

Canon Law: What Is It?

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CANON LAW: *WHAT IS IT?*

Judges and attorneys of the American civil court system, as well as lay people in general, often hear about *Canon Law* but few fully understand its nature and purpose within the Catholic Church. The purpose of this short article is to provide an explanation of the nature of Canon Law and a brief historical overview of its origins. As we look at Canon Law, the legal system of the Catholic Church, we do so keeping in mind the phenomenon of extreme deference to institutionalized religious bodies and to their internal rules.

Organized religion has traditionally been presumed to be a force for good. Marci Hamilton begins her book, God vs. The Gavel with a blunt statement of a truth that has ample historical foundation: “*The United States has a romantic attitude toward religious individuals and institutions, as though they are always doing what is right . . . The unrealistic belief that religion is always for the good, however, is a hazardous myth.*”²

Before discussing the origins and meaning of Canon Law it is perhaps helpful to look a bit deeper as to why Americans, or anyone for that matter, has such a forgiving attitude toward organized religion. The courts in our country have traditionally been deferential toward religious institutions. Our judicial system has also looked favorably upon professional religious practitioners such as bishops, priests, nuns, ministers and rabbis. These men and women of God are accorded the strong presumption that their actions are always upright and their motives always honest. In spite of centuries of historical evidence of the harm that can come from religious conviction and fanaticism, our civic culture still finds it both painful and guilt-inducing to hold organized religious entities and professional religious persons accountable before the law with the same objectivity that is expected of lay persons or secular organizations. Chapter Nine of Marci Hamilton’s recent book provides a detailed and lucid description of rise and fall of the legal and judicial favoritism of religious institutions.

Why People Show Deference to Organized Religion and Churches . . . And Their Rules

From the dawn of history men and women have created religious belief systems and religious societies whereby they attempted to communicate with the unseen god or gods. Some scholars have opined that the concept of religion really came as a result of meteorological phenomena that were regularly observed but not understood by people. They did not know the origin of such phenomena, especially the more spectacular and destructive ones such as thunder, lightning, tornadoes, tidal waves or hurricanes. In their naivete, people attributed such power to angry supreme beings and sought ways to control or at least influence them so as to ensure their safety. In his book Religion Explained, scholar Pascal Boyer sums up the theories of many:

² Marci Hamilton, God vs. The Gavel (Cambridge, Cambridge University Press, 2005), p. 3.

*Most accounts of the origin of religion emphasize one of the following suggestions: human minds demand explanations, human hearts seek comfort, human society requires order, human intellect is illusion-prone.*³

Religion is a creation of mortal men and women and not a creation of the unseen deities, imposed by them on humans. It is found throughout history and in every culture in many different forms. As people share their ideas about the unseen powers they are naturally led to theories about the nature and causal powers of these nonobservable beings.

All religious entities such as denominations, institutions, organizations or churches are essentially “man-made” though many claim to be of divine origin. Religion is a mysterious and powerful force in society because it acts as a bridge or a gateway to the unknown. The primitive religions came into existence largely as a response to the fear instilled by the destructive and powerful forces of nature which loomed before men and women who had no ability to understand them much less control them. As societies evolved and became more knowledgeable about the world around them religion maintained control and often proved to be the strongest opponent of more enlightened explanations of the forces of nature and many other heretofore unexplainable human events. Perhaps two of the most well known examples are the Catholic Church’s condemnation of Galileo which was only repudiated at the end of the twentieth century and the ongoing conflict between proponents of evolution and those who firmly believe in creationism, now known as “intelligent design.”

Although religious systems have been created to relieve or displace the fear prompted by the unknown, these same systems have themselves been the origin of fear. Well intentioned religious leaders often induce or provoke the fear to influence people to avoid wrongdoing. In other cases the fear is both unjust and irrational in that it is induced by religious personages who claim it to be of supernatural origin when in reality the object of the fear is not obedience to angry gods but control by humans. Thus the world of some organized religions can be every bit as terrifying as a world controlled by unseen angry supernatural forces. The gloom and fear that seem fundamental to some religions including expressions of Christianity, can be as mysterious as the unseen supernatural powers. The Christian philosopher Soren Kierkegaard wrote of the psychological tenor of Christian revelation in such works as The Concept of Anguish and Fear and Trembling

Religious concepts are connected to human emotional systems. These systems react to life-threatening situations such as the power of nature or any other force that threatens a person and cannot be readily controlled. Returning to Boyer, we read:

³ Pascal Boyer, Religion Explained, (New York, Basic Books, 2001), p. 5.

*It is probably true that religious concepts gain their great salience and emotional load in the human psyche because they are connected to thoughts about various life-threatening circumstances. So we will not understand religion if we do not understand the various emotional programs of the mind.*⁴

A logical progression leads to human speculation on how to influence the superhuman entities in order to avoid their wrath and to gain their benevolence. Herein lies the origin of the notion of *sacrifice* which is central to primitive and ancient religions as well as to Christianity. Sacrifice came about as a way of placating the gods. Mortals gave the first and best crops, the fatted calf, money and various promises of good behavior to them in return for their benevolence. There is even evidence of human sacrifice in several religious systems. With the notion of *sacrifice* comes the concept of *priesthood*

The primitive communities selected highly respected members to act as intermediaries between the unseen and uncontrollable forces and themselves. The idea of the *priest* as the community holy man and advocate grew out of fear of the unseen gods. Organized religion evolved on the premise that the unseen deities were basically hostile to humans. Crucial to the balance between these powers and humans were the religious leaders whose power grew out of the perception that they were in an exalted and unique position because they could somehow influence or control the gods.

Priesthood is the most ancient form of religious office. The *priest* has traditionally but not exclusively been male. It is an office or role given to one who is thought by the community to be in a special, privileged position in the estimation of the unseen powers. The priest is the special person deputed by the community and favored by the gods to lead worship services but especially to offer sacrifices on behalf of individuals and the community. The earliest known religions have priestly offices. Because of their closeness to the deities, the priests themselves have traditionally been thought to have special powers

Though civilization evolved and became more sophisticated in a variety of ways, the essential power of organized religion remained grounded in the unknown. In a word, the power and influence of religion can be reduced to the single concept of *fear*.

Fear of the unknown and fear of some form of divine “payback” after death is quite possibly at the root of the deference shown to organized religion and its leaders. No doubt a significant degree of respect is due to the charitable works and influence for good that many religions accomplish. On the other hand respected sociological studies of the role of religion in shaping secular political life and governmental policy point more to the controlling influence of

⁴ Ibid., p. 23.

organized religion, rooted not in proliferation of good works but in presenting itself as necessary for achieving favor with the god or gods. Sociologist Tom Inglis studied the role of the Catholic Church in the social and political life of the Republic of Ireland in his book Moral Monopoly: The Rise and Fall of the Catholic Church in Modern Ireland. His conclusions as to the source of the Church's influence all converge to a common denominator: the Church presented itself as the only source of spiritual security as a mediator between the people and the God whom they portrayed as just and stern. Concerning this power he says:

*It was the power over peoples' consciences, instilled in churches, schools, hospitals and homes which made the church unlike any other power bloc in Irish society. It was a power which, as every politician knew, could be exercised at any time with devastating consequences.*⁵

Author John Whyte, Church and State in Modern Ireland, 1923-1970 is even more specific in naming the reason for the Catholic Church's power:

*The Maynooth Parliament (i.e., the hierarchy) holds a weapon which none of the other institutions holds: the weapon of the sacraments . . . When the Catholic Church, through its representatives speaks, he [the prime minister] realizes that if they disobey they may draw on themselves this weapon whose touch means death.*⁶

Catholics are taught that the sacraments are essential to their spiritual well-being and indeed to their spiritual salvation. The seven rituals correspond to major life moments and rites of passage. Access to the sacraments is essentially controlled by the clergy especially the bishops, who have used this access to influence secular political activity. In the recent presidential election several bishops declared that Catholic candidates who held views that the bishops considered unacceptable, especially in the area of abortion rights, could not receive the Eucharist. This tactic was praised by some in the "orthodox" or conservative camps and roundly criticized by many others for the subjective politicization of the Eucharist, the fundamental spiritual element in the Catholic faith. Though other Christian denominations do not have the same number or understanding of sacraments as does Catholicism, most have similar ways to express the power they claim over their congregants.

The harm done to individuals by organized religion is too often minimized or dismissed outright because of the false perception that to call churchmen (or churchwomen) to task is to

⁵ Tom Inglis, Moral Monopoly (Dublin, University College Press, 1998), p. 83.

⁶ John Whyte, Church and State in Modern Ireland, 1923-1970 (Dublin, Gill and MacMillan, 1971), p. 249.

risk negative social and economic consequences. Churches have not been called to account for their wrong doing with the same objectivity as have private businesses or public institutions. If we search for acceptable reasons for allowing the appearance that churches are above the law, we will be hard pressed to find results that are rational and verifiable. The reasons will often be a mixture of unspecified deference, magical thinking or misunderstanding as to the role of religion in our lives. Organized religious bodies have enjoyed and encouraged a significant degree of mythology about themselves. Possibly the first serious cultural and theological challenge to this mythology occurred with the Protestant Reformation. In the past few decades this mythology has been challenged once again, much to the chagrin of church leaders of all denominations. The clergy sexual abuse scandals that have plagued Roman Catholicism (and several other denominations though to a lesser degree) have served as a cultural and religious catalyst for an increasingly critical look the role of the Catholic Church in secular society. The time has come for an objective and clearheaded analysis of the institutional Church and its regulatory system, Canon Law.

Canon Law and the Catholic Church

Canon Law is the commonly understood name for the legal system or internal regulatory structuring of the Roman Catholic Church. As a system of law, Canon Law is the world's oldest continuously functioning legal system. Canon Law is not God's law nor is it a summary of the required beliefs of Roman Catholics. It is the collection of rules and norms that form the internal regulatory system of the institutional dimension of a worldwide religion.

The name comes from the Greek word *kanon* which means a straight line or a rule. Each of the individual rules that make of the system is known as a "canon." The essential source for the laws of the Catholic Church is known as the Code of Canon Law. There have been two such Codes in the history of the Church. The first was officially published, or promulgated, in 1917, contained 2414 separate canons, many of which were divided into sub-parts or paragraphs. The Code was revised between 1965 and 1983 and the revised version promulgated on January 25, 1983. The new collection of canons reflected the changes mandated by the Second Vatican Council (1962-65) and contains 1752 canons.

The Code does not contain all of the Church's legislation and regulations. From time to time existing canons are changed or dropped and new laws are promulgated. These are not added to the Code as such but are published separately, usually in the official bulletin of the Vatican known as the Acta Apostolicae Sedis or Acts of the Apostolic See. When new laws are passed or existing ones officially changed notice is generally sent to all of the bishops and religious orders throughout the world.

The remote origins of Canon Law reach back to the 4th century. A group of Catholic bishops from Spain gathered at a place called Elvira and held a synod, or meeting, to discuss mutual problems and seek solutions. They ended up passing a series of regulations which

addressed these problems. The canons of the Synod of Elvira, which dates from 309 AD, are generally regarded as the earliest formal church legislation.

Similar gatherings of bishops occurred in every other area where the Catholic Church had been established. It is important to understand that Catholicism was not an established “church” as we know it until the fourth century when it was granted official recognition and privileged status by Emperor Constantine. The papacy was not as we know it today and obviously communication among bishops was minimal. As the church evolved from a movement to an established social and political institution, it had an increasing need for legal structure. By the early medieval period certain church lawyers had gathered the canons passed at various councils and synods into Canonical Collections. These collections were neither systematized nor official but did reflect the types of issues facing the institutional church as well as the various ways the bishops sought to face these problems.

The first systematic study of Catholic Church law was accomplished by a monk named Gratian. He set about gathering the vast array of church laws and published his momentous work in 1140. The official name is the Concordance of Discordant Canons but it is commonly known simply as Gratian’s Decree. The official title aptly describes the work. It consists of several sections that attempt to reconcile, in a dialectic manner, the various strands of information that made up the law of the Catholic Church at the time. Included by Gratian were episcopal and papal decrees, letters, opinions with varying legal weight. He also drew on the writings of the Church Fathers, the scholars and theologians of the first five centuries of Christian history.

Gratian’s work was never given full and official approbation as a Church law book yet it remains the most authoritative historical source of Canon Law. It would not be until 1234 that an official collection of Church laws would emerge with the Decretals of Pope Gregory IX. Early in the 15th Century the most important works in Canon Law, including Gratian’s Decree, the Decretals of Gregory IX as well as several other collections, were combined to form the Corpus Iuris Canonici or “Body of Canon Law.” This collection served as the foundation and backdrop for all lawmaking activities undertaken by Church leaders for the next four and a half centuries.

Official Catholic Church law is not passed by a legislature but by those officeholders with the power to enact laws. Various councils or commissions at the Vatican or elsewhere may draft proposed legislation but it becomes law only when the official legislator gives it life. The only legislator for the universal or worldwide Church is the Pope. In their dioceses individual bishops have the power to create legislation but this power is limited by the Code or by special mandate of the Pope. A local bishop may pass laws in those areas allowed him by the general law of the Church or in those areas specially given him by the Pope. An ecclesiastical judge who makes a decision in a Church tribunal also gives an official interpretation of a specific law for a specific case. In other words, the judge’s determination controls the application of the law to the parties in that case.

Yet, judicial decisions either individually or in numbers do not have the force of determining the objective meaning of a law. In writing their decisions the judges often look to the writings of the commentators on the law. These are scholars who write commentaries on the canons which, though they are not officially approved, serve as a primary means of understanding the law. Other judicial decisions may serve as indicators for the commentators but cannot be construed to be an official interpretation of a law for all cases.

Canon Law and indeed all Church Law is officially interpreted only by the legislator⁷ and not by a “supreme” court that functions independently from the legislator. An official interpretation is made when there is an authentic and objective doubt about the meaning of the law. If there is uncertainty as to how a law is applied in a specific instance, the process for determining the application differs from that followed in the Anglo-Saxon common law. Rather than look to the courts and previous decisions for wisdom, Canon Law relies on the scholarship of the commentators on the canons. The commentaries on Canon Law abound and provide the basis for scholarly articles or opinions on the meaning and application of the various canons of the Code or other examples of official Church Law.

The canons do not have definitive, specific and exact meanings that apply without question to each and every case. They are, by their very nature, impersonal and general. They become personal and specific in the application of the canon to the specific facts of a case. Official interpretations are somewhat rare and actually amount to a fundamental revision of a law so that the end result is actually a new law. Short of promulgating definitive interpretations, inconsistencies in meaning, questions about the application of canons and the resolution of conflicts between canons happens at several levels. There is an official office in the Vatican charged with the management of the Code and other Church laws. The *Pontifical Council for Legislative Texts* provides commentary and guidance on the application of Church laws and oversees the process whereby objective unclear canons are officially interpreted.

On another level the various Vatican congregations, roughly equivalent to governmental cabinets, may issue responses to doubts about a particular canon or section of Canon Law presented to them or other forms of clarification. In most instances these are considered “private replies” in that they are not issued by the pope. Nevertheless such replies have weight in determining how competing meanings are resolved. The most common level of resolution is that mentioned above, namely the resolution of inconsistencies or doubts by means of a study of commentaries by canonical scholars. The last word however, is always the pope.

⁷ The legislator, or law-giver, for the entire Catholic Church is the pope. A Cardinal is a legislator only when he is also the bishop or archbishop of a diocese. After the pope, the bishop or archbishop of a diocese is the law-giver for his diocese within the limitations set by the general law of the Church.

The 1917 Code of Canon Law was divided into five books: *General Norms, Persons, Things, Procedures, Crimes and Penalties*. This division reflects the ancient Roman Law tradition of limiting all laws to *persons, things* or *actions*. Consequently in Canon Law, all of the regulations and norms dealing with Church offices, clerics, religious orders and lay persons are contained in the book on *persons*. Everything about the sacraments is contained in the book on *things*. The 1917 Code was published in Latin which remained the only officially approved language for Church law. While there were numerous translations into various vernacular languages none were deemed official. This changed with the 1983 Code. The primary text was published in Latin but the Vatican allowed other translations to be made, all of which needed Vatican approval to be considered official.

The revised Code (1983) departed from the Roman Law tradition and adopted a more literal division of topics which correspond more realistically to the actual structure and life of the Church. There are seven books in the Code: *I. General Norms, II. The People of God, III. The Teaching Office of the Church, IV. The office of Sanctifying, V. The Temporal Goods of the Church, VI. Sanctions in the Church, VII. Processes*.

Canon Law is a Code system of law and as such is more akin to continental European legal systems than to the common law. Legal historians have grouped the legal systems of the world into *Families*. There generally are three such legal families into which the majority of the systems can be classified: the *Romano-Germanic Family, the Common Law Family and the Family of Socialist Laws*.⁸ The *Romano-Germanic* family is considered to be not only the oldest but in many way the foundation of both the Common Law and the Socialist Laws.⁹

The *Romano-Germanic* family has its remote roots in ancient Roman law. The Roman empire was in a serious decline by the fourth century and its brilliant legal system no longer served as the structural guide for the civilized world of the west and the near east. The Germanic invasions into the former Roman Empire brought other forms of legal custom. The period known unofficially as the Dark Ages, from the fall of the Roman Empire of the west to the 11th century, was a stale era in the development of law. As David and Brierly state, "*In the West, during the dark Ages, there was no teaching of the law; and even for practical purposes, the knowledge of the law was of little use . . . In the shadows of the Dark Ages society returned to a more primitive state.*"¹⁰

⁸ Rene David and John E.C. Brierly, Major Legal Systems in the World Today, Second Edition, (New York, The Free Press, 1978), p. 21-25.

⁹ See H.F. Jolowicz, Roman Foundations of Modern Law (Westport, CT Greenwood Press, 1957), p. 6-20.

¹⁰ Ibid. P. 35.

Western society experienced a significant period of development in the 12th and 13th centuries. There was a remarkable growth in cities, commerce, arts and learning during this period. The universities came to be and the Romano-Germanic legal family came into being in an attempt to bring social organization and justice into a world heretofore marked by feudalism, anarchy and arbitrary rule. In the face of a diversity of local customs and regulatory systems one law presented itself as holding a realistic hope. The Catholic Church was more instrumental than any other single social force in the establishment of the Roman Law as a foundation for the legal structures of secular society because it had based its Canon Law upon the rediscovered fundamental works of Roman law, namely the *Codex Iustinianus*, the *Digestum* and the *Institutis*. These three sources were compilations of the Emperor Justinian, published from 529 through 534. Although Roman Law was essentially the product of a non-Christian culture, its use by the Church and by the Christianized European civilizations was justified by St. Thomas Aquinas (14th century) who taught that it was based on a philosophy that was to a large extent in conformity with Divine Law.

In appealing to Divine Law Aquinas, the foremost Theological scholar in the Catholic Church's tradition, distinguished or separated Divine Law from the rule and regulations of the Catholic Church. The inspiration for his thought on Roman Law was the Greek philosopher Aristotle (384-322 B.C). Divine Law was, for both Aristotle and Aquinas, the fundamental civilizing influence grounded in the author of life. The author of Divine Law is the author of life and not the personal deity of any humanly created religious system.¹¹ The Divine Law, which precedes human law, is also the foundation of natural law which resides in human reason. In proposing that the pre-Christian Aristotelian idea that law based on reason conforms to Divine law, Aquinas bypassed the idea that civil society needed to be based on the Christian concept of brotherly love to be authentic. In sum he taught that although the Roman Law was the product of a secular culture it was nevertheless ordered to a just and civilized society.

Gratian, the foremost architect of the canonical system, was heavily influenced by the structure, concepts and basic systemic integrity of Roman Law. His work., commonly known as the *Decretum* remains the cornerstone of the Canon Law system. In creating his systematic presentation of the laws of the Catholic Church he drew on a vast array of sources that included the secular as well as scripture, the writings of Church scholars and Church enacted laws. The preface of the 1917 Code of Canon Law, written by its primary architect, Pietro Cardinal Gasparri, says: "...*finally he [Gratian] took not a few citations from Roman and Germanic law.*"

¹¹ Stanley Perry, St. Thomas Aquinas Treatise on Law (South Bend, Indiana, Gateway Publications, no date). See p. 38 which cites the Summa Theologiae of St. Thomas, Quest. 93. See also Dino Bigongiari, editor, The Political Ideas of St. Thomas Aquinas (New York: Hafner Press, 1954), p. 3-11.

¹² He wrote at a time when the Catholic Church was the only Christian denomination and therefore integrated into society in a manner much different from today. During the period of the intellectual, social and cultural renewal of the middle ages, Canon Law emerged as the predominant legal system for Church *and* secular society.

*During the middle ages, Canon Law regulated areas that would today be thought of as thoroughly secular, such as business, warfare and marriage. Together with Roman Law, Canon Law formed a coherent and autonomous legal system, the so-called 'ius commune' (European common law). This system was the only legal system that was studied at universities, and during the middle ages it was in fact used in local judicial practice and in producing local law codes.*¹³

This brief look at the historical roots of Canon Law demonstrates that as a legal system it is not the product of purely internal Church doctrine with little or no relationship to the secular world. Canon Law is a legal system that does what any legal system does: it provides order for the visible socio-political structure of the Church and it seeks to regulate the relationships of persons within this structure. As a legal system it has been influenced by Roman law concepts and Christian principles. A good example of the blending of the two is found in the fundamental political structure of the Catholic Church.

Ecclesiastical Law and Secular Legal Systems: Church as Community and Institution

For the first three centuries what we now call a *Church* was essentially a movement of men and women who followed the teachings and example of Jesus Christ as the focal point of their lives. A key aspect of the movement was *community* in that the followers were linked together by their common belief and common commitment to one another. This movement grew and as it did so did a need for structure. The Christian movement became an officially recognized religion in the early fourth century through the recognition of the Emperor Constantine. As it slowly evolved into a political institution existing in the midst of the imperial society the *Church* began to take on aspects of political structure. At that time and for most of the centuries of its existence the dominant form of government was monarchy. Although St. Thomas Aquinas later refuted the notion of the “divine right of kings” this philosophy heavily influenced the formation of Christian political structures. The Church borrowed from the world around it and developed a political-governmental structure that has remained in place throughout its history.

¹² The 1917 or Pio-Benedictine Code of Canon Law. English translation by Edward Peters. (San Francisco, Ignatius Press, 2001), Preface, p. 2.

¹³ Anders Winroth, The Making of Gratian's *Decretum* (Cambridge, Cambridge University Press, 2000), p. 2.

The Church does not define itself as “monarchical” but as “hierarchical” in nature and claims that this model was imposed by God Himself. *Hierarchy* means “holy origin” or “holy dominion.” The concept has been used since the third century at least to describe structure or governmental ordering believed to have been given to the Church by its Creator.¹⁴ Yet historical evidence demonstrates that the concept of *hierarchy* originated not with Jesus but with a disciple of St. Paul, writing about five hundred years after Jesus.¹⁵ Here then we see an appeal to Divine authority to authenticate the adoption of a secular political model for a religious society.

Throughout the history of the development of the Catholic Church’s legal system reference has constantly been made to various legal structures and definitions found in secular legal systems and included in the Church’s canonical body. As it adapted many of these, the tendency on the part of Church authorities was to claim that in doing so, the Church was “Christianizing” secular law. In the Apostolic Constitution that officially published the 1917 Code, Pope Benedict XV said, in reference to the Church, that it had promoted the development of civilization by its own legal system active in secular society. The Pope’s rendition of the influence of Roman Law illustrates the superior attitude of the institutional Church:

*“By these laws and enactments . . . she [the Catholic Church] promoted also most effectively the development of civilization . . . but likewise, with God’s assistance, she reformed and brought to Christian perfection the very law of the Romans, that wonderful monument of ancient wisdom which is deservedly styled written reason, so as to have at hand, as the rule of public and private life improved, abundant material both for medieval and modern legislation.”*¹⁶

There has been an interrelationship between ecclesiastical law and civil law for centuries. The civil law codes of nineteenth century Europe had significant influence on the formulation of the 1917 Code. Secular legal systems continued to have impact even on the revision process leading to the 1983 Code. This influence is most evident in that numerous canons found in both the 1917 and 1983 Codes reflect secular legal principles, constructs or processes.¹⁷ These canons are not expressions of theological truth nor are they part of the body of doctrine held by the

¹⁴ Karl Rahner, editor. Encyclopedia of Theology: The Concise Sacramentum Mundi (New York, Seabury Press, 1975), p. 615.

¹⁵ Hans Kung, The Catholic Church: A Short History (New York, The Modern Library, 2003), p. 9.

¹⁶ Apostolic Constitution *Providentissima Mater Ecclesia*, May 27, 1917, Pope Benedict XV in The 1917 Pio-Benedictine Code of Canon Law, p. 21.

¹⁷ James Coriden, Thomas Green and Donald Heintschel, editors, The Code of Canon Law: A Text and Commentary (New York, Paulist Press, 1985), *General Introduction*, p. 11

Church. They are regulations that help to put order into the institutional life of the Church. While certain canons are direct expressions of theological truths, especially the canons that pertain to the sacraments, the overall purpose of the canonical system is facilitate order. In the Apostolic Constitution that introduced the revised Code, Pope John Paul II said:

*“...the Code is in no way intended as a substitute for faith, grace, charisms, and especially charity in the life of the Church and of the faithful. On the contrary its purpose is rather to create such an order in the ecclesial society that, while assigning the primacy to love, grace and charisms, it at the same time renders their organic development easier in the life of both the ecclesial society and the individual persons who belong to it.”*¹⁸

Canon Law is not a substitute for the secular legal systems. Nevertheless there is historical precedent for the belief that Canon Law supercedes civil law in cases of conflict. The ancient “privilege of the forum” claimed that clerics (deacons, priests, bishops, cardinals) could not be summoned as defendants or accused in civil courts without the explicit permission of Church authorities. Accused clerics were to be tried *only* before ecclesiastical tribunals. Although this privilege had been a source of contention between secular authorities and the Church for centuries it was repeated in the 1917 Code (canon 120) but dropped from the revised Code. Those who violated the canon and summoned a bishop or higher prelate before a secular court in a civil or criminal matter were subject to automatic excommunication (canon 2341).¹⁹

Although contemporary Church law has abandoned these privileges and related penalties, the attitude that supported them remains. For example, responding to the clergy sex abuse scandal and the demand that accused clerics be remanded to civil authorities for investigation and possible prosecution, two highly placed Vatican officials stated publicly that bishops are not required to report sexual abuse by priests to secular authorities.²⁰

¹⁸ Apostolic Constitution, *Sacrae Disciplinae Leges*, Pope John Paul II, January 25, 1983 in James Coriden, Thomas Green and Donald Heintschel, editors, The Code of Canon Law: A Text and Commentary (New York, Paulist Press, 1985), p. xxv.

¹⁹ T. Lincoln Bouscaren, Adam Ellis, Francis Korth, editors. Canon Law: a Text and Commentary (Milwaukee, Bruce Publishing, 1963), p. 106 and 925.

²⁰ See Reese Dunklin and Brooks Egerton, Dallas Morning News, October 22, 2002. The two were Archbishop Tarcisio Bertone, then secretary to the Congregation for the Doctrine of the Faith which was presided over by Cardinal Ratzinger, now Pope Benedict XVI and Archbishop Julian Herranz, President of the Pontifical Commission for Legislative texts. Both men are now Cardinals. Bertone is archbishop of Genoa and Herranz retained his Vatican office.

In a related though not identical matter, bishops of two dioceses have appealed to the superiority of Canon Law in determining the ownership of Church property. Archbishop John Vlazny of Portland Oregon stated publicly that he would follow Church law in spite of a civil court ruling which stated that ownership in secular society follows civil law.²¹ On the other side of the same issue, Vatican authorities upheld the Boston archbishop's right to close parishes and seize their assets. The Boston parishioners had appealed to the same canonical ruling to justify their assertions of ownership that the archbishop of Portland had used to resist the civil court's ruling.

The existence and authority of civil law are acknowledged in the Code itself in canon 22 which says:

*Civil laws to which the law of the Church defers should be observed in Canon Law with the same effects, insofar as they are not contrary to divine law and unless it is provided otherwise in Canon Law.*²²

The Church's internal regulatory system is not a theological document nor is it an article of faith that must be believed by Catholics. It is a collection of internal rules, regulations and norms that give concrete shape to the institutional Church. It is true that certain of the individual laws, or "canons" are directly or indirectly related to theological or religious concepts but then this is also true of the certain aspects of many secular legal systems including our own United States Constitution. This does not mean that the legal system itself is a catalogue of the religious beliefs of Catholics. The Code describes the various offices, bodies and internal political structures of the Catholic Church. It presents the duties, responsibilities and qualifications for the various offices and positions in the Church. It contains a section on procedural laws for settling disputes and providing due process. It contains a section of criminal behavior which lists certain actions that are considered church crimes.

Canon Law has no definitive role in the judicial resolution of Church disputes in the civil courts. This point was made abundantly clear in the Spokane and Portland cases where the judge determined that Canon Law was irrelevant to the resolution of the disputes. Even in the Republic of Ireland, where the Roman Catholic Church has been given a privileged place in the Irish Constitution, Canon Law is not welcomed in the civil courts as a determinant in resolving disputes. This was clearly stated by an Irish judge who, when confronted by an attempt by the

²¹ William McCall, Associated Press in Corvallis Gazette-Times, January 8, 2006, "The leader of the Roman Catholic Archdiocese of Portland says the church will follow its own law on ownership of its property despite a ruling by a federal bankruptcy judge declaring it potentially subject to sale to satisfy claims by victims of alleged priest sex abuse."

²² Coriden, Green and Heintschel, p. 38.

Church's barrister to appeal to Canon Law stated that "*Canon Law has as much relevancy in this court as golf rules.*"

Canon Law has been used in civil cases to explain and clarify the internal organization of the Catholic Church. It can help to understand the meanings of words unique to the Church and even the definition of certain titles and offices, especially when members of the hierarchy invoke Canon Law. When it is presented in civil court the purpose is not to expect the civil judges to interpret, apply, critique or explain Canon Law. Rather, the purpose is to assist in understanding how the institutional Church works. For example, Canon Law contains specific procedures that are mandatory for the investigation of reports of possible canonical crimes such as sexual abuse of minors by clergy. It also contains the basic requirements that bishops should look for in assigning priests to various posts. When the facts of a case are examined in civil court, Canon Law can be helpful to determine what the Church's own internal expectations were of an officeholder in a given situation. The constitutional separation of Church and State does not prevent a civil court from using Canon Law as a resource in understanding the internal ordering of the Catholic Church in general or of specific parts such as dioceses or religious orders. It can also act as a frame of reference for expected behavior when the courts study past and current practices of a Church-related organization.

The history of the development of Canon Law and the historical evidence that it was heavily influenced throughout by secular legal systems shows that it is not a unique creation of the Church nor is it a direct reflection or expression of theological realities.

The Church's internal regulations can often determine how Church officials respond to civil law in certain circumstances. The canonical regulations also help to understand areas of responsibility and lines of authority especially when such issues are disputed in the civil forum. Two recent examples help to illustrate this point.

Certain bishops have claimed that diocesan priests are "independent contractors" and therefore outside the bishop's control when not performing their official ministerial duties. Certain sections of Canon Law clearly show that this is hardly the case and that diocesan priests are, in fact, under almost total authority of their bishops. The Canon Law is evidence of the actual relationship between various actors in the Church and can help explain the actual practices despite the theories introduced in the context of a legal dispute in the civil, or secular court.

The other example concerns schools operated by religious orders. Although some bishops have claimed that such schools are totally outside of the scope of their authority the Code is clear that the opposite is true. In bringing these and other examples to the attention of a civil judge, the sole purpose is to show what the Church itself says about and expects in certain situations. The judge is not asked to do what only the Pope can do, that is, provide an official interpretation of Canon Law. He or she may however, look at the internal regulation pertinent

to the case as well as the actual pattern and practice of the Church officials and come to the conclusion that, although he or she is not acting as a canonical judge, that the internal regulations appear not to have been followed.