in 1983 by means of the Apostolic Constitution *Sacrae disciplinae legis*. Recognizing that in the aftermath of the Second Vatican Council the place of law in the Church was again being questioned by many, he offers the following observation on the role of canon law:

In actual fact the Code of Canon Law is extremely necessary for the Church. Since, indeed, it [the Church] is organized as a social and visible structure, it must also have norms: in order that its hierarchical and organic structure be visible; in order that the exercise of the functions divinely entrusted to her, especially that of sacred power and of the administration of the sacraments, may be adequately organized; in order that the mutual relations of the faithful may be regulated according to justice based upon charity, with the rights of individuals guaranteed and well defined; in order, finally, that common initiatives, undertaken for a Christian life ever more perfect may be sustained, strengthened and fostered by canonical norms.<sup>20</sup>

This explanation offers four clear definitions for the role and function of canon law, explanations that are not present in the *Code of Canon Law* itself.

First, canon law makes the hierarchical and organic structure of the Church visible. While the Church is the mystical body of Christ, it is incarnate in physical structures on earth. Canon law provides good order to the Church and defines how it is to function. This includes questions such as how bishops are to be appointed, how the supreme governing authority of the Church is to be exercised, and norms for the acquisition and alienation of property. This provides a defined and expectable order in the Church to its members.

Second, canon law ensures the proper exercise of the sanctifying function of the Church.<sup>21</sup> This respects the salvation of humanity as its primary purpose. Sacraments are understood as ways that divine grace is made present, and canon law provides clear norms for their celebration. The Church understands itself as being bound to follow the sacraments as established by Jesus Christ, and, as a result, firm conditions are required to ensure their valid celebration. These requirements are present in canon law in detailed form; for example, the Eucharist can only be celebrated by a

priest (*sacerdos*) using pure bread and wine and not by a deacon using rice crackers and grape juice.<sup>22</sup> These requirements ensure the sacrament is real and valid and, consequently, grace is offered in a definitive manner and is available to aid the salvation of the faithful.

Third, canon law provides rights, obligations, and methods of resolving conflicts in the Church. Like any society, the Church's members, whether physical persons or legal (juridic) persons, have rights and obligations. These are articulated clearly in the canonical system. The canonical system also provides a system of trials and recourse to ensure the proper exercise of these rights and obligations. The Church is a firmly hierarchical society, and there are occasions where a juridic superior may not function according to the norm of law. In these cases, the one claiming harm may make recourse to a hierarchical superior.<sup>23</sup> Additionally, physical and juridic persons can vindicate their rights using canonical trials and seek redress.<sup>24</sup> Certain crimes can be punished according to the norm of law, and, in fact, a trial is necessary to impose certain penalties.<sup>25</sup> These procedures recognize that if rights are to have any meaning, they are by their nature in need of a mechanism that ensures their enforceability.

Fourth, canon law attempts to provide the structures that sustain and direct the Church's common initiatives. These structures are defined and directed in canon law. For example, a parish or a diocese must have certain bodies that aid its superior in governing the parish or diocese. There are norms to ensure that Catholic schools, faculties, and universities follow the Church's mission.<sup>26</sup> Social communications are regulated to ensure the effective and authentic proclamation of the gospel and transmission of the Christian faith.<sup>27</sup> The simple facts of keeping the bills paid and the buildings open is guided by canon law.

Canon law has numerous elements in common with civil law.<sup>28</sup> Both are forms of positive law established by a legislator. Both derive their ultimate governing authority from God. Both govern relationships of members within an organization, in the case of one the Church, in the case of the other the state. Both systems attempt to provide the necessary structures of governance to ensure a well-functioning society. Each has its respective sphere, however, with separate, but certainly not incompatible, goals to be achieved. This leads to a natural discussion of the relationship between the Church and the state.

### **3. Question of Church and State**

The Catholic Church recognizes the legitimate authority of the nation-state. The Church teaches that political authority is by divine mandate and derives its authority from God. This is a firm application of the Letter to the

Romans, in which Saint Paul states, “Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore he who resists the authorities resists what God has appointed, and those who resist will incur judgment” (Rom 13:1–3). This theme is repeated frequently in Catholic teaching, and John XXIII writes about this in his encyclical *Pacem in terris*, which states,

Human society can be neither well-ordered nor prosperous without the presence of those who, invested with legal authority, preserve its institutions and do all that is necessary to sponsor actively the interests of all its members. And they derive their authority from God, for, as St. Paul teaches, “there is no power but from God.”<sup>29</sup>

Governance is necessary in order to maintain human society.<sup>30</sup> But this authority is from God and must be exercised according to certain principles. Legitimate authority is exercised, however, only when it seeks the common good.<sup>31</sup>

Unjust laws do not bind in conscience, and Catholics are required to disobey laws that are contrary to the moral order as established by the Creator.<sup>32</sup>

Aquinas calls immoral laws, which he defines as laws that are contrary to reason, as “acts of violence.”<sup>33</sup> This moral obligation to refuse to follow laws contrary to the common good is based on the exhortation of Jesus Christ in the Gospel of Matthew: “Render therefore to Caesar the things that are Caesar’s, and to God the things that are God’s” (Matt 22:21). The same message is present in the Acts of the Apostles: “Peter and the apostles answered, ‘We must obey God rather than men’” (Acts 5:29). Civil disobedience, however, is not to rise to the level of armed disobedience unless there are strict conditions satisfied.<sup>34</sup>

The Church and the civil state do not possess the same role, and each has its own function.<sup>35</sup> On this topic, the Second Vatican Council states in *Gaudium et Spes*,

The Church, by reason of her role and competence, is not identified in any way with the political community nor bound to any political system. She is at once a sign and a safeguard of the transcendent character of the human person. The Church and the political community in their own fields are autonomous and independent from each other. Yet both, under different titles, are devoted to the personal and social vocation of the same men. The more that both foster sounder cooperation between themselves with due consideration for the circumstances of time and place, the more effective will their service be exercised for the good of all. For man’s horizons are not limited only to the temporal order; while living in the context of human history, he preserves intact his eternal vocation. The Church, for her part, founded on the love of the Redeemer,

contributes toward the reign of justice and charity within the borders of a nation and between nations. By preaching the truths of the Gospel, and bringing to bear on all fields of human endeavor the light of her doctrine and of a Christian witness, she respects and fosters the political freedom and responsibility of citizens.<sup>36</sup>

Both the state and the Church have their proper areas of competence, and these interact with each other in a complementary relationship. This is reflected even in the canonical system, which frequently takes up civil norms into its own legal structures.

## CANONIZATION OF CIVIL LAW

Canon law often makes use of civil norms: in the 1983 *Code of Canon Law* such occurs twenty-one times. Canon law does, at times, defer to civil norms. A canon may incorporate civil norms into the canonical sphere. This can also happen without explicitly citing the civil norm, but simply referring to the need to consult the civil law in an area. For example, canon 105 of the *Code of Canon Law* indicates that legal emancipation of minors should follow the norm of civil law. Canon 877 indicates that the recording of adoptive parents should follow that which is practiced in civil law. Canon 1540 assigns evidentiary value of documents in a canonical trial in line with that which is determined in the civil law of a jurisdiction.

Other canons do not cite the civil law's regulation into the law, but simply instruct the party to follow civil law. For example, the canons on employment of laypersons refers to the need to follow civil law in a jurisdiction.<sup>37</sup> Pastors are also forbidden from marrying those who are unable to have their marriage recognized by civil law.<sup>38</sup>

The Church also follows civil (international) law with respect to its diplomatic relations. While there is an ancient practice of the Roman pontiff sending legates to local Churches, in modern parlance apostolic nuncios are recognized not only as ecclesiastical representatives to a particular Church but also as civil ambassadors to a political entity.<sup>39</sup> Canon law indicates that these appointments are to follow the norms of international law with respect to the appointment and recalling of such ambassadors.<sup>40</sup>

Civil actions can sometimes have definite effects in the canonical system. For example, a civil adoption creates legal effects in the canonical system: one who has legally adopted a person is not free to contract a marriage with that individual nor their offspring, regardless of any civil restrictions on such a relationship.<sup>41</sup> Once the civil adoption has occurred, the legal relationship has begun and the impediment to marriage now exists.

These effects can even be in manners that are seemingly contrary to the canonical system. For example, marriage is clearly understood in the Catholic Church as being a relationship between one man and one woman. Any permutation upon this relationship is not marriage. Consequently, a priest who contracts a civil marriage with a man does create scandal, and is even perhaps liable for punishment, but he is not liable for the crime of forbidden marriage, as a same-sex relationship is something of a different genre. Many canonists completely disregard the impact of same-sex “marriage” on the canonical sphere.

This is a simplistic view, however. Same-sex relationships do have effects in canon law, and this is plain from a reading of the canons. Using the same example of adoption, one can remind themselves that the canon simply speaks of the legal relationship arising from adoption.<sup>42</sup> The canon does not make any mention as to whether the parent is married, single, or in some kind of relationship *contra naturum*. In a hypothetical situation, the language of the canon suggests that a legal relationship would arise from a same-sex partner who adopts a child. If that person later moved on from the same-sex attraction and desired to marry their adoptive child, the impediment of adoption would exist. A similar argument could be made toward the impediment of public propriety where, again, an impediment in the canonical system could arise from a previous same-sex relationship.<sup>43</sup>

Moreover, the canonical system assigns certain decisions to civil authority. *Codex iuris canonici* canon 1692, for example, allows a bishop to give permission to a couple to approach a civil court in order to declare their separation.<sup>44</sup> This is a specific entrustment of an action that has canonical effects, that is, the cessation of the right to a common residence in marriage, to adjudication by a civil judge, recognizing his or her authority and judgement in a matter normally entrusted to adjudication in the Church.

Civil law, conversely, can also take into itself canon law. In some countries, this results from explicit terms in a concordat. For example, in many non-common law jurisdictions ecclesiastical declarations of nullity of marriage or ecclesiastical separations of the spouses will have corresponding civil effects. However, canon law may be assigned civil effects in a more indirect manner. An example of this exists in Canadian case law: *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston*.<sup>45</sup> This is a 2010 case where a priest was placed on so-called administrative leave after repeated warnings from the archbishop of Kingston regarding financial issues and business relationships. Fr. Hart took the archdiocese to the Superior Court of Justice for damages related to constructive dismissal. In the matter Justice Beaudoin wrote,

The essence of the claim between Father Hart and the Archdiocese is ecclesiastical in nature and this court has no jurisdiction over that dispute. Moreover, the internal processes that are designed to deal with that

dispute do not offend the principles of natural justice and Father Hart has not exhausted the internal processes available to him. For these reasons, these proceedings constitute an abuse of process and are stayed.

The Court of Appeal for Ontario upheld this decision in 2011. It based this on the reasoning that “a person who voluntarily chooses to be a member of a self-governing organization and who has been aggrieved by a decision of that organization must seek redress in the internal procedures of the organization: see *Levitts Kosher Foods v. Levin* (1999), 1999 CanLII 14818 (ON SC), 45 O.R. (3d) 147 (S.C.).”

Additionally, it was clearly stated that

the courts will interfere in the internal affairs of a self-governing organization in only two situations: where the organization’s internal processes are unfair or do not meet the requirements of natural justice; or where the aggrieved party has exhausted the organization’s internal processes. . . . The Roman Catholic Church is a self-governing organization. Its canon law provides an internal review process for ecclesiastical disputes. The expert evidence before the motion judge showed that where an administrative decree may affect the rights of a party, canon law requires that the party be given notice, an opportunity to respond and an unbiased tribunal. Canon law also provides a broad range of remedies, including the substitution of a different decree, monetary compensation and even a trial.

The court clearly recognizes that canon and civil law have different purposes. This is a similar approach, in fact, to the approach of the canonical system to the civil sphere. The civil court recognized the basic concept of natural justice present in the prescriptions of the *Code of Canon Law*, it recognized that Fr. Hart was a voluntary participant in that organization, and it recognized that Fr. Hart did not make use of those means contained in canon law to advance his grievance.<sup>46</sup> In this sense, there is an indirect deferral to the canonical norms as they are written. The civil courts will certainly take action, however, when the internal rules are not followed, as the sex abuse crisis has repeatedly demonstrated.

## CONFLICT OF CIVIL LAW AND CANON LAW

Of course, canon law and civil law are often in disharmony. What is to happen when civil laws and canon laws are in conflict? *The Code of Canon Law* is clear with respect to the conflict of law: “Civil laws to which the law of the Church yields are to be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise.”<sup>47</sup> That is, civil laws are to be observed by the Christian faithful, except when they are contrary to divine law or if there is a contrary norm in canon law. Canon law thus does not yield to civil law in general, but only in

certain matters. The default manner of interpretation is that the canon law is to prevail over the civil norm. What does canonical interpretation suggest should occur when there is a conflict of laws?

Some examples may provide insight into these principles of interpretation. Canon 983 indicates, in part, “The sacramental seal is inviolable; therefore it is absolutely forbidden (*nefas est*) for a confessor to betray in any way a penitent in words or in any manner and for any reason.”<sup>48</sup> The canon is abundantly clear that a confessor is completely and absolutely prohibited from revealing anything learned in the confessional. There are no exceptions to this rule. Catholics understand this norm to be based on the divine law and relates to the nature of the sacraments as established by Jesus Christ. As a result, no power on earth can dispense from this obligation; the Roman pontiff could not free a priest to reveal that which was said to him in confession.

This has conflicts with civil law. In Ontario, minors are protected by the Child, Youth and Family Services Act, 2017. Under this statute, similar to those that preceded it, certain categories of professionals are obligated to report physical, sexual, and/or emotional abuse to a Children’s Aid Society. The statute explicitly includes religious officials.<sup>49</sup> No exception is made for the confessional seal.<sup>50</sup> As a result, clerics who hear a hypothetical confession of a child molester risk civil prosecution if they do not report said information to a Children’s Aid Society.

How is such a conflict resolved? In this case, a Catholic priest would need to be prepared to face civil prosecution for holding the seal inviolate. The Church clearly understands the seal to be of divine mandate and, as a result, the priest is not able to follow the civil law. If he did directly violate the seal by reporting to Children’s Aid, in fact, he would commit a canonical crime and be liable to a penalty of an excommunication.<sup>51</sup> The priest is, of course, free to encourage the penitent to discuss the matter with him outside of the confessional context, at which time he would be not bound by the seal of confession. However, there is a clear conflict of laws to which the priest would be liable to civil punishment by means of following the canon law.

As a more common example, a civil marriage is recognized when the individuals contracting it are not bound to canonical form, that is, if they are not Catholic or Orthodox Christians.<sup>52</sup> Two Buddhists who marry at city hall consequently find themselves in a union with presumptive validity before a Catholic ecclesiastical tribunal. If that marriage should break down, the Buddhists would then go and presumably obtain a civil divorce, which is understood in civil law to terminate the bond. The Catholic Church, however, sees such a dissolution as completely contrary to marriage as established by the Creator, which is indissoluble by its nature. Accordingly, the parties would need to obtain either an ecclesiastical dissolution or

declaration of nullity before the parties could be declared free to marry in the Catholic Church, completely independent of the civil process.

In cases of conflicts of laws, as a result, the Church clearly reserves to itself the ability to determine what is a just law in line with its understanding of the natural moral order. This ability to pass judgement on civil institutions and laws is seen as a right of the Church. The Second Vatican Council describes it clearly, stating,

It is only right, however, that at all times and in all places, the Church should have true freedom to preach the faith, to teach her social doctrine, to exercise her role freely among men, and also to pass moral judgment in those matters which regard public order when the fundamental rights of a person or the salvation of souls require it.<sup>53</sup>

The Church sees itself, manifestly, as holding an authority above that of the state, recognizing, again, the understanding that the authority of the state comes from God and the Church is in a position to evaluate such authority in a manner that is to be free from politics. At the same time, the Church is not “entitled to express preferences for this or that institutional or constitutional solution.”<sup>54</sup> The Church is only to comment on the religious and moral implications of political programs.<sup>55</sup>

## AGREEMENTS WITH STATES

Recognizing that the Church and the state occupy distinct spheres, canon law is explicit in respecting the bilateral agreements that the Holy See has entered into with other nation-states. *The Code of Canon Law* indicates clearly that these agreements with nations supersede any contrary norms in canon law. The canon states, “The canons of the Code neither abrogate nor derogate from the agreements entered into by the Apostolic See with nations or other political societies. These agreements therefore continue in force exactly as at present, notwithstanding contrary prescripts of this Code.”<sup>56</sup> This is an application of the legal maxim, common to both canon and civil law systems, *pacta sunt servanda* (agreements must be honoured). These agreements between the Holy See and other nations are referred to by the general term “concordats.”

Concordats are a practical application of Church-state relations. In post-Reformation times some in the Church would hold that the Church is superior to the state in all things (called the “regalist” position), while others (called the “curialist” position) hold that while the Church is superior to the state, the Church can grant certain privileges to the state through agreements such as concordats. In the contemporary era, the general approach to concordats is that the Church and the individual nation are both legal persons who are able to enter into bilateral agreements. These

agreements allow the Church to establish legal recognition of its proper identity.<sup>57</sup> The practice of negotiating concordats allows these agreements to be entered into according to the norms of international law and, as a result, to be enforceable according to legal principles. This is not to say the Church and the state are equal in their status, but only that an agreement can be entered into respecting the norms of international law to the benefit of both the political and ecclesiastical spheres. This is reflected, for example, in the Constitution of the Italian Republic, which reads, “The State and the Catholic Church are independent and sovereign, each within its own sphere.”<sup>58</sup>

Concordats are entered into in order to protect and clarify the rights of the Church and the relationship between the Church and a particular state. This is an application of the Second Vatican Council’s Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, which states,

The Church herself makes use of temporal things insofar as her own mission requires it. She, for her part, does not place her trust in the privileges offered by civil authority. She will even give up the exercise of certain rights which have been legitimately acquired, if it becomes clear that their use will cast doubt on the sincerity of her witness or that new ways of life demand new methods.<sup>59</sup>

To this end, concordats describe topics such as the civil recognition of academic degrees granted by ecclesiastical faculties, the right of the Catholic Church to own and register property, and the exemption of ecclesiastical properties from taxation. These are documents meant to allow the Church to perform its function effectively in a given political territory. While many of these agreements are entered into with countries or other political entities holding Catholic majorities (e.g., Italy in 1985, Bavaria in 1966, Austria 1969), concordats have also been developed with countries holding non-Christian majorities (e.g., Tunisia in 1964, Morocco in 1985, Israel in 1993).

As an example, the 1993 concordat with Israel allowed for the establishment of diplomatic relations between the Holy See and the state of Israel. In 1994 ambassadors were appointed between the Holy See and the state of Israel. Article 10 affirms the right of the Church to hold property, a debated point after the creation of the state of Israel.<sup>60</sup> However, the question of taxation is not addressed and simply indicates that a subsequent agreement is to be developed.<sup>61</sup> The document continues to be worked on, as the document was never ratified by the Knesset.

## General Conclusions

As Paul VI noted, “Since progress in the Christian life has need of the pastoral ministry, it follows that the special scope of ecclesiastical legislation is to meet adequately the various and complex needs of pastoral action by providing a sound criterion of well-ordered practical efficiency.”<sup>62</sup> The Church’s legal system provides this framework in a manner that is meant to make the proclamation of the gospel more effective. To this end, while the Church certainly recognizes the legitimate authority of the state, it should be noted that the laws of the state are to be restricted to the state’s proper sphere and with a promotion of the common good. When these laws are contrary, they do not bind its subjects, and, in fact, Catholics may even have an obligation to engage in civil disobedience. The interaction with the civil government is not done in order to establish the Holy See as an equal partner as a subject of international law, but to ensure the good of religion and the proclamation of the gospel.

In recent years, Pope Francis has been engaged in frequent revisions of canon law. Unlike a common law system, where individual statutes are frequently revised, the canonical system is a codal system, which is one whereby a complete set of laws is promulgated as a whole. This, certainly, risks the undermining of the codal system into ever more frequently changing legislation. At the same time, it has to be recognized that the Church’s canonical discipline exists for the purpose of the effective proclamation of the gospel so that the people of God can obtain salvation. Consequently, when the law is not able to adequately respond to a challenge, the law should be revised. Such revisions are infinitely more complicated when it is expected that the legal system as a whole, and not a single statute, require revision.

Courts, in general, have respected the authority of the Church to determine its own internal discipline. The Church understands that as an absolute right. It seems manifest, however, that the civil state does not see this as an absolute right: there are situations where the civil courts will intervene in conflicts between members of the Christian faithful, such as when the Church neglects its own canonical discipline. The courts have already established their authority in the common law system to do so. The Church also has the challenge of following its own discipline in order to credibly be able to speak, and especially criticize, the legal system of a state.

There is a principle of law, *leges humanae nascuntur, vivunt, moriuntur* (laws of man are born, live, and die). What is the future of the canonical system? It is certain that there is a necessary place for law in the Church. Such establishes rights and responsibilities of the faithful and provides procedures for dealing with those problems that do arise in any human society. While antinomianism has been present in the Church, especially since the Second Vatican Council, such results in an approach to the Church that does not respect the rights of the individual. Benedict XVI offered this observation: “A society without laws is a society without rights. Law is a

condition of love.”<sup>63</sup> The challenge facing the Church is establishing an effective and credible system that does not provoke the state into interfering into the ecclesiastical sphere. The Church does not have temporal power that can intimidate the civil state: it is the moral authority of the Church of Christ that gives it credibility and authority. If this authority is lost, the state has every reason to interfere in the internal affairs of the Church.

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## CITATIONS

- 1)** All scriptural citations are taken from the Revised Standard Version of the Bible, copyright © 1946, 1952, and 1971 the Division of Christian Education of the National Council of the Churches of Christ in the United States of America.
- 2)** On this topic see A. Milavec, *The Didache: Text, Translation, Analysis, and Commentary* (Collegeville, MN: Liturgical Press, 2004).
- 3)** On this topic see A. Stewart-Sykes, *The Didascalia apostolorum: An English Version: With Introduction and Annotation* (Turnhout, Belgium: Brepols, 2009).
- 4)** The relationship between theology and canon law has been discussed in detail in numerous places. See, for example, J. Coughlin, *Law, Person, and Community* (Oxford: Oxford University Press, 2012), 47–77.
- 5)** The items that make up the sacred canons are listed in canon 2 of the Council in Trullo (692).
- 6)** Code of Justinian (hereafter C.) 1.1.
- 7)** C.1.5.
- 8)** For more on this topic see, for example, B. Lewis, “Foundation Myths of the Millet System,” in *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society*, ed. B. Braude and B. Lewis (New York: Holmes & Meier, 1982), 1:69–90.
- 9)** For a brief overview of the canonical collections that developed during the classical era, see R.M. Helmholz, *The Spirit of Classical Canon Law* (Athens: University of Georgia Press, 2010), 1–32.
- 10)** As a point of definition, the Holy See canonically “refers not only to the Roman Pontiff but also to the Secretariat of State, the Council for the Public Affairs of the Church, and other institutes of the Roman Curia, unless it is otherwise apparent from the nature of the matter or the context of the words” (Codex iuris canonici [hereafter CIC] c. 361). The “Vatican” refers to the city-state that is a political entity and subject of international laws.
- 11)** This was even reflected in the awkward usage of the “old” law (before Gratian), the “new” law (Gratian to Trent), and the “newest” law (since the Council of Trent).
- 12)** See “Preface to the Latin Edition,” in *Code of Canons of the Eastern Churches: Latin-English Edition*, new English trans. (Washington, DC: Canon Law Society of America, 2001), xxix–xli; also “Preface to the Latin Edition,” in *Code of Canon Law: Latin-English*

Edition, new English trans. (Washington, DC: Canon Law Society of America, 1999), xxxiii–xliii.

**13)** For a single-volume introduction to the Orthodox Christian canonical tradition, see P. Rodopoulos, *An Overview of Orthodox Canon Law* (Rollinsford, NH: Orthodox Research Institute, 2007).

**14)** Orthodox canonist John Erickson calls this “the challenge of our past.” See J.H. Erickson, *The Challenge of Our Past* (Crestwood, NY: St Vladimir’s Seminary Press, 1991).

**15)** The periodical *Ecclesiastical Law Journal* would be one of the primary places where such discussions occur. An overview is found in N. Doe, “The Common Law of the Anglican Communion,” *Ecclesiastical Law Journal* 7 (2003): 4–16.

**16)** See, for example, Leo XIII, *Immortale Dei*, November 1, 1885. Translations of this and other papal and conciliar documents can be found at [www.vatican.va](http://www.vatican.va).

**17)** S.B. Smith, *Elements of Ecclesiastical Law*, 2nd rev. ed. (New York: Benziger Brothers, 1888), vol. 3, §§1658–59.

**18)** M. Bargilliat, *Prælectiones Juris Canonici* (Paris: Berche et Tralin, Editores, 1909), 1:3.

**19)** CIC c. 1752.

**20)** John Paul II, *Sacrae disciplinae legis*, January 25, 1983. Paul VI gave an earlier speech containing similar themes: “It is law which gives to the ecclesial community the basic texture of those relationships which produces the vigorous flowering of the Christian life throughout the whole range of its powers until it attains ‘to the measure of the stature of the fulness of Christ’ (Eph. 4, 13). It is the seedbed from which charity buds forth and blossoms in the Church—that love which, like the leaven in the Gospel, permeates everything, vitalizes and sanctifies it, summarizes and synthesizes all things in Christ. Finally, it is on this groundwork of juridical structures that the force and efficacy of the pastoral office is based.” Paul VI, *Essential Role of Canon Law in the Church*, May 25, 1968.

**21)** Christian theology traditionally sees the Church as having three functions: teaching, sanctifying, and ruling.

**22)** CIC c. 924.

**23)** CIC cc.1732–39; *Codex Canonum Ecclesiarum Orientalium* (hereafter CCEO) cc. 996–1006.

**24)** CIC c. 1400, §1, 1°; CCEO c. 1055, §1, 1°.

**25)** CIC c. 1400, §1, 2°; CCEO c. 1055, §1, 2°.

**26)** See, for example, CIC cc. 796–821.

**27)** CIC cc. 822–32.

**28)** It should be mentioned for a common law audience that the functioning of canon law has structures more closely corresponding to Continental civil law systems than English common law systems. For example, canon law has a lack of the concept of *stare decisis*, and canon law has a dual court of appeal and court of cassation system. This is not an exclusive relationship, however, and canon law does have some impact on English common law. On this topic see, for example, D.J. Seipp, “The Reception of Canon Law and Civil Law in the Common Law Courts before 1600,” *Oxford Journal of Legal Studies* 13 (1993): 388–420.

**29)** John XXIII, *Pacem in terris*, April 11, 1963, no. 46.

**30)** This echoes the earlier writings on the necessity of governance by Leo XIII. See Leo XIII, *Immortale Dei*, November 5, 1885.

**31)** The Catholic notion of the common good is defined by the Second Vatican Council as “the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment” (*Gaudium et Spes* [hereafter *GS*], December 7, 1965, no. 26).

**32)** John XXIII, *Pacem in terris*, no. 51.

**33)** *Summa Theologiae Ia-IIae*, q. 93., a.3 ad 2um.

**34)** These are listed in CCEO no. 2243 and are fivefold: (1) certain, grave, and prolonged violation of fundamental rights; (2) all other means of redress have been exhausted; (3) resistance will not provoke worse disorders; (4) there is well-founded hope of success; and (5) it is impossible to reasonably foresee any better solution.

**35)** It should be noted that the distinct and complementary understanding of the Church and the state, while tracing its roots to Constantine, does not correspond to the reality in many places of the Christian East. The intertwining of the civil and ecclesiastical sphere was pronounced in Byzantium and successor states, but is beyond the scope of this study.

**36)** *Gaudium et Spes*, no. 76.

**37)** CIC c. 231, §1.

**38)** CIC c. 1071, §1, 2°.

**39)** As a point of distinction, it should be noted that while they can also be representatives to a political entity, this is not necessarily the case and the ecclesiastical representation is the primary function. See CIC c. 362.

**40)** CIC c. 362.

**41)** CIC c. 1094; CCEO c. 812.

**42)** CIC c. 1094; CCEO c. 812.

**43)** CCEO c. 810.

**44)** CIC, c. 1692, §2.

**45)** *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston*, in Canada, 2011 ONCA 728 (CanLII), <http://canlii.ca/t/fnxj0>.

**46)** A similar case can be found in *Anozie v. McGrattan*, 2017 HRTO 1208.

**47)** CIC c. 22. This is substantially in line with CCEO c. 1504.

**48)** CIC, c. 983, §1.

**49)** *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched. 1, §125.

**50)** On the lack of privilege excluding confessional evidence in Canadian law see G. Zubacz, *The Seal of Confession and Canadian Law* (Montreal: Wilson & Lafleur, 2008).

**51)** CIC c. 1388, §1; CCEO c. 1456, §1.

**52)** CCEO c. 834.

**53)** *Gaudium et Spes*, no. 76.

**54)** John Paul II, *Centesimus annus*, May 1, 1991, no. 47.

**55)** Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (Ottawa: Canadian Conference of Catholic Bishops, 2005), 182.

**56)** CIC c. 3. CCEO c. 4 indicates the same norm.

**57)** In writing to politicians signing the 1980 Helsinki Final Act, John Paul II listed a number of such rights that the Church seeks:

a) at the personal level, the following have to be taken into account:

—freedom to hold or not to hold a particular faith and to join the corresponding confessional community;

—freedom to perform acts of prayer and worship, individually and collectively, in private or in public, and to have churches or places of worship according to the needs of the believers;

—freedom for parents to educate their children in the religious convictions that inspire their own life, and to have them attend catechetical and religious instruction as provided by their faith community;

—freedom for families to choose the schools or other means which provide this sort of education for their children, without having to sustain directly or indirectly extra charges which would in fact deny them this freedom;

—freedom for individuals to receive religious assistance wherever they are, especially in public health institutions (clinics and hospitals), in military establishments, during compulsory public service, and in places of detention;

—freedom, at personal, civic or social levels, from any form of coercion to perform acts contrary to one's faith, or to receive an education or to join groups or associations with principles opposed to one's religious convictions;

—freedom not to be subjected, on religious grounds, to forms of restriction and discrimination, vis-a-vis one's fellow citizens, in all aspects of life (in all matters concerning one's career, including study, employment or profession; one's participation in civic and social responsibilities, etc.).

b) at the community level, account has to be taken of the fact that religious denominations, in bringing together believers of a given faith, exist and act as social bodies organized according to their own doctrinal principles and institutional purposes.

The Church as such, and confessional communities in general, need to enjoy specific liberties in order to conduct their life and to pursue their purposes; among such liberties the following are to be mentioned especially:

—freedom to have their own internal hierarchy or equivalent ministers freely chosen by the communities according to their constitutional norms;

—freedom for religious authorities (notably, in the Catholic Church, for bishops and other ecclesiastical superiors) to exercise their ministry freely, ordain priests or ministers, appoint to ecclesiastical offices, communicate and have contacts with those belonging to their religious denomination;

—freedom to have their own institutions for religious training and theological studies, where candidates for priesthood and religious consecration can be freely admitted;

—freedom to receive and publish religious books related to faith and worship, and to have free use of them;

—freedom to proclaim and communicate the teaching of the faith, whether by the spoken or the written word, inside as well as outside places of worship, and to make known their moral teaching on human activities and on the organization of society: this

being in accordance with the commitment, included in the Helsinki Final Act, to facilitate the spreading of information, of culture, of exchange of knowledge and experiences in the field of education; which corresponds, moreover, in the religious field to the Church's mission of evangelization;

—freedom to use the media of social communication (press, radio, television) for the same purpose;

—freedom to carry out educational, charitable and social activities so as to put into practice the religious precept of love for

neighbor, particularly for those most in need.

Furthermore:

—With regard to religious communities which, like the Catholic Church, have a supreme authority responsible at world level (in line with the directives of their faith) for the unity of communion that binds together all pastors and believers in the same confession (a responsibility exercised through Magisterium and jurisdiction): freedom to maintain mutual relations of communication between that authority and the local pastors and religious communities; freedom to make known the documents and texts of the Magisterium (encyclicals, instructions, etc.);  
—at the international level: freedom of free exchange in the field of communication, cooperation, religious solidarity, and more particularly the possibility of holding multi-national or international meetings;  
—also at the international level, freedom for religious communities to exchange information and other contributions of a theological or religious nature. (John Paul II, Message of John Paul II On the Value and Content of Freedom of Conscience and of Religion, November 14, 1980, no. 4)

**58)** Constitution of the Italian Republic, 1947, art. 7.

**59)** Gaudium et Spes, no. 76.

**60)** Fundamental Agreement Between the Holy See and the State of Israel, December 30, 1993, art. 10.

**61)** Fundamental Agreement Between the Holy See and the State of Israel, art. 10.

**62)** Paul VI, Essential Role of Canon Law in the Church, May 25, 1968.

**63)** Benedict XVI, Letter to Seminarians, October 18, 2010, no. 5.