

Canon law and the recommendations of the Royal Commission

Rik Torfs

Brief remarks about the canon law recommendations that were contained in the Royal Commission's final report

The Royal Commission made a lot of valuable suggestions with regard to the improvement of the canon law legal system and thus prohibiting or combating properly child sexual abuse in the church. Before making a brief analysis of several of the suggestions, it is important to formulate the lines along which a coherent reasoning on this issue should be developed.

A first element is the necessity to safeguard the already existing human rights standards as currently formulated in canon law.¹ This seems to be obvious at first glance. Yet, the legitimate concern for punishing perpetrators and assisting victims could lead to a weakening of already existing standards. Some important legal principles of paramount importance for a healthy human rights policy are rather new in the church and deserve strong support.² Just a few examples: the obligations and rights of Christian faithful as such have been formulated for the first time in the history of canon law in canons 208 to 223 of the *1983 Code of Canon Law* (CIC 1983).³ They are not perfect, and their concrete implementation is partly dependent on a not always efficient procedural system.

Among the improvements that have existed since 1983, we find canon 221 §3: 'The Christian faithful have the right not to be punished with canonical penalties except according to the norm of law.' This principle is quite different from Canon 2222 in the *1917 Code of Canon Law* (CIC 1917), which under certain circumstances allows a punishment without a previously existing legal norm. Canon 221 §3, formulating the principle of legality for the first time, remains endangered even within the framework of the CIC 1983 itself. Indeed, canon 1399, the concluding canon of Book VI dealing with sanctions in the church goes as follows:

In addition to the cases established here or in other laws, the external violation of a divine or a canonical law can be punished by a just penalty only when the special gravity of the violation demands punishment and there is an urgent need to prevent or repair scandals.

It goes without saying that this norm is incompatible with canon 221 §3. In case we admit the formal superiority of fundamental rights to other norms of the code and of canon law as a whole, this canon should even be considered as lacking all force. Yet, this interpretation of the current canon law system is not unanimously shared. At the same time, we note that bishops and other church authorities hesitate to make use of canon 1399, since transgressing the principle of legality within the structures of the Roman Catholic Church endangers its credibility in the secular legal world and in public opinion.

Another norm, with roots in both older canonical legislation and Roman law, is canon 1313 concerning possible retroactivity of penal norms.⁴ Canon 1313 §1 says: 'If a law is changed after a delict has been committed, the law more favourable to the accused is to be applied.' Penal norms can only be retroactive in case they are positive for the accused. This principle, not new in the church, was and is indispensable to be in line with modern human rights standards. To sum up, my first point is: whatever you do, never weaken or put into danger the human rights culture within the church.

1. Cf. Torfs, R. (1995). *A Healthy Rivalry: Human Rights in the Church*, Peeters Press/WB Eerdmans, Leuven, IV and 125; Torfs, R. (1999). 'Rights in Canon Law. Real, Ideal or Fluff?', in Canon Law Society of America. (1999). *Proceedings of the Sixty-First Annual Convention*, October 4–7, Minneapolis, Minnesota, CLSA, Washington, DC, 343–384.

2. See Hamel, E. (1984). L'Église et les droits de l'homme. Jalons d'histoire, *Gregorianum*, 65, 271–299.

3. Torfs, R. 'Human Rights in the History of the Roman Catholic Church', in van der Ven, J A., and Zierbertz, H G., (eds.). (2013). *Empirical Research in Religion and Human Rights. Human Rights and the Impact of Religion*, 3, Brill Leiden/Boston, 55–74.

4. Torfs, R. (2009). Rétroactivité des peines canoniques, *Revue de droit canonique*, 59, 183–199.

A second element is an equally urgent necessity to improve the current quality of canonical principles and techniques, norms and standards. Yes, more transparency is required. Yes, better procedures are a necessity. And a true separation of powers cannot be avoided any more in the church. What is important is that the two lines ultimately join each other. They should both be seen from a human rights perspective. While maintaining the existing norms that go in the direction of a full protection of human rights, other norms not yet meeting those standards should be added. I shall argue that there is no reason to see an opposition between human rights in the church and a consistent and solid canonical legal system.

With regard to several of the Royal Commission's canon law recommendations, a separate remark should be made. Recommendation 16.13 is formulated as follows:

The Australian Catholic Bishops Conference should request the Holy See to amend the "imputability" test in canon law, so that the diagnosis of paedophilia is not relevant to the prosecution of or penalty for canonical offense relating to Church sexual abuse.

It is true that in the church, imputability does not have the same content and the same implications it has in most secular legal systems. To summarise it briefly, one can say that in a secular system, imputability is more easily accepted, fewer requirements have to be fulfilled. Conversely, canon law accepts many reasons to avoid imputability. And I understand very well that some people consider this to be a weakness. By the way, church authorities themselves also seem to be thinking in a similar direction, as proposals for remodelling the canon law penal system are considerably stricter than has been the case up until now. This being said, the current position of the church still is that punishing people is not always a good idea. This principle is present in canon 1341, where the penalty is clearly perceived as a last solution, an *ultimum remedium*:

An ordinary is to take care to initiate a judicial or administrative process to impose or declare penalties only after he has ascertained that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, reform the offender.

This canon is not without danger, as pastoral solutions seem to have priority over correctly doing justice to people. The same hesitation with regard to punishment is present when liability is at stake. The first canon covering this topic, canon 1321 §1, is clear in that regard: 'No one is punished unless the external violation of a law or precept, committed by the person, is gravely imputable by reason of malice or negligence.' This leads to many excuses; the list of exceptions contained in canon 1323 is impressive. Moreover, canon 1324 describes many situations in which violation of the norm does not lead to exemption from a penalty, but to a tempered punishment or a penance. Some of those reasons are more than debatable. For instance, canon 1324 §1, 9° foresees a tempered penalty for a person who without negligence did not know that a penalty was attached to a law or a precept. Most secular systems reject such a principle and use the presumption *iuris et de iure* that every person is supposed to know the law. To put it briefly, it is certainly true that the liability question in canon law should be reconsidered. Yet, there can also be good reasons to maintain some differences with secular legal systems, as long as two principles are clearly kept in mind.

The first principle is that, as a result of the legal procedure, the perpetrator should in any case be of no danger anymore to potential victims. Whether there is penal imputability or not should be *de facto* irrelevant in that regard. Both the perpetrator who is ill and thus not liable, and the perpetrator who is responsible for his deeds should be treated equally when it comes to the potential danger they can cause. In my own country, some people consider it to be a success when, after a long legal trial, the tribunal recognises the imputability of the crime to the perpetrator. Here I think the truth is more important than the psychological feeling of family and friends of the victim. Or the victim himself, if he is still alive. So, I come back to the recommendation: Should the diagnosis of paedophilia be irrelevant to the prosecution? Here the answer is more medical than it is legal, but the result should be the same when it comes to the safety of future victims. To put it in yet another way, it should be possible to punish perpetrators for what they did by, for instance, losing their office or being laicised. Yet both solutions can also be available as a result of a medical diagnosis not leading to penal imputability yet resulting in the loss of an office or a laicisation.

The second principle that should be preserved by all means is the position towards the victim. The recognition should be the same, including financial compensation, whether or not the perpetrator can be held liable for his crimes. If the perpetrator is not responsible himself, because of illness for example, the church as an institution should take up this responsibility. Changing canon law in that regard is recommendable.

Recommendation 16.12 says:

The Australian Catholic Bishops Conference should request the Holy See to amend canon law to remove the time limit (prescription) for commencement of canonical actions relating to child sexual abuse. This amendment should be applied retrospectively.

Both elements of the recommendation are problematic, especially the latter one. Yet, legal constructions can be made to circumvent the problem and still lead to good results when it comes to content. Why are both elements of the recommendation problematic? Lifting any penal prescription is not unique in the legal world. Crimes against humanity are, also in an international context, no longer subject to prescription. From a moral viewpoint, lifting prescription in more cases than today is very understandable. But then again, it is good to have a look at the more positive side of this very old institution with deep roots in ancient legal systems such as Roman law. At first glance, prescription is the opposite of justice, because the intrinsically bad is finally excused after a certain lapse of time. Yet is it psychologically possible for humans to be always under a lifelong threat of punishment because of a crime committed half a century ago or even longer? Theorists of prescription hold the opinion that ultimately prescription is more just than justice itself when it takes too much time to achieve it. At some stage, people need the normalisation of a situation. The empty space before a new start. It is also true that today, secular society fostering stricter moral standards than in the previous century puts pressure on the old and historic notion of prescription.⁵ This issue will probably be the object of debate in the coming years.

Another question that emerges when it comes to the lifting of prescription is whether the death of the accused forms the ultimate frontier. In other words, could a victim claim a compensation after the accused has passed away? Some people would say yes to this question, as the pain of the victim does not depend on the coincidental circumstance of whether the accused is dead or alive. He can die young, or he can live a very long time. However, an important point remains that an accused who has passed away cannot defend himself any longer. Unless he reported his crime in a written document before he died, it seems to be very difficult to find him guilty afterwards.

Apart from principle reasons pleading in favour of prescription, practical arguments can also be invoked. The longer ago a fact took place, the more difficult it becomes to remember it properly. Human memory reforms and reshapes facts of the past. It is generally known that souvenirs of youth

are often interpreted as more positive and colourful than they were at the moment of the facts. That has always been a second and more practical reason to be very cautious in the lifting of prescription for too many crimes in too many cases. We should be able to strike a good balance between these remarks that plead in favour of prescription, and moral indignation offering arguments to rule it out.⁶

The second part of the recommendation pleads in favour of a retroactive application of the lifting of prescription. One should be very well aware of the consequences of such a move. It would mean that a person, who possibly committed a crime, but after prescription of the latter is in a safe situation, would qualify for prosecution again after a period of complete safety. I am afraid that such a recommendation is incompatible with human rights and long traditions in penal law. Of course, by making use of canon 1399 quoted above, church leaders today already can punish without an underlying law and neglect the principle of prescription for a higher good, for instance to avoid scandal. Yet in doing so, the church would abandon the positive steps made in CIC 1983, accepting the principle of legality for the first time in history. Retroactive norms would be a step backwards and would enlarge the cleavage between the canonical legal system and the rule of law.⁷ In that regard, notwithstanding all good intentions, I regret

5. Also in a remote past, some experts were already advocating non-prescription for 'cruel' crimes remaining in people's memory. See Beccaria, C. (1869). *Des délits et des peines*, Librairie de la bibliothèque nationale, Paris, 128. Cesare Beccaria (1738–1794) was a famous philosopher, politician and penal law expert.

6. Prescription as such is not part of a fundamental right. Where it exists, it should of course not be equally applied to all crimes. See Nihman, A. (2008). *Juger à temps. Le juste temps de la réponse pénale*, L'Harmattan, Paris, 604.

7. Not only a penal law, yet also a new interpretation of an existing law never should be applied retroactively, see ECHR. (2012, 10 July). *Del Rio Prada v Spain*.

that in the 2010 *Normae de delictis contra fidem necnon de gravioribus delictis*, article 7 §1⁸ *in fine* allows the Congregation for the Doctrine of the Faith to derogate from prescription in individual cases. It is a mirror of canon 1399 CIC 1983.

Whereas I am very hesitant with the lifting of prescription and I cannot accept retroactivity, I think other solutions can be found to control the perpetrator and to help the victim when it comes to crimes of the past. With regard to the victim, financial compensation remains possible, even after penal prescription, when the damage caused by the act can be proven. Here, canon 128 can be very useful: 'Whoever illegitimately inflicts damage upon someone by a juridic act or by any other act placed with malice or negligence is obliged to repair the damage inflicted.' Prescription is not even an issue if the damage continues to exist. This canon could be strengthened by a commitment of the church to make provision for financial compensation when the perpetrator is unable to do so.

With regard to the accused saved by prescription, it is clear that he remains morally responsible for what he did. If it becomes clear that he committed the crime, for instance as a result of public confession or a secular penal trial, a bishop can take administrative measures against the priest, and could also invite him to apply for laicisation himself, a technique which has not been used enough up to now. In other words, it is possible in my opinion to reconstruct the retroactive lifting of prescription by other techniques including the paying of damages, taking administrative measures, and inviting priests on moral grounds to take up their own responsibility. Is the solution fully equivalent to the strict and radical result of the recommendation? Probably not fully, yet we should not forget that we are in a period of transition, and that a better and stricter legislation will apply on all cases in the future. A lawyer is not always able to solve every single problem of the past in a way that is completely waterproof, bringing justice to the victim and the accused while safeguarding the quality of the legal system.

Recommendation 16.10 is formulated as follows:

The Australian Catholic Bishops Conference should request the Holy See to amend canon law so that the pontifical secret does not apply to any aspect or allegation or canonical disciplinary processes relating to child sexual abuse.

It goes without saying that child sexual abuse is not a topic that should be protected by the pontifical secret. Moreover, the current norm that when it comes to child sexual abuse, priests can only be confronted with and judged by their peers is a very bad idea and gives the impression, even if reality is different, of lack of openness, covering up and mutual protection. One can even argue that giving laypeople a more important role in canon law cases involving priests accused of child sexual abuse also offers an additional guarantee to the priests themselves who all have an interest in being judged in an open system without hidden codes and subtle mechanisms implicitly playing a part in the decision making.

Recommendation 16.9 goes as follows:

The Australian Catholic Bishops Conference should request the Holy See to amend the CIC 1983 to create a new canon or series of canons related to child sexual abuse, as follows:

- a. All delicts related to child sexual abuse should be articulated as canonical crimes against a child, not as moral failings or as breaches of the (special obligations) of clerics and religious to observe celibacy.
- b. All delicts related to child sexual abuse should apply to any person holding the 'dignity, office or responsibility in the Church' regardless of whether they are ordained or not ordained.
- c. In relation to the acquisition, possession or distribution of pornographic images, the delict (currently contained in Art 6 §2 1° of the revised 2010 norms attached to the *motu proprio Sacramentorum sanctitatis tutela*) should be amended to refer to minors under the age of 18, not minors under the age of 14.

With regard to (a), I fully agree with the principle that child sexual abuse is a crime and is not just a consequence of failure to observe celibacy. I would suggest that it is better to remain sober in formulating the crime, because the more detailed the set of norms, the weaker the protection may become as a result of canon 18, stating that laws which establish a penalty are subject to strict interpretation. This means for instance that an interpretation *a similibus* or the reading of a penal norm as non-exhaustive in the examples it quotes, is impossible. A detailed penal norm trying to envisage every possible crime is very likely to omit some of them.

8. *Salvo iure Congregationis pro Doctrina Fidei a praescriptione derogandi pro singulis casibus, actio criminalis de delictis Congregationi pro Doctrina Fidei reservatis praescriptione exstinguitur spatium viginti annorum.* http://www.vatican.va/resources/resources_norme_it.html

With regard to (b), I fully agree that all delicts should apply to any person holding any dignity, office or responsibility in the church. In the CIC 1983, only clerics were potential perpetrators of child sexual abuse. There are two reasons for this. The first is the already mentioned unhappy qualification of these crimes as delicts against special obligations (i.e. as failures to observe the priestly obligation of celibacy). The second is that at the time when CIC 1983 was promulgated, laypeople were less active in the church, certainly on a professional basis, than they are today. From a historical perspective, it is understandable that according to canon 1333 §1, suspension can only affect clerics.

The suggestion formulated in point (c) can be followed. One could ask oneself the question whether a distinction should be made between the nature of the images, the different age categories, or the position of secular penal law in the country where the delict has been committed. This question should be studied properly. Of course, a distinction is meaningless when, as suggested elsewhere, the crime always leads to the same radical sanctions without taking into account age and other circumstances.

Recommendation 16.11 states:

The Australian Catholic Bishops Conference should request the Holy See to amend canon law to ensure that the 'pastoral approach' is not an essential precondition to the commencement of canonical action related to child sexual abuse.

I fully support this recommendation. Two misunderstandings should be ruled out. The first is the idea that a conflict should always be tackled in a peaceful way and that a negotiated solution is better than a legally enforced one. While this may be true for administrative conflicts as described in canon 1733, it is completely wrong when it comes to criminal acts. Transgressing a criminal law is different from having a difference of opinion with one's bishop or other hierarchical superior. It must be noticed however, that in the years during which CIC 1983 was being drafted, secular penal law experts and criminologists in some jurisdictions fostered the idea of a penalty that would be negotiated between the perpetrator and the victim. Clearly, however, that path has been abandoned.

Also, in the days of the drafting of the 1983 Code, penal norms were not popular. Some argued, referring to ecclesiological concepts such as the church as the People of God, that penalties were not appropriate in a loving community such as the church. Arguments were even invoked in favour of suppressing penal law altogether. The alternative, according to some, was a pastoral approach. Today it is very clear that the opposition of a legal to a pastoral approach was an artificial one. Obviously, a refusal to implement the law is not a pastoral attitude. The opposite is true. Being pastoral means in the first place accepting everybody's rights, *ius suum cuique tribuere*.⁹ A pastoral approach that leaves the legal norms aside, strengthens the discretionary power of the pastor. He chooses whether or not, and when, legal norms enter into the discussion. What this means is that a pastoral approach very often comes down to a form of arbitrary behaviour.

Recommendation 16.14 is formulated as follows:

The Australian Catholic Bishops Conference should request the Holy See to amend canon law to give effect to Recommendations 16.55 and 16.56.

These recommendations foster a very strict enforcement of norms prohibiting child sexual abuse, including the permanent removal from ministry of perpetrators as mentioned in Recommendation 16.55. Recommendation 16.56 advises, with regard to Catholic priests and religious, to dismiss them from the priesthood, and/or or dispense them from their vows as a religious.

Two remarks can be made in this regard. A first question to examine is whether all perpetrators should receive equal punishment. One could imagine stricter implementation of penalties to some than to others. There certainly is a difference between sexually abusing a young child and having one single sexual contact with a person who is close to 18 years old. I understand very well the firm attitude as set forward by the recommendations. Tolerant behaviour is certainly not the right solution. Yet the question can be asked whether an equally radical punishment for every crime shows sufficient refinement and ultimately does justice. One could imagine for instance that for some, found guilty of a less heinous delict, another solution than a permanent removal from ministry. A solution may be a permanent prohibition against having contact with young people, or a prohibition against having contact with all people, the perpetrator being confined to a merely administrative job. I realise that this theoretical possibility is very difficult to

9. The source can be found in Justinian's *Institutiones* (Inst. 1, 1, 3–4).

implement in an era characterised by many people feeling shocked by the behaviour of some priests, and rightly so. Yet, the (theoretical) possibility of a differentiated approach should at least be examined in all openness.

A second question deals with the recommendation formulated in Recommendation 16.56: should Catholic priests be dismissed from the priesthood?¹⁰ While this punishment very often seems to be just given the seriousness of the crime committed, and while it is increasingly implemented today, laicisation also has disadvantages. These were spelled out among others by the American canon lawyer John Beal.¹¹ Indeed, there is an important difference between a priest no longer having an office or not being authorised to be in touch with the Christian faithful on the one hand, and a priest being laicised on the other. In the first hypothesis, the bond of incardination between the priest and his bishop or other superior still continues. Having an office or not is irrelevant in that regard. The underlying relationship of incardination remains intact, including the obligation of obedience the cleric has towards the bishop (canon 273, CIC 1983). To put it yet in another way, the bishop still keeps control over the cleric, over how he lives and what he does. However, if the perpetrator is laicised after having been found guilty of the crime he committed, the last link with his hierarchical superior is suppressed. There is no more possibility of control that the bishop can exercise. Certainly, the punishment is more radical. Yet, the laicised priest is completely free to do what he wants to do in society. From that perspective, he may be more dangerous to children and there may be a possibility of new abuse cases once he is laicised. Is this a reason not to implement laicisation any longer? I do not think so. The possibility should remain, including the priest asking for laicisation himself. Yet it is not an entirely positive story, the pros and cons should be balanced carefully.

Child sexual abuse can be tackled by canon law in various ways and at different levels.

The Royal Commission decided not to make recommendations for changes to particular canon law for Australia, but rather to seek clarification or reform of certain issues at the level of universal law.

This approach has both advantages and disadvantages. The advantage is that aiming at universal law is more effective. A strategy making use of the possibilities offered by particular law will always be limited in its possibilities. Canon 135 §2 *in fine* is clear in that regard: 'A lower legislator cannot validly issue a law contrary to higher law.' Universal law always prevails. What does this mean exactly? Sometimes the answer is easy. A simple example to illustrate the point: A particular legislator accepting women for ordination will be stopped immediately by canon 1024, which states that 'a baptised male alone receives sacred ordination validly.' This is a very clear case which becomes even more dramatic by the fact that since the apostolic letter *Ordinatio Sacerdotalis* of 22 May 1994, the impossibility of ordaining women to the priesthood is seen as belonging to the divine constitution of the church.

The concrete space available to a particular legislator is not always as large as it seems, although there are possibilities. These are clearly formulated in canon 1315, especially §1 and §3. Canon 1315 §1 goes as follows: 'A person who has legislative power can also issue penal laws; within the limits of his competence by reason of territory or persons, moreover, he can by his own laws also strengthen with an appropriate penalty a divine law or an ecclesiastical law issued by a higher authority.' At first glance, this sounds promising for the Australian bishops. But two elements should be taken in to account. Firstly, the particular legislator remains bound by the legislator of universal law (the pope). I will come back to this issue later. Secondly, canon 1315 §1 should be interpreted in the light of canon 455 §1. The conference of bishops can only act in cases where universal law has prescribed it, or a special mandate of the Apostolic See has been issued. In all other cases, the individual bishop, and not the conference, is competent.¹²

Canon 1315 §3 adds some other possibilities, yet at the same time it warns of the need to remain cautious:

Particular law also can add other penalties to those established by universal law for some delict, however, this is not to be done except for very grave necessity. If universal law threatens an indeterminate or facultative penalty, particular law can also establish a determinate or obligatory one in its place.

10. See Ingels, G. (1999). Dismissal from the Clerical State: An Examination of the Penal Process, *Studia Canonica*, 33, 169–212.

11. See Beal, J. P. 'At the Crossroads of Two Laws. Some Reflections on the Influence of Secular Law on the Church's Response to Clergy Sexual Abuse in the United States', in Torfs, R., (ed.), (2000). *Canon Law and Realism. Monsignor W. Onclin Chair 2000*, Peeters, Leuven, 51–74.

12. Canon 455 §1 of the 1983 *Code of Canon Law* provides that: 'A conference of bishops can only issue general decrees in cases where universal law has prescribed it or a special mandate of the Apostolic See has established it either *motu proprio* or at the request of the conference itself.'

Particular legislators should in any case take two points into account. Firstly, they cannot limit the rights accorded to the Christian faithful in general and to clerics in particular by issuing particular norms with or without a penal character. Could the bishop issue a penal norm prohibiting a priest buying a Porsche Targa? In my opinion, the answer is no. Certainly, canon 282 §1 says that clerics should foster simplicity of life and ought to refrain from all things that have a semblance of vanity. But this norm is not precise enough to forbid the Porsche Targa. Every priest also has a free zone in his life and is protected by canon 220 guaranteeing his privacy. In other words, a bishop does not only have the obligation to literally respect universal law, he should also safeguard the liberties and free zones as set forward by the latter.¹³

Secondly, particular legislators remain limited in their possibilities to impose a wide range of sanctions. Indeed, they are not allowed to impose the most radical penalties as canon 1317 *in fine* makes clear: 'Particular law, however, cannot establish a penalty of a dismissal from the clerical state.'

To sum up, given the restricted possibilities available to particular law, the Royal Commission's decision to focus on the universal legislator was a good idea.

Yet, appealing to the universal legislator also has disadvantages. The chances of being heard with anything more than just some kind attention or some sympathy are more remote. Changing universal law, as recent history has shown, remains a difficult and hazardous operation. It is true that Pope Francis is less hesitant in this regard than his predecessors, Benedict XVI and even more so John Paul II. But then again, achieving a change of universal law affecting the Catholic Church everywhere in the world will be a difficult and slow operation.

Another potential disadvantage could be that the higher the level of discussion, the more general the principles and theological considerations that will be made. It would not be the first time that elements of divine law entered into a discussion that began at a much lower level. A good example is offered by the Apostolic Letter *Ordinatio Sacerdotalis* of 1994, which would never have been issued without the Church of England allowing women to enter the priesthood. Only at that moment, the Roman Catholic Church clearly stated that the impossibility of female ordination to the priesthood was part of the divine constitution of the church.¹⁴

An intermediate approach that I would suggest myself, is the possibility of authorising more local variation under the overall umbrella of universal law. We can see today that this suggestion is made more often than in the past, increasingly also by diocesan bishops. What does it mean exactly? Perhaps all evolutions in the church should not develop simultaneously in all places in the world. One example is compulsory celibacy for diocesan priests. Waiting for a universal solution means that a conservative reflex will prevail for a very long time. Changes of universal law only become plausible if more or less all continents and countries can cope with the renewal. Yet, if the issue – which is clearly not of divine law, given the fact that for more than one millennium compulsory celibacy of priests was not always enforced or punished – is left to local episcopal conferences, non-simultaneous and culturally well-adapted decisions can be taken. I personally think that this strategy, granting more autonomy to the particular churches without giving up unity when it comes to essential matters, is the best way to arrive at slow and credible changes. An important issue will be: how courageous is the universal church? How quickly will it invoke divine law as an argument not to change anything, nor to delegate the decision-making to particular legislators? In this regard, the non-possibility of ordination of women seems to be blocked for a long time by the theological statement that the divine constitution of the church is at stake.

13. See Schmitz, H. (1990). 'Professio fidei' und 'iusiurandum fidelitatis'. Glaubensbekenntnis und Treueid, Wiederbelebung des Antimodernisteneides?, *Archiv für katholisches Kirchenrechts*, 159, 395.

14. Pope John Paul II, Apostolic Letter, *Ordinatio Sacerdotalis*, On Reserving Priestly Ordination to Men Alone, 22 May 1994, http://w2.vatican.va/content/john-paul-ii/en/apost_letters/1994/documents/hf_jp-ii_apl_19940522_ordinatio-sacerdotalis.html. In number 4, the pope states: 'Wherefore, in order that all doubt may be removed regarding a matter of great importance, a matter which pertains to the Church's divine constitution itself, in virtue of my ministry of confirming the brethren (cf. Lk 22:32). I declare that the Church has no authority whatsoever to confer priestly ordination on women and that this judgment is to be definitively held by all the Church's faithful.' See also Cito, D. (1995). Lettera Apostolica sull'ordinazione sacerdotale da riservarsi soltanto agli uomini, 22 maggio 1994, con nota di D Cito, *Ius Ecclesiae*, 7, 347–353; Ferme, B. (1996). The response (28 October 1995) of the Congregation for the Doctrine of the Faith to the dubium concerning the Apostolic Letter 'Ordinatio Sacerdotalis' (22 May 1994): Authority and significance, *Periodica*, 85, 689–727; Raberger, W. (1996). Ordinationsfähigkeit der Frau?, *Theologisch-praktische Quartalschrift*, 144, 398–411; Torfs, R. (1994). *Ordinatio sacerdotalis*. Kanttekeningen bij een definitief afgesloten discussie, *Onze Alma Mater*, 47, 282–302.

But even divine law should be scrutinised in more depth. The Austrian canon lawyer Helmuth Pree wrote about this point and evoked some examples of norms once considered of divine origin, that eventually changed.¹⁵ The evolution of ideas about the goals of marriage can serve as an illustration. Historically, *procreatio* and *educatio prolis* (procreation and the education of offspring) were considered to be the first goal of marriage underpinned by divine law. Vatican II changed that order as one can read today in canon 1055 §1, putting the good of the spouses on the same level as procreation and education of offspring.¹⁶ As if God changed his mind. Later on, I will discuss a few issues where divine law seems to be directly or indirectly involved. Bringing clarity to that discussion is very important for a future positive evolution of canon law.

A last advantage of leaving more matters to the appreciation of the particular legislator than happens today, is a better interconnection between canon law and civil law. Although the church, as a result of freedom of religion, enjoys the right to organise itself according to its own theological standards and principles, it remains important to enter into a fruitful dialogue with secular legislation, the priorities it makes, and the way it evolves. I am certainly not saying that secular law should always prevail. There may be cases in which canon law does not follow and prefers to punish its ministers itself, considering compliance with the secular legislation unjust. However, in a democratic state that accepts the rule of law, these situations will be rare. An interpretation of certain canonical norms in the light of the existing secular legislation can be an interesting hermeneutical operation, without, of course, abandoning religious freedom and the theological insights of the church.

To conclude: although focusing on a change of universal law can lead to better results than just looking at the particular situation, probably the best way forward is insisting on giving more autonomy to local churches in matters dealt with, up until now, exclusively at the universal level.

In this section I would like to make a last remark on the possibilities of customary law. I do know that in practice, customs are limited to the realm of liturgy. That is what Giorgio Feliciani held already a long time ago. But there is no reason to stick to that limited application. Looking at the position of custom in the CIC 1983, there is room for a more all-encompassing approach. The legal position of custom is dealt with in canons 23–28. This means that, in terms of how the code is structured, the section on customary law immediately follows the section on ecclesiastical laws (canons 7–22). Not only do canons 23–28 provide for the possibility of creating customs *praeter legem* (outside the law), but also *contra legem* (contrary to the law). Certainly, canon 24 §1 says: ‘No custom which is contrary to divine law can obtain the force of law.’ But then again, where exactly can the limits of that divine law be situated? Moreover, one often overlooks the remarkable possibility of canon 26, which says that a custom needs 30 years to obtain the force of law, ‘unless the competent legislator has specifically approved it’. In other words, the legislator can speed up a custom on its way to becoming law. Obviously, customs remain vulnerable and the legislator can always make them disappear by issuing new legislative norms. But even then, the fact that the custom emerged and possibly was approved, was a signal to the universal legislator that something was going on, and that adapting his norms or his policy might be a good idea.

Key issues for renewal in canon law. From an (implicit) *societas perfecta* model to a fruitful interaction between canon law principles and both secular law quality and governance standards.

1. Clericalism

The Royal Commission rightly blames the culture of clericalism in the Roman Catholic Church as an important cause of its failure in dealing properly with child sexual abuse. This culture of clericalism is supported by different elements that, together, make a transparent and open legal approach problematical. The first reason has deep historical roots. Already at the end of the eighteenth century, Catholic thinkers such as Franciscus Rautenstrauch (1734–1785) promoted the idea of the Catholic Church as *societas perfecta* or perfect society.¹⁷ The term was used as an answer to Protestantism seeing

15. Pree, H. (1996). *Ius divinum* Between Normative Text, Normative Content, and Material Value Structure, *The Jurist*, 56, 50. Pree rightly states that there is no *ius mere divinum*. Rather, there is always a *ius divinum* grasped only within a human situation and language. In *ius divinum* the divine foundation mixes with the human element. Pree is very clear on this: *ius divinum* is to be considered both as the substratum of legal truth that underlies positive canon law and as the fundamental legal orientation. It is not an already given code of norms.

16. Hannon, P. (2002). Theological Reflections on ‘the Good of Spouses’ (can. 1055 §1), *Irish Theological Quarterly*, 67, 351–364.

17. See also Granfield, P. (1982). The Rise and Fall of *Societas Perfecta*, *Concilium*, 7, 3–9; Torfs, R. (1999). The Roman Catholic Church and Secular Legal Culture in the Twentieth Century, *Studia Historiae Ecclesiasticae*, 25, 1–20.

the church as a collegium within the state. Catholics didn't like this notion and tightened the idea of *societas perfecta* later, after the loss of the Papal States as a result of the unification of Italy in 1871. The further the church was away from a real state, the more theoretical thinkers insisted on the church being a perfect society. One of the main theorists in that regard was Camillo Tarquini (1810–1874).

One should understand the term perfect society correctly. It does not mean that the church is morally perfect, that it makes use of higher moral standards than secular states do. It only means that the church has everything it needs to function autonomously, not requiring the framework of a secular state as a context to operate in. This theory fits very well in the discussions of the nineteenth century, which included debates about power over marriage. Which prevails? State marriage or church marriage? The CIC 1917 was given shape in a context still openly promoting *societas perfecta* thinking. This is understandable while the pope was still a prisoner in his palace, as the Lateran Treaties that created Vatican City as the material support for the Holy See were only concluded in 1929. The CIC 1983 was promulgated in a completely different context. The ecclesiology of Vatican II did not talk about the *societas perfecta* as an image to describe the church. Preference was given to other theological ways of representation. The church was described as the Body of Christ, the *communio* of the Christian faithful, the People of God. The CIC 1983 aimed at the canonical translation of the concepts and ideas as formulated in the various documents of Vatican II. Probably, the dominating notion used in the code to describe the church, at least when it comes to establishing its structures, is the *communio hierarchica*. Yet, traces of other notions such as the Body of Christ or the People of God are also present. With regards to the position of the old *societas perfecta*, it is clear that it is no longer explicitly mentioned in the code. However, silently, it still influences various key norms of the CIC 1983. The best illustration of this tacit yet strong presence is canon 22, which is formulated as follows:

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.

A superficial view of this canon can lead to a positive conclusion: the church refers from time to time to civil law and gives the latter a place in its own legal order. However, a closer look shows the canon is saying that the church itself can freely decide whether or not to adopt certain civil norms. The fact that divine law is seen as problematic and prohibits the adoption of civil law is still understandable. Yet, the last part of canon 22 goes beyond that point: '... unless canon law provides otherwise.' This means that the church keeps its discretionary power to refer or not to refer to civil law, even when it comes to norms applicable to all, such as city planning laws or labour law regulations. The maintaining of this complete liberty reflects, without being explicit, the old idea of the *societas perfecta*.

To come back to the Royal Commission. It goes without saying that the *societas perfecta* nourishes the ambitions of a clerical system to remain autonomous and to close its doors to an open approach and external influences. Within the canonical system, which is still characterised by *societas perfecta* thinking, the CIC 1983 makes a fundamental distinction between laypeople and clerics. Admirers of Vatican II were happy with the new role that was granted to laypeople. However, this role should not be overestimated when it comes to its canonical implications. In that regard, a key norm remains canon 129 of CIC 1983. Its first paragraph sets the standard:

Those who have received sacred orders are qualified, according to the norm of the prescripts of the law, for the power of governance, which exists in the Church by divine institution and is also called the power of jurisdiction.

The supremacy of clerics is clearly set forward in this first paragraph. What about laypeople? Their role is described in paragraph 2:

Lay members of the Christian faithful can cooperate in the exercise of this same power according to the norm of law.

The wording of this canon is clear. Laypeople can cooperate, not participate, as had been suggested during the drafting of the code but was rejected on the initiative of some influential cardinals, including Basil Hume and Joseph Ratzinger. It goes without saying that the *summa divisio* as made in canon 129 strengthens the clerical culture in the church, which is protected by the implicit survival of the perfect society.

It is clear that in a context of legal and administrative openness, this canon cannot be maintained without further discussion. And in case it is maintained anyway, it should at least be openly recognised that by no means can this canon be seen as an expression of divine law. To put it another way, two solutions are possible. The first is dropping the canon, the second is not taking it too seriously, refusing it a high-ranking theological status. By the way, that is what F J Urrutia did in commenting on this canon.¹⁸ It cannot be of divine law, he said, as the CIC 1983 accepts exception to the principle of canon 129 itself. The most striking exception is offered by canon 1421 §2, which allows laypersons to be appointed as judges, and when necessary, one of them can be selected to form a college. A layperson appointed as a judge is participating in the power of governance, not just cooperating as allowed by 129 §2. In other words, 1421 §2 proves that there is no divine law underpinning canon 129.¹⁹ Some people argue that a layperson, when becoming a judge and member of a college has no proper power of governance. This is wrong, as has been demonstrated adequately by the late Jim Provost, who invoked canon 131 §1²⁰, which starts as follows: ‘The ordinary power of governance is that which is joined to a certain office by the law itself.’

To sum up: the culture of clericalism is still present in the Roman Catholic Church of today. But the pillars on which it is built are extremely vulnerable. One pillar is the *societas perfecta* ecclesiology which still survives in the current code of canon law without being supported by the ecclesiology of Vatican II. The second pillar is the radical distinction between the power of governance that can be participated in by clerics, whereas laypeople are only in a position to cooperate. While this may be true in theory, in practice the norm has exceptions. There is no good reason to keep the clerical culture alive from that perspective.

2. Lack of separation of powers

Probably the deepest reason for the ongoing prospering of the clerical approach of canon law is the lack of separation of powers in the church – or at least, the lack of balance of powers. In that regard, canon 135 is the key norm. Its first paragraph goes as follows:

The power of governance is distinguished as legislative, executive and judicial.

Optimists could see in this paragraph the germ of the separation of powers, but this is not what the paragraph says.²¹ Although it distinguishes the three powers, it does not attribute them to different persons or colleges. They are distinguished for technical reasons, having a repercussion on issues such as the possibility of delegation. However, when it comes to the three powers themselves, they are always concentrated with key church figures. This becomes clear when reading about the power of the pope as described in canon 331 *in fine*: ‘By virtue of his office he possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely.’ Here, no distinction is made between legislative, executive and judicial power, as the pope possesses them all. On a lower level, the same is true for the bishop. Canon 381 §1 says:

A diocesan bishop in the diocese entrusted to him has all ordinary, proper, and immediate power which is required for the exercise of his pastoral function except for cases which the law or decree of the Supreme Pontiff reserves to the supreme authority or to another ecclesiastical authority.

Unlike the pope, the bishop is limited in his power, but not along the lines of the legislative, executive and judicial power.

It is of utmost importance that checks and balances are created in the church. Should a distinction be made between legislative and executive power? Ideally it would not be a bad idea, yet in most democracies, the dividing line between the legislative and executive power is becoming vague, leading to a clear supremacy of the latter. But what certainly matters is an independent and impartial jurisprudence, which by the way will not be easy in cases where only clerics qualify or take the lead in the judicial realm, as they always remain incardinated and to some extent dependent on their hierarchical superior. Therefore, laypeople should qualify to become judges in all circumstances.

18. Urrutia, F J. (1992). Lectio cursorial canon 129 CIC, *Periodica*, 81, 355–380.

19. Luis Navarro recognises the fundamental character of the principle of equality: “Il principio di uguaglianza radicale costituisce un vero principio costituzionale che, come tale, deve informare l’intero ordinamento canonico ...” [‘The principle of radical equality constitutes a true constitutional principle which, as such, must inform canon law in its entirety.’] Cf. Navarro, L. (1992). Il principio costituzionale di uguaglianza nell’ordinamento canonico, *Fidelium iura*, 158.

20. Provost, J. (1983). The Participation of Laity in the Governance of the Church, *Studia Canonica*, 17, 417–448.

21. Canon law does not contemplate a separation of powers with its corresponding unitary and independent organisations. See Labandeira, E. (1988). La distinción de poderes y la potestad ejecutiva, *Ius Canonicum*, 28, 85–98.

What always has to be examined in proposals such as these, which aim at the clear separation of powers, is whether presupposed divine laws can hamper a renewal of the system. We do not often read that canon 135 is based upon the divine ordination of the church. Yet some arguments go in that direction.²² Some canon lawyers refer to the historical fact that the bishops are successors to the apostles, and that the latter, in their way of governing the church, were not bound by a phenomenon such as the separation of powers. Of course, this is true. The main advocate of the separation of powers was Charles Louis Montesquieu, who lived between 1689 and 1755. Yet, referring to the way the apostles acted as a reason for rejecting the separation of powers in the church today, looks very much like cautiously building up a reasoning underpinned by divine law to forever help concentrate all powers in the hands of the same key people. This idea should be combated.

To be complete, I also have to mention other arguments invoked for the current absence of independent tribunals. These arguments are much more practical, including the lack of enough qualified canon lawyers and the impossibility of organising local tribunals, even at the level of the episcopal conference. Such argumentation leaves God out of the picture and can of course be circumvented much more easily.

3. The selection of bishops

The selection of bishops remains a problem in the church. This was rightly spelled out by the Royal Commission, which recommended (Recommendation 16.8) that the Holy See should publish criteria for the selection of bishops, including criteria relating to the promotion of child safety. Also recommended was the establishment of a transparent process for appointing bishops which includes the direct participation of laypeople.

What are the current issues with regard to the appointment of bishops? A first issue is the almost unlimited power of the pope in this regard. Canon 377 §1 says: 'The supreme pontiff freely appoints bishops or confirms those legitimately elected.' Local exceptions remain possible. Historically, they were much more numerous than they are today, as reported by the French historian Jean-Louis Harouel.²³ It was the CIC 1917 that helped create as much as possible a uniform system, strengthening the power of the pope and limiting, if not suppressing, the role of both local church representatives and secular powers. There were good reasons for that move, including the disappearance or at least the weakening of local political influences, although, let us not forget, these can also be exercised by putting pressure on officials of the universal church. Together with the weakening of political influences, also the role of the *vox populi* or the opinion of local church members was largely put aside. One could imagine changes in this regard. Representatives of the local church, for instance, could propose a list of candidates from which the pope makes the final choice. The opposite is also thinkable, with the pope presenting a list leading to a choice made at local representative level, ultimately confirmed by the Holy Father. And why not give representatives of the local church the right of veto?

In practice, many still existing contracts and agreements between the Holy See and various civil authorities include provisions regarding the appointment of bishops. These can be divided into two major groups. Firstly, there is the right to consultation, also called the right to official communication. The Holy See communicates the name of the candidate to the respective government, which can make objections. The second is the more intrusive right to presentation: the civil authority can submit candidates to the Roman Pontiff. Perhaps this entanglement with civil authorities is not the best way for settling things in the future.²⁴ The role of the particular church should be much more important. In any case, the curriculum vitae of the candidate, whatever the required standards are, should be scrutinised in detail.

22. See Viana, A. 'Commentary on canon 135', in Marzoa, Á., J Miras, J., and Rodríguez-Ocaña, R., (eds.), (2004). *Exegetical Commentary on the Code of Canon Law, I*. Prepared under the responsibility of the Martin Azpilcueta Institute Faculty of Canon Law, University of Navarre, Wilson and Lafleur/Midwest Theological Forum, Montreal/Chicago, 850: 'Canon law does not contemplate a separation of powers ... due to the constitutional principle of concentration of the *sacra potestas* in the Roman Pontiff and in the bishops. The Roman Pontiff and the bishops in their dioceses are at the same time and by nature, legislators, judges and administrators.'

23. Harouel, J-L. (1977). *Les désignations épiscopales dans le droit contemporain*, PUF, Paris, 142.

24. le Tourneau, D. 'Commentary on canon 377', in Marzoa, Á., Miras, J., and Rodríguez-Ocaña, R., (eds.), (2004). *Exegetical Commentary on the Code of Canon Law, II/I*, 758–759.

So far we have identified some questions with regard to the procedure of appointment. The second issue concerns the competence and qualities needed by a bishop. Canon 378 of the CIC 1983 enumerates several required qualities in the first paragraph, and goes as follows:

In regard to the suitability of a candidate for the episcopacy, it is required that he is:

1° outstanding in solid faith, good morals, piety, zeal for souls, wisdom, prudence, and human virtues, and endowed by other qualities which make him suitable to fulfil the office in question;

2° of good reputation;

3° at least 35 years old;

4° ordained to the presbyterate for at least 5 years;

5° in possession of a doctorate or at least a licentiate in sacred scripture, theology, or canon law from an institute of higher studies approved by the Apostolic See or at least truly expert in the same disciplines.

It goes without saying that the qualifications remain vague and that they probably would not hamper any candidate. Of course, all general conditions for an office will remain open for interpretation. However, two qualities should be strengthened in the future. First of all, the bishop should be free of any criminal behaviour, including child sexual abuse. Today, this requirement is not explicitly spelled out. Secondly, the bishop should be possessed of a strong personality and be able to withstand criticism and tough debates in secular society. In other words, he should be a person with moral courage, able to take the right decisions, including painful ones. This criterion is not explicitly mentioned in the list of canon 378. This list was given shape in an era different from ours. The underlying presumption was of a respectable and respected church in a society that did not challenge by any means the position of the church. For that reason, it was not seen as necessary that a bishop should be endowed with a keen fighting spirit or a lot of courage to overcome difficult debates in society. He could very well be a soft, holy man, reliable in a clerical context, yet dangerous in difficult situations. Today, the previously existing plausible position has vanished. In contemporary society, a different, more courageous, and more professional profile is required of the bishop.

It is clear that both issues are entangled, and that coming to a good choice also requires a keen understanding of the circumstances of the local church in which the bishop will have to function. Do we need new conditions formulated in canon 378? Probably yes. Yet criteria will always be abstract, and new norms do not help without a new mentality guiding those implementing them.

4. Synods and synodality

Can synods bring hope? The CIC 1983 made diocesan and national synods a matter for the discretion of the bishops. Do such gatherings need to be mandated to occur at regular intervals that can possibly be determined by particular law? Several elements play a part in this discussion. Firstly, tradition is not irrelevant. In many countries, diocesan or national synods never, or very rarely, took place. This is true of Australia, where the last national synod took place in 1937, the Archdiocese of Sydney has not had a synod since 1959, and Melbourne and Hobart not since 1916. However, the introduction of compulsory synods would only be a first step. For instance, canon 466 states:

The only legislator in a diocesan synod is a diocesan bishop. The other members of the synod possess only a consultative vote. Only he signs the synodal declarations and decrees, which can be published by his authority alone.

Clearly the problem is double. The organisation of the synod is one thing; its truly consultative force and its real power are another. During my career as a canon lawyer, my students of all continents were advocating the usefulness of synods with a true decision-making power. It could be an ideal solution. Yet in my eyes, other issues, including the power of governance exercised by laypeople and independent tribunals, should be achieved first in order to create a shift in mentality, before truly effective synods have a chance of being successful. One should not forget that synods that nourish expectations but do not lead to visible results will be a source of frustration and may cause laypeople to refrain from further participation in projects without concrete consequences.

5. Compulsory celibacy

Compulsory celibacy of priests is often perceived as one of the main reasons for their sexual crimes. Without denying the part this plays, I am convinced that the power structures as analysed above, including the clerical culture and the lack of independent jurisprudence have been more important contributors to the failure of the system. This being said, a refinement of the current legislation with regard to compulsory celibacy is also highly recommendable. Here, church authorities cannot invoke divine law as a limit for their possible action. Saint Peter had a mother-in-law, and such a person can only be acquired by marriage. It is only since the 12th century that compulsory celibacy was generally accepted and enforced in the Latin church. Recent popes have not denied this. In 1971, Paul VI was truly thinking of lifting compulsory celibacy, as reported by Cardinal Bernhard Alfrink (1900–1987) to the theologian Edward Schillebeeckx (1914–2009).²⁵ He eventually refrained from doing so because he did not want to be the pope making an end to a long tradition. This may be a fair reason, without it being fundamental however. Also, Pope Francis suggested that maybe one day, the church could ordain *viri probati* to the priesthood.²⁶ These *viri probati* are married men. However, in this configuration, marriage precedes ordination, not the opposite. But then again, the possible combination of marriage and ordination shows that there is no divine inspired reason for keeping norms with regard to celibacy the way they exist today.

A change of legislation should address two points of concern. Firstly, lifting the obligation of celibacy does not mean that the latter is meaningless. It rather says that celibacy is optional. For some, it will be a better way of life. For others, the opposite will be true. Lifting the obligation means that compulsory celibacy and priestly ordination are not necessarily intertwined. Secondly, compulsory celibacy remains very valuable for one type of ordained priest, namely religious order priests. They make a choice for a life together in an abbey or a monastery. A lifestyle very different from that of a diocesan priest, with other fundamental options and perhaps less loneliness.

6. The rights of priests

The life of clerics, their obedience to their bishop, the protection of their privacy and the free zone they possess in their personal life, is another important issue. Priests, notwithstanding their obedience to the bishop, should remain free people, with their own spiritual lives, sources of inspiration, and methods of serving the people. Crimes, which have to be avoided by all means, cannot imply a strict control on everything priests do in their lives. This does not mean that no specific measures with regard to priests can be taken. Again, the overall structural reform as advocated above is of utmost importance, and without these changes, nothing will fundamentally improve. This being said, here are some suggestions with regard to the legal position of priests.

Firstly, candidates should be scrutinised very thoroughly before ordination. American bishops do this better today than they did in the past, mainly under pressure of liability concerns imposed by secular tribunals. But the selection of priests should also take place in a context that respects privacy. In that regard, asking a candidate to the priesthood before he is authorised to enter the seminary whether he is homosexual or heterosexual, is an illegitimate question and also completely irrelevant with regard to possible child sexual abuse.²⁷ But then again, questions helpful to determining the psychological suitability and moral characteristics of a candidate are more than welcome, even necessary.

A second point concerns the contact between a bishop and his collaborators on the one hand, and the clergy on the other. Priests should not be left alone. There should be sufficient occasions and opportunities for them to formulate their needs and concerns and communicate these to the bishop, including for example any interest they may have in undertaking further studies, and their spiritual needs. In many countries, these contacts between bishops and priests after ordination are not always effective. I know of priests who have not been in touch with their diocesan bishop for over five or even ten years. The feeling of loneliness may inspire priests to make unexpected decisions in their lives.

25. Schillebeeckx, E. (1995). *Theologisch testament: notarieel nog niet verleden*; Nelissen, Baarn, 200.

26. Pope Francis said so in an interview with the German weekly *Die Zeit*, 8 March 2017. See also: <https://cruxnow.com/global-church/2017/03/08/pope-francis-signals-openness-ordaining-married-men/>

27. Torfs, R. 'Instruction or Intrusion?', in Torfs, R., (ed.) (2008). *Homoseksualiteit en wijding. Juridische en maatschappelijke analyse van de kerkelijke instructie/Homosexuality and Holy Orders. Juridical and Social Analysis of the Ecclesiastical Instruction*. Monsignor W. Onclin Chair 2006, Peeters, Leuven, 13–23.

7. Canon law and civil law

A last very important issue is the relationship between canon law and civil law. The Catholic Church never had a profound tradition in this regard, at least when it came to collaboration. It always started from a model of rivalry, following the *societas perfecta* approach as described earlier. Most of the time, the ultimate question was: who is competent for what? Do priests enjoy a *sui generis* position exempting them from labour law and legislation? Can canonical marriages among the faithful be recognised in the civil realm without a civil marriage being necessary? Historically, the longing for church autonomy went even further, establishing in some countries a *privilegium fori* for clerics who could only be judged by ecclesiastical courts.²⁸ Today, this model belongs to the past. One of the reasons for this is that churches cannot argue any longer that they possess the right to act in their own parallel world without being affected by state legislation. The second is that state legislation itself became increasingly complex, occupying new fields left previously to the free choice of the citizens. For instance, labour law is relatively new, as is environmental law, and regulations with regards to the protection of historic monuments. The emergence of more compulsory law makes it increasingly impossible to create a free zone for the church.

The future relationship between civil and canon law will be given shape in another way. A first element is that they both accept human rights, including the idea that freedom of religion itself is one of them. Which means that religious freedom within a religion is of course nonsensical, and that in cases where there are conflicts between religious aspirations and secular human rights, as in the case of the impossibility of women's ordination to the priesthood, some delicate balancing has to be done. But then again, human rights should be a shared package, the starting point for any further collaboration.

A second element is the need for keen collaboration in certain fields. In that regard, the penal law systems of the church and of the state can be connected in a fruitful way.²⁹ Some people argue that the church should refrain from dealing with child sexual abuse cases itself and leave the handling of these to secular tribunals. This approach misses refinement, as secular judges can fine or jail priests found guilty of child sexual abuse, but have no authority to remove them from a church office or to impose laicisation upon them. The cooperation lies in establishing a correct timeline. Bishops should report problematic cases they are aware of to secular authorities (I leave apart the issue of the seal of confession). They have the right to start a penal procedure within the church, but once secular judges taken on the case, they should suspend the procedure until a final judgement has been issued. Only then should the canonical procedure be continued. In the meantime, of course, administrative suspension remains possible. The relationship between canon and civil law of the future will no longer be a fight over competence over matter, but a search towards a fruitful collaboration for specific cases, including those of child sexual abuse.

In that context, it remains important to highlight the way canon law education should be organised and structured. Unfortunately, today students with a legal background are in an increasingly difficult position in relation to obtaining a degree. They should at least have two full-time years of theology before being authorised to enter into the three-year JCL program.³⁰ This means that in a country where one becomes a lawyer after five years of study, the student needs another five years to become a qualified canon lawyer. That is 10 years of study altogether, and without the guarantee of becoming as rich as a tax lawyer. For the good of the church, it is important to have a healthy mix of canon lawyers from legal and theological backgrounds, so that deep thoughts are not left aside, but also that a fruitful dialogue between canon and civil law remains possible. Here also, the Australian Bishops Conference could ask the universal legislator to change the current system.

28. *Privilegium fori* (privilege of the forum) refers to ancient privilege of clerics to be tried in an ecclesiastical court. Puznan, R. (1977–1999). *Privilegium fori*, in *Lexikon des Mittelalters*, VII, Metzler, Stuttgart, 228–229.

29. Torfs, R. 'Contractual Religious Freedom', in van de Beek, A., van der Borgh, E A J G., and Vermeulen, B P., (eds.) (2010). *Freedom of Religion*, Brill, Leiden/Boston, 141–154.

30. See http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_2018042_8_istruzione-diritto-canonico_en.html

Conclusion

To conclude, here are my main points. Firstly, some structural changes in canon law are absolutely necessary. In universal law, a true separation of powers and room for power of governance for laypeople are of the utmost importance. Another change in canon law that deserves a recommendation is more space for particular legislation on certain specific matters. Today, universal law legislates in too detailed a way on too many issues.

Secondly, what are the barriers in canon law to changing the system? It is never easy to lose power, including for those governing the universal church. Yet, invoking divine law as a reason for not allowing changes is sometimes too easy a solution. One should have the courage to disentangle that mechanism and enter into discussion about it. Very often, divine law is less divine than it seems to be at first glance.

Thirdly, the future relationship between canon law and civil law needs to be one of collaboration, of working together on specific points. This requires full recognition of human rights with respect to both legal systems, without the church being exempted from the laws of the state.

Rik Torfs is Professor of Canon Law at the Catholic University of Leuven and from 2013 to 2017 was Rector of the University. The author of more than 300 articles on canon law, and church and state, he is visiting professor at the universities of Strasbourg (France) and Stellenbosch (South Africa), editor of the *European Journal for Church and State Research*, and a member of the editorial board of *Revue de Droit Canonique*. From 2010 to 2013 he was a member of the Belgian Parliament as a senator for the Christian Democratic Party. He is a member of the Honorary Committee of the Bern-based International Association for the Defence of Religious Freedom (AIDLR), and a member of the board of the International Academy for Freedom of Religion and Belief, based in Washington DC. In 1998, he was a member and co-rapporteur of the working group set up to establish Belgium's Commission on Sexual Abuse in Pastoral Relations. He is a regular newspaper columnist in Belgium.