THE FUNDAMENTALS OF CANONICAL JURISPRUDENCE

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1. INTRODUCTION

Jurisprudence drawn from two latin words "*iuris*" and "*prudentia*" means "prudence concerning law"[1], or the science of law[2] i.e. " a complex of uniform decisions…pronounced by tribunals with uniformity in the effective exercise of their jurisdictional function"[3] or simply "the judgment of prudent persons"[4] which is equivalent to canonical interpretation. Canonical jurisprudence in essence is interpretation and application of law in concrete circumstances.

Jurisprudence has been practiced in both secular and ecclesiastical courts with the aim and finality of truth and restoration of justice and defence of the rights of physical and juridical persons. In the secular civil or political community,[5] the doctrine of separation of powers (into legislative, executive and judicial), endows the judicial arm in their different hierarchical structures with the business of jurisprudence. In the Church, however, although we have the existence of power of jurisdiction or governance (cann 129; 135) divided into legislative, executive and judicial powers,[6] this power devolves primarily on the Pope and the

[1] J. B. Sylles ed., *The Concise Oxford Dictionary of Current English*, Oxford, Oxford University Press, 1982, p. 545.
[2] J. M. Hawkins & R. Allen, eds., *The Oxford Encyclopedic English Dictionary*, Oxford, Clarendon Press, 1991, p. 774.
[3] Z. Varalta, "De iuris prudentiae conceptu," in *Periodica*, 62 (1973), p. 40, also p. 39;
[4] Francisco Suarez in *Tractatus de legibus et de Deo legislatore* (1612), I. VI, c.1, n. 5, quoted in James Corriden, "Rules for Interpreters," in *The Jurist*, 42 (1982, pp. 277-303, here in p. 278.
[5] The concept used by the Church in identifying civil governments (GS 76).
[6] Cf. P.G. Marcuzzi, "Distinzione della potestas regiminis in legislative, esecutiva e giudiziaria" in *Salesianum*, 43 (1981), pp. 275-304; J. J. Cuneo, "The Power of Jurisdiction: Empowerment for Church Functioning and Mission Distince from the Power of Orders," in *The Jurist*, 39 (1979), pp. 183-219; G. Ghirland, "De Natura,

diocesan Bishops operating under the hierarchical principle of norms (can 135) and principle of subsidiarity.[7]

In the context of these principles the Church allows for vicarious participation both in the power of the Pope and the diocesan Bishop especially within the exercise of judicial power which is the main concern of canonical jurisprudence. At the universal Church level, the Pope is the supreme judge (can 1442) but is assisted by the apostolic tribunals in adjudicating matters (cann 1405, §3; 1443-1445; *Pastor Bonus* artt 53, 67-68, 117-120, 121-125, 126-130),[8] while at the particular level, the diocesan Bishop is the *iudex natus* or proper judge of the first instance tribunal, and exercises the judicial power either personally or through the judicial Vicar or Judges (cann 135, § 3; 391, §2; 1419; 1420; 1421).[9]

This judicial power belongs to the Church naturally and exclusively (cann 1311; 1401; 1671). Thus decreed Pope Pius XII:

The judicial power is an essential part and a necessary function of the …Church…. In the Church, otherwise than in the State, the primordial subject of power, the supreme judge, the

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Origine et Exercitio Potestatis Regiminis Iusxta Novum Codicem," in *Periodica*, 74 (1985), pp. 109-164; B. Wilhelm, "De Potestate Episcopali Exercitio Personali et Collegiali," in *Periodica*, 53 (1964), pp. 455-481.

[7] The fifth principle approved by Synod of Bishops that will guide the review of the new Code of Canon Law (see "principia quae Codicis Iuris Canonici recognitionem dirigano," in *Communicationes,* 1 (1969), pp. 80-82 and also in Prefatio to 1983 Code, in AAS, 75/2 (1983), p. xxii; B. Wilhelm, "De Principio subsidiaritatis in iure canonico," in *Periodica*, 46 (1957), pp. 3-65; Leo XIII, Encyclical Letter, On the Condition of Labor, *Rerum Novarum*, 28, 15 May 1891 Nos 3, The English translation is taken from David J. O'Brien and Thomas A. Shannon, *Catholic Social Thought: The Documentary Heritage*, New York, Orbis Books, 1992, pp. 14-39; Pius XI, Encyclical Letter, On Condition of Social Work, *Quadragesimo Anno*, 15 May 1931 No 79, in AAS 23 (1931), pp 177-228. English Translation from David J. O'Brien and Thomas A. Shannon, *Catholic Social Thought: The Documentary Heritage*, cit., pp. 40-79; In his significant words, Pope Pius XI, QA 79 stated: "it is a fundamental principle of social philosophy, fixed and unchangeable, that one should not withdraw from individuals and commit to the community what they can accomplish by their own enterprise and industry. So, too, it is an injustice and at the same time a grave evil and a disturbance of right order to transfer to the larger and higher collectivity functions which can be performed and provided for by lesser and subordinate bodies. Inasmuch as every social activity should by its very nature, prove a help to members of the body social, it should never destroy or absorb them"; John XXIII, Encyclical Letter, *Mater et Magistra*, 15 May 1961, in AAS, 53 (1961), pp. 401-464. The English translation taken from David J. O'Brien and Thomas A. Shannon, *Catholic Social Thought: The Documentary Heritage*, cit., pp. 82-128 (henceforth to be referred to as MM). See MM 51-58, 117, 152; Paul VI, Encyclical letter, *Populorum Progressio* No 33 and *Octagesimo adveniens*, No. 46 (taken from Papal Encyclicals Online, http://www.papalencyclical.net/Paul06/p6voi.htm); Second Vatican Council, Declaration on Christian Education, *Gravissimus Educationis*, 3, 6; 28 October 1965, in AAS, 58 (1966), pp. 728-739; GS 86

[7] Cf. Second Vatican Council, Declaration on Christian Education, *Gravissimus Educationis*, 3, 6; 28 October 1965, in AAS, 58 (1966), pp. 728-739; GS 86 ; The hierarchical principle in the Code. For example: CIC/83, can.135, §2 "…a lower legislator cannot validly make a law which is contrary to that of a higher legislator" and can 139, §2 "A lower authority, however, is not to interfere in cases referred to higher authority, except for a grave and urgent reason; in which case the higher authority is to be notified immediately"; Congregation of Bishops & Congregation of Evangelization of Peoples, *Instruction on Diocesan Synods*, March 19, 1997, "They are juridically invalid those synodal decrees which are contrary to superior law: that is, the universal law of the Church; the general decrees of particular Councils and of the Conferences of Bishops; the general decrees of the meeting of a Province in matters of its competence"; Juan I. Arrieta, *Governance Structures within the Catholic Church*, Gratianus, 2000, p. 29, calls it also "principle of the inviolable character of the norms of competence".

[8] John Paul II, Apostolic Constitution, *Pastor Bonus*, 28 June 1988, in AAS, 80 (1988), pp 841-932.

[9] Congregation for the Bishops, Directory on the Pastoral Ministry of Bishops, *Apostolorum Successors*, No 180 February 22, 2004, Vatican City: Libreria Editrice Vaticana, 2004 (here after referred as *Apostolorum Successors*); Pontifical Council for Legislative Texts, Instruction to be Observed by Diocesan and Inter-diocesan Tribunals in Handling Causes of the Nullity of Marriage, *Dignitas Connubii*, January 25, 2005, Art. 22, §1, Vatican City: Libreria Editrice Vaticana, 2005 (here after referred to as *Dignitas Connubii* or simply DC).

highest court of appeal, is never the community of the faithful. There is not, therefore, and there cannot be in the Church, as it is founded by Christ, a popular tribunal or a judicial power deriving from the people[10].

The Magisterium of the Church calls for observation of the principles of pastorality and equity in the operation of the tribunal and administration of justice, i.e. in canonical jurisprudence. Pope John Paul II further confirmed this constant teaching of the Magisterium when he exhorted that the judicial activity of the Church "is in itself, by its nature, pastoral"[11] being "an integrating and qualified part of the pastoral office of the Church"[12].However he continues, "pastoral efforts would have almost no result… if they were not accompanied by a corresponding legislative and judicial action"[13]. Our focus is to expose the fundamental contents and dynamics of canonical jurisprudence in the Church.

2. THE HUMAN ELEMENT IN CANONICAL JURISPRUDENCE

In the first place, the business of canonical jurisprudence is accomplished by the human agents that function within the judicial organs of the Church called the tribunals in their various instances and levels. In the universal Church we have the ordinary tribunal of Roman Rota operating in the first, second, third and further instances,[14] while at the local Church level we have the first instance diocesan (can 1419-1420) or inter-diocesan tribunal (can 1423) and the second instance appeal tribunals (cann 1438-1441; 1682-1685). These tribunals are directed by human persons i.e. the collegiate or single judge tribunals (cann 1425; 1441; 1609), with the assistance of other personnel especially the public ministers (defender of bond and promoter of justice-cann 1430-1436); notary (can 1437) and the patrons (cann 1481-1490). However, the responsibility falls on judges with the duty and onerous task to give reasoned sentence and authentic jurisprudence.

In effect, therefore, we affirm that that the laws of the Church like all laws is according to the classical definition of St Thomas Aquinas "*rationis ordination ad bonum commune, ab eo qui curam communitatis habet, promulgata*" (i.e. ordinance of reason for the common good, promulgated by him who has the care of the community).[15] The judge from the etymological root is the one who speaks the law or pronounce right (*ius dicit*). He is identified as the living justice, advocate and minister of justice, personnel of the tribunal of justice.[16] Thus, law is made by human persons and for the community of faith, however, it requires the intervention of physical and concrete persons to interpret and apply it as James Coriden holds:

Law is not self-implementing….No law works automatically, nor is its application a purely mechanical robot-like function. All law is applied by persons. Interposed between the general

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[10] Pius XII, Allocution to the Roman Rota, 2 October 1945, in *CLD* 111, pp. 588-592; Z. Grocholewski, "Theological Aspects of the Judicial Activity of the Church," in *The Jurist*, 46 (1986), pp. 552-567.
[11] John Paul II, Allocution to the Roman Rota, 17 February 1979, n. 3 in AAS, 71 (1979), p. 425.
[12] John Paul II, Allocution to the Roman Rota, 24 January 1981, n. 3, in AAS, 73 (1981), p. 229.
[13] John Paul II, Allocution to the Roman Rota, 13 December 1979, n. 4, in AAS, 71 (1979), p.1529.
[14] Cf. CIC/1983, cann 1444, 1405, §3; *Pastor Bonus*, artt. 128, 129; Instruction, *Dignitas Connubii*, artt. 27, 283.
[15] S. Th. 90, 1-4.
[16] S. Th. II-II q. 60 a. 1; Pius XII, Allocution to the Rota, October 1, 1940, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, pp. 3, 7; Paul VI, Allocution to the Rota, January 28, 1971, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 110; John Paul II, Allocution to the Rota, January 26, 1984, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 182; Regan Columkille, "The Church Lawyer- Advocate for Justice," cit., pp. 195, 198; Frans Daneels, "The Right of Defence," in *Studia Canonica*, 27 (1993), pp. 84, 86, 94.

and abstract norm of law and the community for which it is intended is always a human person whether judge or executive, counsellor or citizen, the law is understood, interpreted and applied by persons.[17]

It is therefore within the judicial order that is this action of the human persons that we locate the human element of canonical jurisprudence or simply interpretation. Interpretation of law is an art, it requires learning and creative response and services from those involved. It requires virtue of prudence, which helps the interpreter to discern, select with moral certainty what is most suitable means and options to a decision. This virtue operates in concrete world circumstances of the interpreter and the community of reception of the laws. This prudence involves according to Aquinas: *consilium*-taking counsel, making inquiring, considering options, its consequence and contingencies, wide consultation for informed decisions; *iudicium*- judgement in conscience about the action to take; and finally *imperium*-commanding or putting the decision into effect or action. This is rigorous and engaging but essential and necessary in any authentic and meaningful jurisprudence.[18] In brief,

Jurisprudence is a science which deals with principles that emerge in the application of law to concrete cases. Law by nature is not specific enough to cover each and every case it is supposed to provide for. Therefore, when the law is applied to a concrete case, new situations, conditions, and conflicts are encountered, and these are to be resolved by the judge with creative and systematic interpretation of relevant law and by drawing upon principles that are found in canonical doctrine and past judicial experience. This approach has a special place in the application of canon law. According to c. 19 jurisprudence of the Roman curia plays an important role in the interpretation and application of canon law."[19]

The judge and other tribunal personnel are expected to have good reputation, proven prudence, zeal for justice (cann 1420, §4; 1421, §3; 1435; 1483; 483), and religious disposition to know and to observe both divine and ecclesiastical laws and doctrines. John Paul II counselled thus: "It will then be this same faithfulness that impels the judge to acquire that group of qualities needed to carry out the other duties with regard to the law: wisdom to understand it, learning to illustrate it, zeal to defend it, prudence to interpret it in its spirit beyond the simple façade of the words (*nudus cortex verborum*), careful consideration, and Christian equity to apply it."[20]

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[17] James Corriden, "Rules for Interpreters," in *The Jurist,* 42 (1982), pp. 277-303, here in p. 279; see also Richard A. Hill, "Reflections on the Interpretation of the Revised Code," in *The Jurist,* 42 (1982), pp. 311-319, here in p. 311 where he maintained that law is not self-actualizing it requires the services of persons.

[18] Cf. Peter Riga, Prudence and Jurisprudence: Authority as the Basis of Law According to St Thomas," in *The Jurist*, 37 (1997), pp. 287-312; James Corriden, "Rules for Interpreters," cit., p. 280; Columkille Regan, "The Church Lawyer-Interpretation of Law," in *The Jurist,* 43 (1983), pp. 194-208, here in pp. 412-415; F. McManus, "Role of the Canonist: Interpreter and Advocate," in *CLSA Proceedings,* 36 (1974), pp. 98-105; E. Graziani, "Interpretazione (Diritto Canonico)," in *Apollinaris,* 51 (1978), pp. 396-403; Ladislas Orsy, "The Interpreter and His Art," in *The Jurist,* 40 (1980), 27-56.

[19] Augustine Mendonça, "Recent Trends in Rota Jurisprudence," in *Studia Canonica*, 28 (1994), pp. 167-230, here p. 168; see also CIC/1983, can 19; John Paul II, Allocution to the Rota, February 26, 1983, no. 4, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 179: "guides and orientation for interpretation of the law in some cases"; Cristian Begus, *L'Armonia della Giurisprudenza Canonica*, Vatican City: Lateran University Press, 2002, pp. 17-18.

[20] John Paul II, Allocution to the Rota, February 4, 1980, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 163; also Pius XII, Allocution to the Rota, October 1, 1942, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 20: "The conscientious observance of these norms is a matter of duty for the judge; but on the other hand in their application he must remember that they are not ends in themselves, but means to an end, that is, to attain and guarantee a moral certainty with an objective foundation as

The invitation to observe the legislative dispositions and the fact the judge is seen as law speaking imposes on the judge a duty to minister or serve the law through genuine interpretation of law that invariably completes the work of the legislator and contribute to the development of ecclesial legal system.[21] But how can the tribunal officials make this contribution without in-depth and ongoing formation (can 279) on the Code and legislative and doctrinal dispositions of the Church; praxis and jurisprudence of the superior tribunals especially that of the Apostolic See (that are sources of interpretation cf. can 19); publications of learned authors; professionally organized conferences and seminars; and the contributions of behavioural sciences (i.e. Psychology, Psychiatry etc.), Medical Law and Bio-Ethics. John Paul II aptly invited the judges in these words:

The law (ius), which gives you the ideal measure or criterion of discernment to apply in the evaluation of the facts. This law (ius), which will guide you, giving you sure parameters, is the new Code of Canon Law. You must know it perfectly, not only in the procedural and marriage sections which are so familiar to you, but in its entirety, so that you may have complete knowledge of it, as magistrates (magistrate), that is, as masters of the law that you are. This knowledge presumes an assiduous scientific, deep study which is not limited to pointing out the possible variations with respect to the previous law or to establishing its purely literal or philological meaning, but which takes into consideration the mind of the legislator (mens legislatoris) and the reason of the law (ratio legis).this will give you a global view which enables you to penetrate the spirit of the new law. For the issue in substance is: The Code is a new law and it is to be evaluated primarily in the perspective of the Second Vatican Council to which it is intended to conform fully.[22]

Finally, the judge should see his office as an important and necessary one especially in the identification of values underlying the laws, their proper interpretation and genuine application of law within socio-cultural context guided by the principle of equity [23] and other imperative principles and foundations of canonical interpretation which we shall present subsequently.

3. THE FOUNDATIONS OF CANONICAL JURISPRUDENCE: THEOLOGY AND COUNCIL

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the reality of the fact. It should not come about that, what the will of the legislator intended as a help and security for discovering the truth, become instead an obstacle to its discovery. If ever the observance of formal rules of law results in injustice or is contrary to equity, there is always a right of recourse to the legislator".

[21] Paul VI, Allocution to the Rota, January 1970, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, pp. 98, 101-102.

[22] John Paul II, Allocution to the Rota, January 26, 1984, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, pp. 182-183; Sacred Congregation of the Sacraments, Instruction, *Provida mater Ecclesiae*, August 15, 1936, in AAS 28 (1936), pp. 313-361, here p. 314: "However it must be observed that such rules will be insufficient to achieve their stated purpose unless diocesan judges know the sacred canons thoroughly and are well prepared through an experience of tribunal work"; Zenon Grocholewski, "Current Questions Concerning the State of Activity of Tribunals with Particular Reference to the United States of America," in *Incapacity for Marriage: Jurisprudence and Interpretation*, Robert M . Sable, ed., Rome , PUG, 1987, p. 227: "No one can carry out the above-mentioned responsibilities without a solid and specific preparation and a precise knowledge of substantive and procedural law as well as jurisprudence"; Richard A. Hill, "Reflections on the Interpretation of the Revised Code," in *The Jurist,* 42 (1982), p. 318: called on the judge to study the law so as to serve the people.

[23] Cf. Augustine Mendonça, "The Rights of the Parties to Inspect the Acts and Its Relation to the validity of a Definitive Sentence in a Marriage Nullity Process," in *Studia Canonica,* 33 (1999), p. 314.

In this section I wish to present the foundation of authentic interpretation in the Church. This demands recourse to the sources of legislative dispositions in the Church. To discern the source of the laws in the Church we have to refer to the purpose of law which is principally to serve values and goods in the community of faith.[24] These values are first articulated in the teachings of the Magisterium made manifest in the theology of the Church and in the Second Vatican Council. Thus for meaningful canonical jurisprudence, interpreters should make recourse and identify firstly the relationship between the theology of the Church and Canon Law, secondly the relationship between the Second Vatican Council and the Code and finally be challenged to be imbued with this new way of thinking based on the Council and theology of the Church.

On the one hand, Canonical Jurisprudence must draw from theological science. Interpreters of law belong to the Church and are serving the Church. They must operate within the articulated value of faith of the ecclesial community, provided by the Magisterium and scholars in the theological dispositions. In this ambient interpreters are enriched by the Church theology, scripture and sacred tradition. This was the advise of Paul VI when he said: "if the Church is a divine project- *Ecclesia de Trinitate*- its institutions, though perfectible, should be established with the aim of communicating divine grace and fostering, according to the gifts and mission of each, the good of the faithful, which is the essential aim of the Church"[25] and that canonists should "seek more deeply in sacred scripture and in theology the reasons for their own teaching".[26] This is the reason of the compulsory nature of the science of theology for students of canon law and the obligation of theology of canon law for the licence students as decreed by the Congregation of Catholic Education.[27]

On the other hand, from all intent and purposes, the Council formed the foundation of the new Code. The ten principles of Revision presented by the Commission for Revision of the new Code and approved by the Synod of the Bishops gathered in Vatican City from September 30-October 4, 1967, maintained in an unequivocal language on the connection between the Council and the Code when it affirmed in the introductory session that the Council will provide "the general plan of the new work".[28] In his words John Paul II confirmed:

The new Code, therefore, was conceived (by John XXIII) along with the Council, and from the very beginning the Code was intimately joined to the Council. And as a matter of fact the Council Fathers themselves were conscious during their deliberations that there would be a

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[24] Ladislas Orsy, "The Relationship between Values and Laws," in *The Jurist*, 47 (1987), pp. 471-483; "Integrated Interpretation, or, The Role of Theology in the Interpretation of Canon Law," in *Studia Canonica*, 22 (1988), pp. 245-264, here in p. 248; "Theology and Canon Law: An Inquiry into their Relationship," in *The Jurist*, 50 (1990), pp. 402-434, here in pp. 408, 416-434.

[25] Paul VI, Address to the Participants in the 2nd International Congress of Canon Law, September 17, 1973, in *Communicationes*, 5 (193), p. 176.

[26] Paul VI, Address to the Participants in the 1st International Congress of Canon Law, January 20, 1970, in AAS 62 (1970), p. 106; see also OT 16: "In the expounding of Canon Law… the mystery of Church be kept present"; John Paul II, Allocution to the Rota, January 26, 1984, p. 185 & January 30, 1986, p. 190; Julian Herranz, "Renewal and Effectiveness in Canon Law," in *Studia Canonica*, 28 (1994), pp. 5-31, here in pp. 14-20.

[27] Cf. Congregation for Catholic Education, Decree, *Novo Codice*, approved in '*forma specifica'* by John Paul II, September 2, 2002, in *L'Osservatore Romano*, September 2002, p. 2 or www.vatican.va.

[28] Cf. "principia quae Codicis Iuris Canonici recognitionem dirigano," in *Communicationes* 1 (1969), pp. 80-82 and also in *Prefatio* to 1983 Code, in AAS 75/2 (1983), p. xxii; John A. Alesandro, "The Revision of the Code of Canon Law: A Background Study," in *Studia Canonica*, 24 (1990), pp. 100-110; Richard G. Cunningham, "The Principles Guiding the Revision of the Code of Canon Law," in *The Jurist*, 30 (1970), pp. 447-455; James Corriden, "Rules for Interpreters," cit., p. 283; Richard A. Hill, "Reflections on the Interpretation of the Revised Code," cit., p. 316.

new Code, and provided subject matter and directive guidelines for it. In their mind the Code should be the fruit of the Council, or better, an instrument for carrying out its decisions and for realizing its desired fruits."[29]

This position of connection of the Council to the Code is variously seen in the words of Pope Paul VI and John Paul II to the Commission as summarized by John A. Alesandro, "Formulate in concrete terms the deliberations of Vatican Council II (1964); Accommodate canon law to the new way of thinking of Vatican Council II (1965, 1973); Express more clearly the doctrinal and disciplinary thrust of the Council (1970); Form an instrument to implement the directives of the Council and to realize the fruits desired by it (1979); Bring the Church's legislation into harmony with the broadened understanding of the Church as found in the Vatican Council (1981)."[30]

This gives us the bases to affirm that the foundation of canonical jurisprudence i.e. its doctrinal and theological matrix should draw from the Council's four Constitutions, nine Decrees and four declarations (1963-1965).[31] The Code truly reflected not only in exact representation but also in a reformulation of the conciliar dispositions in many canons. This occasioned the words of John Paul II, the supreme legislator to affirm in essence that the Code enjoys the status of being the "last document of the Council"[32]; "a great effort to translate the conciliar ecclesiological teaching into canonical terms. If it is impossible perfectly to transpose the image of the Church described by conciliar doctrine into canonical language, nevertheless the Code must always be related to that image as to its primary pattern, whose outlines, given its nature, the Code must express as far as possible"[33]; "an authoritative guide for the application of the second Vatican Council."[34] And finally adding: "For the issue in substance is: The Code is a new law and it is to be evaluated primarily in the perspective of the Second Vatican Council to which it is intended to conform fully." [35]

The Council, the principles of revision of the Code, post-conciliar documents from the Hole See remain desiderata, a *vade mecum* and a veritable foundation and challenge to interpreters and for canonical jurisprudence in the Church.

4. THE PRINCIPLES IN CANONICAL JURISPRUDENCE

The Indispensable Use of Doctrinal Interpretations in Jurisprudence

[29] John Paul II, Address to the Final Plenary Meeting of the Commission for the Revision of the Code, October 1981 in AAS, 73 (1981), p. 721.

[30] John A. Alesandro, "The Revision of the Code of Canon Law: A Background Study," cit., p. 98; Continuing John Alesandro in p. 99 said: "The close dependence of the legal reform on Vatican II is a very important factor to bear in mind when studying the Code. It means that the canons, many of which repeat or summarize the Council's texts must be interpreted in light of Conciliar teaching; they cannot properly be isolated from their historical sources."

[31] Cf. Austin Flannery, ed. *Vatican Council II, The Conciliar and Post Conciliar Documents*, New York: Costello Publishing Company, 1981.

[32] John Paul II, Allocution to the Rota, January 26, 1984, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 181; see also Julian Herranz, Renewal and Effectiveness in Canon Law," in *Studia Canonica*, 28 (1994), pp. 5-31, here in p. 7.

[33] John Paul II, Apostolic Constitution *Sacrae disciplinae leges,* 25 January 1983 in AAS, 75 Pars II (1983) vii-xiv here in p. xiv.

[34] John Paul II, Allocution to the Rota, January 26, 1984, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 181.

[35] John Paul II, Allocution to the Rota, January 26, 1984, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 183.

Recourse to the legislator is also a fundamental bases of interpretation. On this John Paul II in his ordinary magisterial teaching exhorted:

In this regard it seems appropriate here to recall some hermeneutical principles. When they are disregarded, canon law disintegrates and ceases to be such, with dangerous results for the Church's life, for the good of souls, and particularly, for the inviolability of the sacraments instituted by Christ. If ecclesiastical laws are to be understood first of all "according to the proper meaning of words considered in their text and context", it would as a result, be totally arbitrary even patently illegitimate and gravely culpable (gravemente colposo) to attribute the words used by the legislator, not their "proper" meaning but one suggested by disciplines different from the canonical one.[36]

In addition to this basic provision, the supreme legislator in this allocution of 1993 and that of 2005 provided for other elements which include:

- Recourse to canonical tradition to discover the consistent mind of the legislators. Hence there is no break with the past nor a leap into a new reality with the emergence of the new Code but a reflection of dynamism of same pilgrim Church (cf. can 6, §2);
- The innovative dispositions in the Code do not call for a jurisprudence that attach "usual meanings" to the words and mind of the legislator;
- Canonical jurisprudence must endeavour to avoid "excessive relativization" of terms which will ultimately prevent their characteristic and essential features.
- Finally, to buttress the subordination of law to theology, John Paul II maintained that if there has been an authentic doctrinal interpretation in an issue, it has to be taken into account when applying the law,[37] and further insisted on "fidelity to the revealed truth about marriage and the family, authentically interpreted by the Church's magisterium, always serves as the definitive reference point and the true incentive for a profound renewal of this area of Church life."[38]

Some of the doctrinal interventions of the Church include:

a. On Indissolubility of Marriage: This sacred bond of marriage is sealed by conjugal sexual act accomplished in a truly human way (can 1061, §1).[39] The issue of the effect of

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[36] John Paul II, Allocution to the Rota, January 30, 1993, p. 225; Ladislas Orsy, "Interpretation in view of Action, A Quest for Clarity and Simplicity (canon 96)," in *The Jurist*, 52 (1992), pp. 587-597 & "Models of Approaches to Canon Law and their Impact on Interpretation," in *The Jurist*, 50 (1990), pp. 83-101; Patricia Smith, "Determining the Integral Reordering of Law: Tools for the Canonist," in *Studia Canonica*, 35 (2001), pp. 97-132, here in p. 126.

[37] Cf. John Paul II, Allocution to the Rota, January 30, 1993, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 225 & January 25, 2003.

[38] John Paul II, Allocution to the Rota, January 17, 1998, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 248, no. 6.

[39] Cf. GS 49: "The action within marriage by which the couple are united intimately and chastely are noble and worthy ones. Expressed in a manner which is truly human these actions signify and promote mutual self-giving"; Thomas P. Doyle, "The Moral Inseparability of the Unitive and Procreative Aspects of Human Sexual Intercourse," *Monitor Ecclesiasticus*, 109 (1984), pp. 447-469, here in p. 464: "The Code of Canon Law refers to sexual consummation '*humano modo*', i.e. in a human fashion. The sexual language of the spouses must be free of violence and coercion or it is not an expression of the conjugal community. To carry the concept of '*humano modo*' one step further, one could argue that the sexual act must also be open to procreation in principle of it is to be fully human"; President of the Code Commission in *Communicationes*, 61 (1974), pp. 187-193; Michael G.

consent and conjugal sexual act on marriage created different jurisprudential trends between Paris and Italy. While the school of Paris led by Peter Lombard emphasized the consensual theory (that is affirming that consent makes the marriage), the school of Bologna led by the father of Canon Law, Gratian, emphasized the copula theory (that is the conjugal sexual act makes the marriage). The synthetic theory emerged from Alexander III (1159- +1181), who as Roland Brandinelli and Professor of Canon Law in Bologna followed these trends from various schools and provided a Solomon's wisdom solution that guided and remained at the base of Church's doctrine on indissolubility and consummation.[40]

In this position, distinction is made of marriage entered by mutual consent and not yet sealed by sexual act and one sealed by conjugal sexuality. In his words John Paul II confirmed: "the coming into being of marriage is distinguished from its consummation to the extent that without this consummation the marriage is not yet constituted to its full reality. The fact that a marriage is juridically constituted but not consummated corresponds to the fact that it has not been fully constituted a marriage."[41] Marriage is considered dissoluble if not yet consummated but absolutely indissoluble if ratified and consummated (cann 1061, §1; 1141). Thomas Doyle summarized this position in these words: "After the spouses have made the marital covenant with one another they are truly married. If both are baptized the union is called a 'ratified' marriage. When this covenant is consummated by sexual intercourse, its stability is strengthened. For ratified marriages, the property of absolute indissolubility is added with consummation. What is about sexual intercourse that it can have this effect on a marriage covenant? The answer is in the unitive-procreative nature of intercourse."[42]

b. Impotence: On the one hand, male impotence occurs when one is unable to have sufficient or even partial erection of penis (essential organ for sexual intercourse), penetration of and ejaculation in the vagina during intercourse.[43] This ejaculation need not contain the *verum semen* for the consummation of marriage as was later decreed by the Congregation for

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Lawler, "Blessed are Spouses who Love for their Marriages will be Permanent," in *The Jurist*, 55 (1995), pp. 218-242, here in p. 233.

[40] Cf. Edward Hudson, "Marital Consummation According to Ecclesiastical Legislation," in *The Jurist*, 12 (1978), pp. 93-124, here in p. 99: "It is here that we must look for the origin of the present canonical notion of the consummation of marriage found in canon 1015 of the Code of canon law"; James A. Coriden, *The Indissolubility Added to Christian Marriage by Consummation: An Historical Study from the End of the Patristic Age to the Death of Innocent III*, Rome: Officium Libri Catholici, 1961, pp. 21-22; Ladislas Orsy, "Christian Marriage: Doctrine & Law, Glossae on Canons 1012-1015," in *The Jurist*, 40 (1980), pp. 282-348, here in p. 323, indicated that earlier than Alexander III, i.e. in the 9th century, Hincmar, Archbishop of Rheins brought new precision and clarity to the issue of indissolubility through reading of the text of Leo the Great emphasizing this later position of Alexander III, that is that consent is sealed by consummation and receives the essential character of indissolubility.

[41] John Paul II, Audience, January 5, 1983, in *L'Osservatore Romano*, quoted in Thomas P. Doyle, "The Moral Inseparability of the Unitive and Procreative Aspects of Human Sexual Intercourse," cit., p. 462.

[42] Thomas P. Doyle, "The Moral Inseparability of the Unitive and Procreative Aspects of Human Sexual Intercourse," cit., p. 462; James H. Provost, "Intolerable Marriage Situations Revisited," in *The Jurist*, 40 (1980), p. 141: "Sexual intercourse completes the contract and seals its indissolubility"; Urbano Navarrete, "Indissolubitas matrimonii rati et consummate: opinions recentiores et observations," in *Periodica*, 58 (1969), pp. 415-489; Urbano Navarrete, "De notione et effectibus consumationis matrimonii," in *Periodica*, 59 (1970), pp. 628-660, here p. 658; Robert T. Kennedy-John T. Finnegan, "Select Bibliography on Divorce & Remarriage in the Catholic Church Today," in *Ministering to the Divorced Catholic*, James J. Young, ed., New York: Paulist Press, 1979, pp. 260-273; Sea'mus Ryan, "Survey of Periodicals: Indissolubility of Marriage," in *The Furrow*, 24 (1973), pp. 150-159, 214-224, 272-284, 365-374, 524-539; Lawrence G. Wrernn, "Marriage-Indissoluble or Fragile?" in *Divorce & Remarriage in the Catholic Church*, Lawrence G. Wrenn, ed., New York: Newman, 1973, pp. 134-135.

[43] Cf. Richard C. Bauhoff-Augustine Mendonça, "Psychic Impotence Part I," in *Studia Canonica*, 24 (1990), pp. 205-240 & "Psychic Impotence Part I," in *Studia Canonica*, 24 (1990), pp. 293-333.

the Doctrine of Faith with express approval by the Pope.[44] On the other hand, female impotence is the inability of partner to have a vagina (the essential organ of sexual intercourse) that receives the erect penis and the ejaculate.

c. Incapacity in Canon 1095: In another level, canon 1095 talks about incapacity and not difficulty or character incompatibilities but clearly of true, serious and moral impossibility. The mind of the legislator (can 17) in relation to this canon 1095 was clearly expressed by John Paul II, when he said:

For the canonist, the principle must remain clear that only incapacity and not difficulty in giving consent and in realizing a true community of life and love invalidates a marriage. Moreover, the breakdown of a marriage union is never in itself proof of such incapacity on the part of the contracting parties. They may have neglected or used badly the means, both natural and supernatural, at their disposal. Alternatively, they may have failed to accept the inevitable limitations and burdens of married life, either because of blocks of an unconscious nature or because of slight pathological disturbances to leave substantially intact human freedom or moral order.[45]

Continuing, the legislator provided that "A true incapacity can be considered only in the presence of a serious form of anomaly which however it may be defined, must substantially impair the contractants' capacity to intend and/or to will"[46]

d. Experts in Trials: The next important requisites for experts is that they should be imbued with Christian anthropology which defends the good of marital institution, the goods of spouses, children, sacramental and conjugal bond; [47] and accepts the integral and complete understanding of the human person and Christian marriage. This vision of Christian

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[44] Cf. Congregation for the Doctrine of Faith, Decree, *Sacra Congregatio*, May 13, 1977, in AAS, 69 (1977), p. 426 or CLD, 8 (1973-1977), p. 677; Paul VI, Allocution to the Rota, January 28, 1978, in William H. Woestman, ed. *Papal Allocutions to the Roman Rota, 1939-2002*, cit., p. 146; c. Raad, March 9, 1978, in RRDec, 70 (1988), pp. 133-147 or *Monitor Ecclesiasticus*, 103 (1978), pp. 289-302; T. J. O'Donell, "A Recent Decision of the Holy See Regarding Impotence & Sterility: Implications for Medical Practice," in the *Lincre Quarterly*, 45 (1978), pp. 15-21; P. Tocanel, "Sacra Congregatio pro Doctrina Fidei: Decretum circa impotentiam quae matrimonium dirimit," in *Apollinaris*, 50 (1977), pp. 338-340.

[45]John Paul II, Allocution to the Rota, February 5, 1987 in William H. Woestman, ed. *Papal Allocutions to the Roman Rota, 1939-2002*, cit., pp. 193-194 or in AAS, 79 (1987), p. 1457; John Paul II, Allocution to the Rota, January 25, 1988 in William H. Woestman, ed. *Papal Allocutions to the Roman Rota, 1939-2002*,pp. 198-200; John Paul II, Allocution to the Rota, January 29, 2004, in *Origins*, p. 635; John Paul II, Allocution to the Rota, January 29, 2005, no. 3 in www.vatican .va; c. Ragni, November 26, 1985, in RRDec, 77: 543-557, here p. 555 or *Il Diritto Ecclesiastico*, 97/2 (1986), pp. 29-40; c. Bruno, March 30, 1979, in RRDec, 71 (1988), pp. 118-132; c. Egan, December 9, 1982, in *Monitor Ecclesiasticus*, 108 (1983), pp. 233-244; Aidan McGrath, "On the Gravity of Causes of a Psychological Nature in the Proof of Inability to Assume the Essential Obligation of Marriage," cit., p. 69; Ignatius Gramunt-Leroy A. Wauck, "Capacity & Incapacity to Contract Marriage," in *Studia Canonica*, 22 (1988), pp. 147-168, here in p. 168.

[46] John Paul II, Allocution to the Rota, February 5, in AAS, 79 (1987), p. 1457; John Paul II, Allocution to the Rota, January 25, 1988 in AAS, 80 (1988), p. 1182: "Bearing in mind that only very serious forms of psychopathology reach the point of impairing substantially the freedom of the person…"; Augustine Mendonça, "Conceptual Incapacity for Marriage," in *The Jurist*, 54 (1994), pp. 477-559, here in p. 528; c. Burke, July 18, 1991, in *Studia Canonica*, 26 (1992), pp. 244-245; Cormac Burke, "Some Reflections on Canon 1095," cit., pp. 143-146; c. Egan, July 28, 1983, no 5 in *Studia Canonica*, 17 (1983), p. 264; E. M. Egan, "The Nullity of Marriage for Reason of Incapacity to fulfill the Essential Obligations of Marriage," in *Ephemerides iuris canonici*, 40 (1984), pp. 5-35.

[47] Cf. John Paul II, Allocution to the Rota, January 27, 1997, in AAS 89 (1997), p. 488 & January 28, 2002, in AAS 94 (2002), pp. 340-346 & February 5, 1987, p. 195 & January 25, 1988, p. 198; *Dignitas Connubii*, Introduction, p. 7; Acta Tribunalium Sanctae Sedis, Supremum Signaturae Apostolicae Tribunal: Quaesitum de usu periti in causis nullitatis matrimonii," cit., p. 622.

anthropology accepts that man is creature of God with capacity and freedom to know, love and serve His Creator; and that marriage is ordained and willed by God, a divine vocation involving two persons of diverse gender who under a lawfully manifested consent constitute and realize the community of conjugal life and love.[48]

On another important note, this Christian anthropology rejects certain modern tendencies, mentalities and pretensions. These trends include:

- Unorthodox and Questionable Anthropological Theories, which deny freedom in human person or extol freedom extremely to the rejection of divine assistance in human problems.[49]
- Unacceptable and Irreconcilable Anthropology, which include: pessimistic view that could not consider any aspiration except ones imposed on man by his impulses or social condition; exaggerated optimistic view of man as having within themselves their self fulfillment; reduce marriage to a means of gratification, self fulfillment or means of psychological release or see every tension in marriage as an indication of weakness and incapacity to live out the obligation inherent in the conjugal union.[50] In most cases these experts impose diagnostic labels to human predicaments. [51]

In summary, the judge should uniquely consider the fundamental facts (can 1579, §1), fundamental methods (can 1578, §2) and fundamental Christian anthropology underlying the report or opinion of the expert.[52] John Paul II exhorted the judge in these words:

The judge, therefore, cannot and ought not to expect form the expert a judgment on the nullity of marriage, and still less must he feel bound by any such judgment which the expert may have expressed. It is for the judge and for him alone to consider the nullity of marriage. The task of the expert is only that of providing the elements of information which have to do with his specific competence, that is the nature and extent of the psychic and psychiatric realities on grounds of which the nullity of the marriage has been alleged. In fact, the Code in cc. 1578-1579 explicitly demands from the judge that he critically evaluate the reports of the experts. In this evaluation it is important that he should not allow himself to be misled either by

[48] See Second Vatican Council, Pastoral Constitution of the Church in the Modern World, *Gadium et Spes*, Dec 8, 1965.

[49] Cf. Pius XII, Allocution to the Rota, October 3, 1941, in ASS, 33 (1941), pp. 421-426.

[50] Cf. John Paul II, Allocution to the Rota, February 5, 1987, in William H. Woestman, ed. *Papal Allocutions to the Roman Rota, 1939-2002*,p. 193 & January 25, 1988, p. 201.

[51] John Paul II, Allocution to the Rota, January 25, 1988, in William H. Woestman, ed. *Papal Allocutions to the Roman Rota, 1939-2002*, p. 200: "It frequently happens that the psychological and psychiatric analyses carried out on the contracting parties…are limited to a description of the behaviour of the contracting parties in the different stages of their life. From that, the abnormal symptoms are collected and classified according to a diagnostic label. It must be said candidly that such an exercise, while it has its value, is totally incapable of supplying the clarification which the ecclesiastical judge expects of the expert. The judge should, therefore, request the expert to go further and extend the analysis to an evaluation of the underlying causes and dynamic processes without stopping with the symptoms which spring from them. Only such a complete analysis of the subject, of the individual's psychic capacities, and freedom to strive for values, that are in themselves self-fulfilling can be translated into canonical categories by the judge"; whatever the diagnostic labels or tags the tribunal interest is to determine how the condition affected the individually in relation to conceptual incapacity to fulfil and assume in canon 1095, 2°, 3° (cf. H. McMahon, "The Role of Psychiatric and Psychological Cases," in *Studia Canonica*, 9 (1975), p. 66; see also on this issue of diagnostic labels which is of no interest , c. Parisella, July 22, 1971, in RRDec, 63 (1980), pp. 697-706; c. Fiore, October 7, 1978, in RRDec, 70 (1988), pp. 415-420).

[52] Ibid; Arroba Conde, M.J. *Dirrito processuale canonico*, EDIURLA, pp. 452-453; Aidan McGrath, "At the Services of the Truth: Psychological Sciences and their Relation to the Canon Law of Nullity of Marriage," cit., pp. 390-391 that presented comprehensive guidelines for the jurisprudence of the Rota and writings of experienced authors for the evaluation of experts reports or submissions.

superficial judgments or by expressions that are apparently neutral but which in reality contain unacceptable anthropological presuppositions[53]

This is an exhortation against the incorrect use of the findings of the expert and worst still accept them because they are from the experts without putting the reports or opinions within the searchlight of Christian anthropology. This obligation binds the judge and also the defender of the bond in conscience. These ministers of justice should know that what is at stake is the Christian family- the domestic Church (LG 11) and the "sanctuary of life." [54] The judge should therefore, avoid the scandal to the Christian community by not paying attention to this duty of critical evaluation of experts' reports and worst still consider failed marriages and irregular situation ("under the pretext of some immaturity or psychic weakness of the parties")[55] as grounds for declaring nullity of marriages. On this note, the legislator called for a genuine formation of both judges and experts within a common horizon of Christian anthropology.

The Necessity of the Principle of Equity in Jurisprudence

Etymologically, the word equity comes from the Latin word *aequitas*- i.e. "spirit of fundamental fairness, justice and right dealing. In his famous phrase, Hostiensis (1200-1271), defined equity as "Justice tempered with the sweetness of mercy"[56] i.e. justice administered

[53] John Paul II, Allocution to the Rota, February 5, 1987, in AAS (1987), pp. 1457-1458; Cormac Burke, "Some Reflections on Canon 1095," in *Monitor Ecclesiasticus*, 117 (1992), pp. 133-150 here in p. 137: "It is primarily and essentially the Acts and not the 'perizia', that must provide the juridic proof of the presence of a grave psychopathology causing consensual incapacity. It is the judge's competence and responsibility to weigh the acts, to see if they indicate the presence of an anomaly that substantially undermine the person's mind of will. To do this is the very essence of his judicial mission. The expert opinions, if they have been called for, have, according to c. 1579, to be considered simply as one more qualified-element of the instruction of the case."

[54] John Paul II, Encyclical, *Centissimus Annus*, 1 May 1991, No 39 in AAS 83 (1991), p. 842. The family if further seen as "a school for a richer humanity" (GS 52); a place where "human society begins" (Pius XII 1 October 1940, in *Discorsi e Radiomessaggi di Sua Santita Pio XII*, 2 (1940-1941), pp. 231-236, here in William H. Woestman, ed., *Papal Allocutions to the Roman Rota 1939-2002*, Ottawa, St Paul University, 2002, p. 9); Pius XII, Allocution to the Rota, October 1, 1940, p. 9; "most sacred of all human bonds", "a conjugal society" (John XXIII, Allocution to the Rota, 19 October 1959, in AAS 51 (1959), pp. 822-825 here in William H. Woestman, ed., *Papal Allocutions to the Roman Rota 1939-2002*, p. 60) "the basic unit of civilized society" (John XXIII, Allocution the Rota, 13 December 1961, in AAS, 53 (1961), pp. 817-820 here in William H. Woestman, ed., *Papal Allocutions to the Roman Rota 1939-2002*, p. 69); "The sanctuary of the family" (Paul VI, Allocution to the Rota, 12 December 1963, in *The Pope Speaks*, 9 (1964), pp. 257-259 here in William H. Woestman, ed., *Papal Allocutions to the Roman Rota 1939-2002*, p. 76); "the healthy and truly vital cell of society" (John Paul II, Allocution to the Rota, 24 January 1981, in AAS, 73 (1981), pp. 228-234 here in William H. Woestman, ed., *Papal Allocutions to the Roman Rota 1939-2002*, p. 166);"fundamental and irreplaceable ecclesial cell" (John Paul II, Allocution to the Rota, 30 January 1986, in AAS, 78 (1986), pp. 921-925 here in William H. Woestman, ed., *Papal Allocutions to the Roman Rota 1939-2002*, p. 189); "institution fundamental to society" (John Paul II, Allocution to the Rota, 5 February 1987, in AAS, 79 (1987), pp. 1453-1459 & 1 February 2001, in AAS, 93 (2001), pp. 385-390 here in William H. Woestman, ed., *Papal Allocutions to the Roman Rota 1939-2002*, p. 194); "a domestic Church" (John Paul II, Allocution to the Rota, 28 January 2002, in *Osservatore romano*, February 3, 2002, pp. 6-7 here in William H. Woestman, ed., *Papal Allocutions to the Roman Rota 1939-2002*, p. 269 & 30 January 2003, No 4).

[55] John Paul II, Allocution to the Rota, February 5, 1987, no 9 & Allocution to the Rota, January 29, 2005, no. 3; Cf. *Familiaris Consortio*, nos 69-85.

[56] Hostiensis, *Summa aurea* in John J. Coughlin, "Canonical Equity," in *Studia Canonica*, 30 (1996), pp. 403-435; Maurice Amen, "Canonical Equity Before the Code," in *The Jurist* 33 (1973), pp. 1-24, 256-295; Innocentius Parisella, "De Aequitate doctrina et praxis in iurisprudentia rotali," in *Periodica*, 69 (1980), pp. 222-226 here in p. 222; J. Fuchs, " 'Epikeia' circa legem moralem nutruarel?" in *Peridoica*, 69 (1980), pp. 251-270;

with milk of human kindness. This principle is founded on the consideration of the salvation of the human person as the supreme law and the natural law and Christian obligation of love, compassion and mercy. Paul VI has this to say:

Motivated by canonical equity, the judge will take into account all the promptings of charity and seek to avoid the rigor of the law and the rigidity of its technical expression. He will avoid the letter of the law that kills by imbuing his interventions with charity that is the gift of God's freeing and life giving Spirit. He will take into account the human person and of the demands of a given situation, which may compel the judge to apply the law more severely, but ordinarily they will lead him to exercise it a more human and compassionate manner. He must take care not only to safeguard the juridic order but also to heal and educate thus giving proof of authentic charity. The pastoral exercise of judicial power is medicinal rather than vindictive. [57]

Furthermore, this principle of canonical equity drawn from Roman law and jurisprudence[58] should guide the interpretation of the law. No wonder the legislator made immense provisions for this principle either in general term of equity (cann 221, §2; 686, §3; 702, §2) or in specific terms of natural equity (cann 271, §3; 1148, §3) and canonical equity (cann 19; 1752),[59] which serve the same purposes of mitigation of law in a particular case. This is operative in area of singular administrative acts (cann 35-93), i.e. either in decrees or precepts (cann 48-58), rescripts (cann 59-93) which grants privileges (cann 76-84), dispensations (cann 85-93) or permissions and other favors (can 59) etc. In this context equity

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E. Corecco, "Valore dell'atto 'contra legem,'" in *Ius Canonicum,* 15/2 (1975), pp. 237-257; P. Caron, "Canonical Equity," in *Concilium,* 107 (1977), pp. 24-25; Paul VI, Allocution to the Rota, February 8, 1973, in AAS, 65 (1973), pp. 98-99; c. Serrano, April 5, 1973, RRDec, 65 (1984), pp. 327, 328; Augustine Mendonça, *Rotal Anthology: An Annotated Index of Rotal Decisions from 1971 to 1988*, p. 667; S. Th. I-II q. 96, a. 6 & II-II, q. 120, a.1; Francesco de Suarez, *De legibus e legislatore Deo*; Gratian, *Concordance of Discordant Canons*; Andrew Cushieri, "The Endorsement of Human Dignity in the Jurisprudence of the Sacred Roman Rota in the XVI-XVII Centuries," in *The Jurist*,43 (9183), pp. 466-496 here in pp. 470-484.

[57]Paul VI, Allocution to the Rota, February 8, 1973, in AAS (1973), p. 101 also Allocution to those attending the "Course on Canonical Renewal for Judges & Other Tribunal Officials," at the Gregorian University, December 13, 1972, in AAS, 64 (1972), p. 81: "Canon law is the law of a society which is indeed visible but also supernatural; a society which is built up through the word and the sacraments, and whose objective is to lead people to eternal salvation" & Allocution to the Rota, February 4, 1977, in William H. Woestman, ed. *Papal Allocutions to the Roman Rota, 1939-2002*, p. 142 & Allocution of January 29, 1970 in AAS, 62 (1970), p. 112: the Judge "must have great objectivity in judgment, together with greater equity, so that he can evaluate all the factors that he has patiently and perseveringly come to know, so that he can, as a result judge with an imperturbable, impartial balance" ; John Paul II, Allocution to the Rota, February 17, 1979, p. 154 & February 26, 1983, p. 177; Columkille Regan, "The Church lawyer-Interpretation of Law," cit., p. 425; Val J. Peter, "The Canonist in an Age of Privacy," in *Studia Canonica,* 14 (1980), pp. 323-333; Augustine Mendonça, "Recent Trends in Rota Jurisprudence," in *Studia Canonica*, 28 (1994), pp. 167-230, here p. 177.

[58] The praetorian activities is an activity of equity and Roman Law through the Justinian Digest was the source of the introduction of this principle in canonical practice used by medieval canonists (cf. John J. Coughlin, "Canonical Equity," cit., pp. 403, 435); For other references of Roman Law origin of canonical equity see Paul VI, Allocution to the Rota, February 8, 1973 in AAS 65 (1973) p. 99 & January 29, 1970 in AAS, 62 (1970), p. 112; Augustine Mendonça, "The Application of the Principle of Equity in Marriage Nullity Cases," in *The Jurist,* 55 (1995), pp. 664-697; Olysius Robleda, "De usu iuris romani in Ecclesia," in *Monitor Eccleisasticus,* 100 (1975), pp. 434-443;

[59] Cf. c. Morano, April 6, 1935, in RRDec 27: 200, c. Doran, November 9, 1989, in *Monitor Ecclesiasticus,* 116 (1991), pp. 379-389.

allows for what Joseph Koury called flexibility and accommodation in application of laws in concrete cases.[60]

The Church legislator imposes on the judge to employ this principle in the application of law. The Rota[61] has been consistent in using this principle in both substantive and procedural laws. In effect, equity is a virtue that must be cultivated in the heart of the ecclesiastical judge. This prevents arbitrariness in the use of faculties/discretion by the judge, and indeed, judicial positivism. Finally, equity supports the principle of economy of salvation nurtured by the theory of evolving interpretation of human persons within the Church that grows and is subject to evolution and change.[62]

The principle of equity is also operational in socio-cultural and contextual interpretation of law. This is so because of the observation made by Augustine Mendonça,

The universal nature of ecclesiastical law and its supreme purpose rooted in the very nature and mission of the Church necessarily implies that it must be interpreted and applied in a spirit of equity to diverse conditions where the life of the faithful is grounded and nurtured…. The cultural conditions and pastoral needs of particular local Churches and of individual faithful are so diverse that the interpretation and application of the universal law must take into consideration the cultural heritage and social situations of the people concerned.[63]

This is all the more true because the ecclesiastical judges make decisions on marriages located within the cultural contexts and historical conditions of people. The Church allows for this pluralism and diversity (GS 53). This involves the accommodation of the contribution of behavioural sciences based of course on the Christian anthropology of human redemption of God through Christ and in the Spirit. The understanding of sociology of human organization and anthropological nuances on human culture and language helps in this enterprise.[64] This

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[60] Cf. Joseph J. Koury, "Hard & Soft Canons Continued: Canonical Institutes for Legal Flexibility and Accommodation," in *Studia Canonica,* 25 (1991), pp. 335-364 & "From Prohibited to Permitted: Transition in the Code of Canon Law," in *Studia Canonica,* 24 (1990), pp. 147-152.

[61] Cf. c. Serrano, June 2, 1989, Umuahia (Nigeria), in *Monitor Ecclesiasticus,* 115 (1990), pp. 233-238; c. Faltin, May 26, 1989, in *Ius Ecclesiae,* 2 (1990), pp. 177-190; Augustine Mendonça, *Rotal Anthology: An Annotated Index of Rotal Decisions from 1971 to 1988*, p. 669, 696-697.

[62] Cf. James Coriden, "Rules for Interpreters," cit., pp. 278-279, 285 also p. 303: "Some have treated the Code of Canon Law as an "other god", as a graved image, as carved in stone, as an object of veneration. This form of idolatory can lead to pharisaical legalism; it can be more harmful to God's people than if the law had not been given or if it were to be ignored. The revised Code, like its predecessor must be kept in human perspective. It is the work of human minds, and the product is often wise and good, but sometimes faulty and foolish. It is not permanent, but temporary, and will require continual amendment. It is to be welcomed and observed, but always judiciously, prudently. In most instances, the revised Code will lead to good order in the Church. It can provide opportunities for renewal. But in some matters it deserves to be ignored. In the hands of the intelligent interpreters it can be a model boon for the people of the Church"; Ladislas Orsy, "In Search of the Meaning of Oikonomia: Report on a Convention," in *Theological Studies,* 43 (1982), pp. 313, 316, 318; P. Moneta, "Error sulla qualità individuate et interpretatione evolutiva," in *Il Diritto Ecclesiastico,* 18/2 (1970), pp. 33-44; G. Delgado de Rio, "La Interpretation de la Norma," in *Ius Canonicum,* 10/2 (1976), pp. 117-135.

[63] Augustine Mendonça, *Rotal Anthology: An Annotated Index of Rotal Decisions from 1971 to 1988*, p. 27; See also Augustine Mendonça, "Reflections on Some recent Rotal Sentences on Cases Originative in the United States, Part II," in Forum, 10 (1999), p. 328: "A judge's sole responsibility in examining a case brought before him/her is to interpret the facts in the light of the law and jurisprudence applicable to it and pronounce a just and equitable decision."

[64] Cf. John Paul, Post Synodal Apostolic Exhortation, *Familiaris Consortio,* 4 & Allocution to the Rota, February 5, 1987; January 28, 1991, pp. 214-215; [64] Augustine Mendonça, *Rotal Anthology: An Annotated Index of Rotal Decisions from 1971 to 1988*, pp. 20-2, 431 on Emilio Collogiovani "The Role of *Peritus* and the Judicial Evaluation of the *peritia*," in *Forum*, 1/1 (1990), p. 89, where he affirmed that "a judge is the product of his or

diverse cultural situation does not accept monological but dialogical interpretation of law. John Huels advised:

Judges, administrators, pastors, people of God- to ensure that canon law is not applied without sensitivity to culture. Interpretations of canon law should not, and cannot, be uniform. Since interpretation is a human act and human beings are psychologically and culturally diverse, we should always expect a variety of interpretations, the more so as the background and culture of the interpreters are various.[65]

The Council in its last document opened the Church clearly to the world with a mandate to integrate the gospel in the cultures of the people. The culture remains the foundation for an authentic expression and proclamation of the good news. There is connection between the gospel and the human cultures.[66] Thus, "a faith that does not become culture is not fully accepted, not entirely thought out, not faithfully lived."[67] On these bases, the John Paul II called the tribunal officials to take into considerations the culture of people in canonical applications, "precisely because it is a reality that is deeply rooted in human nature itself, marriage is affected by the cultural and historical conditions of every people. They have always left their mark upon the institution of marriage. The Church, therefore, cannot prescind from the cultural milieu."[68]

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her own culture….This implies that a judge must have a genuine feeling for the socio-cultural milieu within which the particular marriage was contracted and lived, and the decision eventually rendered must be based on the objective evidence secured from and weighed in light of concrete circumstances of the case"; c. Agustoni, May 9 1973, RRDec 65 (1973), pp. 409-417; John M. Huels, "Interpreting Canon Law in Diverse Cultures," cit., pp. 251-252, 256;

[65] John M. Huels, "Interpreting Canon Law in Diverse Cultures," in *The Jurist*, 47 (1987), pp. 249-293, here in p. 290; Adam Maida, "Visionary or Reactionary: The Canonists' Challenge to Create," in *CLSA Proceedings*, 39 (1977), p. 2: "The canonist who merely explains the law as written and does not take into account the changing circumstances in ecclesial life has failed in his professional responsibility to Church people."

[66] Cf. GS 58, 44; AG 15, 22; EN 20; FC 10; JohnPaul II, *Ecclesia in Africa*, no. 59, 78; *Redemptoris Missio*, no. 52 December 7, 1990, in AAS, 83 (1991), p. 229; John Paul II, Allocution to the Rota, January 22, 1996, no. 7, in William H. Woestman, ed. *Papal Allocutions to the Roman Rota, 1939-2002*, cit., p. 240; Augustine Mendonça, "The Church of the Third Millennium. An Exercise in Theological & Canonical Imagination: In Praise of *Communio*," cit., p. 8.

[67] John Paul II, Allocution to the Rota, Address to the Italian Congress of the Ecclesial Movement for Cultural Commitment, January 16, 1982, no. 2, in *Insegnamenti VII*, 1982, p. 131.

[68] John Paul II, Allocution to the Rota, January 28, 1991, in William H. Woestman, ed. *Papal Allocutions to the Roman Rota, 1939-2002*, cit., p. 214; John Paul II, Allocution to the Rota, January 22, 1996, no. 5, in William H. Woestman, ed. *Papal Allocutions to the Roman Rota, 1939-2002*, cit., p. 239: Judges should "evaluated and weigh individual case, taking into account the individuality of the subject as well as the particular nature of the culture in which the person grew up and lives"; FC 4: "Since God's plan for marriage and the family touches men and women in the concreteness of their daily existence in specific social and cultural situations, the Church ought to apply herself to understanding the situations within which marriage and the family are lived today, in order to fulfill her task of serving"; Augustine Mendonça, "Exclusion of the Essential Elements of Marriage," in *Simulation of Marriage Consent, Doctrine, Jurisprudence, Questionnaires*, cit., p. 81; Augustine Mendonça, "The Importance of Considering Cultural Contexts in Adjudicating Marriage Nullity Cases with Special Reference to Countries of Southeast Asia," in *CLSA Proceedings*, 57 (1995)/ Proceedings of the Annual Convention of the Canadian Canon Law Society, 35 (1995), pp. 231-292, here in pp. 231-232; Augustine Mendonça, "Recent Rotal Jurisprudence from a Socio-cultural Perspective (Part I)," in *Studia Canonica*, 29 (1995), pp. 29-83 & "Recent Rotal Jurisprudence from a Socio-cultural Perspective (Part II), ibid., pp. 317-355; John M. Huels, "Interpreting Canon Law in Diverse Cultures," in *The Jurist*, 47 (1987), pp. 249-293; Lynda A. Robitaille, "Consent, Culture and the Code," in *Studia Canonica*, 33 (1999), pp. 125-138; Rudolf R. Calvo, "The Impact of Cultures in Marriage Cases," in *CLSA Proceedings*, 55 (1993), pp. 108-120.

Finally, this principle of equity should dispose the judge to see the Code for what it is, i.e. an instrument at the service of redemption and maintenance of unity of faith and communion and not the source of grace or to replace faith.[69]

5. THE PRECEDENTS OF THE JURISPRUDENCE OF THE TRIBUNAL OF ROMAN ROTA

The Apostolic Tribunals and the Doctrine of Stare Decisis

The new Code and *Pastor Bonus*[70] affirm the auxiliary and ministerial status of the Roman curia to the Supreme Pontiff, the Universal Church and the Particular Churches (PB 1; can 360).[71] By this disposition its competence is essentially vicarious (PB 8) that is "it acts not in its own right or by its own initiatives, but always in accord with the will of the pope and in service to the good of the Church and service of the bishops."[72] Principally the curia operates according to the universal law (the 1983 Code) and special law (*Pastor Bonus* and *Regolamento* and ones particular to the individual dicasteries).[73] The curia serves the finality of the Church which is the good of the Church especially the salvation of souls (PB 12, 15; can 1752). Hence from its title and focus, *diakonia* is the leitmotiv of *Pastor Bonus.*[74] The fact that the curia draws its existence from the pastor of the universal Church (PB 7; Cf. can 331) and serves the whole Church (PB 12), makes it to have an ecclesial character (PB 7, 12).

The Apostolic Constitution, *Pastor Bonus* of 28 June 1988, provided for the judicial competences of some tribunals of the dicasteries of the Roman Curia (e.g. Congregation for Doctrine of Faith on *graviora delicta*-art 53; Congregation for Divine Worship and Discipline of Sacraments, non-consummation-art 67 and nullity of ordination-art 68 etc.) apart from the de facto Apostolic Tribunals (i.e. The Apostolic Penitentiary-artt. 117-120; The Supreme Tribunal of the Apostolic Signatura-artt. 121-125 and The Tribunal of the Roman Rota-artt. 126-130). These dicasteries present different nuances of authority and authenticity. For instance, there is no appeal against the judgement of the Supreme Tribunal of the Apostolic Signatura (can 1629, 1°) and the Congregation for Doctrine of faith in *graviora delicta* (grave delicts) cases.[75] In addition in situation of *lacuna legis* (i.e. where there is no express provision

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[69] Cf. Paul VI, Allocution to the Rota, February 4, 1977, p. 141.

[70] John Paul II, Apostolic Constitution, *Pastor Bonus*, 28 June 1988, in AAS, 80 (1988), pp 841-932.

[71] Cf. CD 9 which emphasizes that it is for "the good of the Churches and in service to the sacred pastors"; see also James H. Provost, who added: "Since it is at the service of the pope, it is also at the service of the local pastors and Churches" (James H. Provost, "*Pastor Bonus*: Reflections on the Reorganization of the Roman Curia," in *The Jurist*, 48 (1988), pp. 499-507, here in p. 509) ; Jean-Baptiste Beyer, "The Roman Curia: Official Organism of the Pope at the Service of the Particular Churches," in *The Bishop and His Ministry*, Vatican City, Urbaniana University Press, 1998, p. 391.

[72] James H. Provost, "*Pastor Bonus*: Reflections on the Reorganization of the Roman Curia," cit., p. 509; see also CIC/83, can 131, §2.

[73] *Pastor Bonus* regulates that there should be *Ordo servandus* or common norms for the Curia (Art 37: since its publication in June 28, 1988 and its coming into effect in March 1, 1989 we have experienced two common norms in 4 February 1992 and the last in 1 July, 1999) and also *Ordo servandus* or special norms for each dicastery, with the attendant obligation of publicity (Art 38) in accordance with operations of the Holy See (Cf. can 8, §1 on publications of Holy See).

[74] Cf. The title and then the first paragraph (PB 1); John Paul II in another place said: "I have myself emphasized that the vocation of all those who collaborate in the Curia, has a directive and only norm, this generous service, the service of the Church and for the Church" (Allocution of 21 June 1986; *Insegnamenti* 9, 1- 1854-1986).

[75] John Paul II, Apostolic Letter, motu proprio datae, *Sacramentorum Sanctitatis tutela*, quibus Normae de gravioribus delicts Congregationi pro Doctrina Fidei reservatis promulgator, 30 Apri. 2001, in AAS, 93 (2001),

of neither universal and particular laws, nor custom, and always in a particular matter that is not penal), the legislator allowed recourse for interpretation and solution to "the jurisprudence and practice of the Roman Curia." [76]

This introduces the issue of the judicial value of the activities of Apostolic Tribunals especially the ordinary tribunal of the Roman Rota (cann 1443, 1444) charged with "the unity of jurisprudence"[77] and that of the Supreme Apostolic Tribunal that oversees the "proper administration of justice." [78] The legislator in this canon 19 affirms the interpretative value and principle of judicial precedents of especially the Roman curia, but elsewhere in the Code disposes that:

- The sentences of Church tribunals have no force of law except for the parties in a particular matter (can 16, §3);
- Adjudged matter (can 1641) has the force of law and juridic effect for the parties (can 1642, §2);
- Recourses and appeals are allowed against the judgement of the lower tribunals and also that of the Tribunal of the Roman Rota (cann 1628; 1643; 1644; 1683; 1619-1627; 1732-1739; 1445, §1, 2°; 1614).

In these provisions we can say in a strict sense that doctrine of judicial precedents (*stare decisis*) do not exist within the canonical jurisprudence of the Church. James H. Provost added:

Because Church courts are not governed by the stare decisis system of the Anglo-American legal system, but rather must authoritatively interpret the law for each individual case (c. 16, §3) in light of "the proper meaning of the words" of the law "Considered in their text and context" (c. 17), and are to look to "the jurisprudence and praxis of the Roman Curia," among other sources, in supplying for an express prescription of law (c. 19), it is this doctrinal jurisprudence as reflected in various sentences to which the Rota itself turns to decide cases that is of most long-term value to local tribunals.[79]

This signifies that judicial decisions do not enjoy the status of law or authentic interpretation (can 16, §2). Its juridic value and binding effect is only for the parties (cann 16, §3; 1642, §2), that is to say, "when a matter calls for a former judicial resolution, however, the basic understanding is that a court is not bound by earlier judicial decisions on the same or a

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pp 737-739 where this congregation is raised with the dignity of an apostolic tribunal in this cases of graviora delicta.

[76] CIC/1983, can 19; see also Cristian Begus, *L'Armonia della Giurisprudenza Canonica*, Vatican City: Lateran University Press, 2002, pp. 17-18.

[77] *Pastor Bonus*, art. 126; *Dignitas Connubii*, art. 35, §3.

[78] *Pastor Bonus*, art. 121, 124, 1°; can 1445, §3, 1°; *Dignitas Connubii*, Introduction, p. 17, Augustine Mendonça, *Rotal Anthology: An Annotated Index of Rotal Decisions from 1971 to 1988*, CLSA, Washington, D.C. 1992, p. 7.

[79] James H. Provost, "Sources for Canon 1095, 1°, Part One," in *The Jurist*, 54 (1994), pp. 257-333, here in p. 257; see also Patrick S. Morris, "Alcoholism and Marital Consent," in *Studia Canonica*, 34 (2000), pp. 155-195, here in p. 157: "Although the Code itself does not contain a principle of precedence and the principles of jurisprudence employed in a given case are binding only on the parties involved in the case, the application of the law in local courts finds guidance from and inspiration in the sentences of Rota auditors"; John Paul II, Allocution to the Rota, January 26, 1984, no 6, in AAS, 76 (1984), pp. 643-649, here in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, Ottawa: St Paul University, 2002, p. 184: The interpretative power, however, is to placed, above all, in the formation of jurisprudence, that is, of that ensemble of concordant decisions, which-without having the absoluteness of the ancient ?the authority of cases always decided in the same way (*auctoritas rerum perpetuo similiter indicatarum*), nevertheless plays a notable role in filling possible lacunae in the law"; Dig. 1. 3. *De Legibus*, 1, 38. *Nam Imperator*.

related matter, in order to dispose of the case at hand."[80] For the judicial decisions of the Apostolic See, the interpretative value comes when they are designated as authentic interpreters like the Pontifical Council for Legislative Texts (can 16, §1; PB art. 154, 155); or acts with delegated legislative power to issue general decrees (cann 29; 30); or have their general executive decrees or Instructions approved *in forma specifica* (can 1405, §2).[81] This draws from the fact that the legislator remain the authentic interpreter of laws as John Paul II, remarked: "In a strict sense, the true authentic interpretation which declares the general meaning of the law for the entire community is reserved to the legislator, according to the well-known principle: 'The source of the law is the source also of interpretation' (*unde ius prodiit, interpretation quoque procedat*)."[82]

However, with regard to the jurisprudence of the tribunal of the Roman Rota, we experience circumstances that endow its jurisprudence with the status of judicial precedents even in a quasi level as John Paul II indicated that although judges undoubtedly enjoy a freedom of decision (cann 16, §3; 1642, §2), nevertheless the jurisprudence of the Roman Rota and the practice of the Roman dicasteries are to be considered "guides and orientation for interpretation of the law in some cases."[83] This is considered necessary in order to avoid jurisprudential laxity and arbitrary application of legislative dispositions, and specifically to enthrone the required jurisprudential unity (a unity that is not actually uniformity but harmony, respecting the liberty of judges [can. 16, §3], diversity of cultural contexts [can 17], and creative collaboration of all).[84] In this context, John Paul II continued, "While respecting a healthy pluralism that reflects the Church's universality, the function of the jurisprudence of the Rota is indeed that of leading toward more convergent unity and substantial uniformity in safeguarding the essential contents of canonical marriage, which the spouses, the ministers of the sacrament, celebrate in adherence to the depth and wealth of the mystery in reciprocal profession before God."[85]

Finally, therefore, it is within these provisions of the Code (can 19) and the expression of the mind of the legislator (can 17), that we intend to discuss the issue of jurisprudence of the Roman Rota as precedents to the local Church tribunals.

The Unique Dignity of the Tribunal of the Roman Rota as Precedents to Local Church Tribunals

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[80] Norman Doe, "Canonical Doctrines of Judicial Precedent: A Comparative Study," in *The Jurist*, 54 (1994), pp. 205- 215, here p. 206; see also Hugh F. Dorgan, "The Tribunals of the Catholic Church," in *Catholic Tribunals: Marriage Annulment & Dissolution*, Hugh F. Dorgan, ed., New Town, Austrial, E.J. Dweyer, 1990, pp. 12-13.

[81] This approval according to the *Regolamento Generale* Art 126, §4,: "Affinché consti dell'approvazione in forma specifica si dovra dire esplicitamente che il Sommo Pontefice **in forma specifica approbavit**"; *Pastor Bonus*, Introduction, No 18; Ladislas Orsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, pp. 37-39; James Coriden, "Rules for Interpreters," in *The Jurist*, 42 (1982), pp. 277-303; James H. Provost, "Approval of Curial Documents *in Forma Specifica*," in *The Jurist*, 58 (1998), pp. 213-225; John M. Huels, "Interpreting an Instruction Approved *in Forma Specifica*," in *Studia Canonica*, 32 (1998), pp. 5-46.

[82]John Paul II, Allocution to the Rota, January 26, 1984, no 6, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 184; Innocent III, X, V, 39, 31; CIC/1983, cann 16, §1; 17.

[83]John Paul II, Allocution to the Rota, February 26, 1983, no. 4, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 179.

[84] Cf. Cristian Begus, *L'Armonia della Giurisprudenza Canonica*, cit., p. 9.

[85] John Paul II, Allocution to the Rota, February 26, 1983, no 5, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 179; Mario F. Pompedda, "Il Tribunal della Rota Romana," in AA.VV., *Le 'normae' del Tribunale della Rota Romana, Studi giuridici* vol. XLII, Citta del Vaticano, 1997, pp. 21-22: "sempre più diordinata interpretatione ed applicazione dellage legge canonica, soprattuto quando è in gioco la validità e la sacramentalità del matrimonio."

The new Code and the Constitution *Pastor Bonus* provide the specific competence of the Roman Rota (cann 1405, §3; 1443; 1444; PB art. 126-130). The Rota operates in first, second, third and further instances.[86] Essentially it is an appeal tribunal that judges in turns of three auditors (i.e. a collegiate tribunal). In summary, according to the Apostolic Constitution *Pastor Bonus*, its unique and specific competence is that, the "Roman Rota is a court of higher instance at the Apostolic See, usually at the appellate stage, with the purpose of safeguarding, and, by virtue of its own decisions, provides assistance to lower tribunals."[87] This competence as already indicated earlier, introduces our theme of discussion that is the service of the jurisprudence of the Rota as precedents to local Church tribunal.

It is good to remark that Roman Rota has received credible remarks annually from the supreme legislator, who always confirms the value of their judicial decisions especially for the entire Church and especially for the lower tribunals. In fact, this ordinary collegiate tribunal of the Apostolic See is both historical and international tribunal "which brings together the contributions of the most diverse cultures and harmonizes them in the higher light of revealed truth,"[88] serves the ecclesial and Christian families.[89] It is indispensable, irreplaceable and most valuable collaborator of the First See.[90] Furthermore, the Rota auditors and officials have been acknowledged as perfect devotees, wise interpreters, renowned masters and doctors of law,[91] marked with judicial talents and learning;[92] and identified as priests and administrators

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[86] Cf. CIC/1983, cann 1444, 1405, §3; *Pastor Bonus*, artt. 128, 129; Instruction, *Dignitas Connubii*, artt. 27, 283.

[87] *Pastor Bonus*, art 126; see also Instruction, *Dignitas Connubii*, Introduction p. 17.

[88] Cf. John Paul II, Allocution to the Rota, January 22, 1996, , in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 240; cf. Pius XII, Allocution to the Rota, 1939, , in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 3

[89] Cf. Pius XII, Allocution to the Rota, October 1, 1940, , in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 8; John XXIII, Allocution to the Rota, October 29, 1959, , in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, pp. 60-61; Paul VI, Allocution to the Rota, December 12, 1963, , in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 71; John Paul II, Allocution to the Rota, January 17, 1998, , in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 247: "Contribute to a correct and deeper understanding of marriage law" & January 21, 1999, , in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 249: "made knowledge of the institution of marriage by offering a very sound doctrinal reference point for other ecclesiastical tribunals" (see also John Paul II, Allocution to the Rota, January 21, 1981, , in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, pp. 168-169 & January 26, 1984, , in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, pp. 184-185).

[90] Cf. Pius XII, Allocution to the Rota, October 1, 1940, p. 8 & October 3, 1941, p. 11; John XXIII, Allocution to the Rota, October 19, 1959, , in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 60; Paul VI, Allocution to the Rota, February 12, 1968, , in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 89; John Paul II, Allocution to the Rota, February 17, 1979, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 153: "I am delighted with this opportunity to meet for the first time those who, beyond all others, embody the Church's judicial function in the service of truth and love for the building up of the body of Christ. I am happy to recognize in them, as in all administrators of justice and specialists in canon law, professionals of a vital role in Church, indefatigable witnesses to a higher justice in the midst of a world characterized by injustice and violence, and, consequently, most valuable collaborators in the pastoral activity of the Church herself"; NB as observed by Manuel J. Arroba Conde, *Diritto processuale canonico*, Roma, Editiones Institutum Iuridicum Claretianum, 4th ed., 2001, p. 94: "L'espressione "prima sedes" include la persona del Papa. … Senz'altro, l'espressione "prima sedes" non equivale sempre all formula "sede apostolica" (o "santa sede"), in quanto quest'ultima si referisce all'insieme di organismi di governo della curia romana (c. 361)."

[91] Cf. Pius XII, Allocution to the Rota, October 1, 1940, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, pp. 7-10; John XXIII, Allocution to the Rota, December 13, 1961, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 68; Paul VI, Allocution to the Rota, December 12, 1963, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 79 & Paul VI, Allocution to the Rota, January 11, 1965, in Ibid., p. 80 & January 27, 1969, in Ibid., p. 97 & January 29, 1970, in Ibid., p. 104.

of justice. Their function in the Church is qualified as having pastoral solicitude[93] that is a service to law, justice and unity in the church and indeed the Christian family with the spirit of religious devotedness.[94]

Owing to the value of this jurisprudence of the Apostolic Tribunals, the supreme legislator in his ordinary exhortatory teaching have not failed to call on the local tribunals to have recourse to them. Here are their words:

- "It is our wish that all ecclesiastical judges would model themselves on you, so as neither too readily nor without legitimate cause to allow dispensations from these norms".[95]
- "Indeed, any innovation of law, substantive or procedural, that does not correspond to the jurisprudence or practice of the courts and dicasteries of the Holy See is reckless."[96]
- "To the healthy jurisprudence of the Rota must correspond equally wise and responsible work in the lower courts."[97]
- "If it is true that the new Code clearly imposes the obligation of rapidly bringing all processes of first and second instance to completion, this must not result in the detriment of justice and protection of the rights of all the parties to the cause and the community of which they are members. This requirement becomes the more urgent inasmuch as the jurisprudence of the Sacred Roman Rota, as that of the other apostolic tribunals, and also the practice of the dicasteries of the Roman Curia are considered to be guides and orientation for interpretation of the law in some cases. Along this line, the jurisprudence of the Rota has acquired increasing authority- not only moral but juridical authority- in the Church's history in reference to the evolution of the norms."[98]
- "The value of the Rota jurisprudence in the Church has always been noteworthy, given the knowledge and experience of the judges and the authority they enjoys as papal judges. Canon 19 of the new Code expressly confirms this."[99]
- "If then we limit the significance of this expression to cases of marriage nullity. It seems evident that, on the level of substantive law, i.e. in deciding the merit of the

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[92] Cf. Paul VI, Allocution to the Rota, January 25, 1966, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 84 & February 12, 1968, in Ibid., p. 90 & January 31, 1974, in Ibid., p. 127 & January 31, 1974, in Ibid., p. 127; John Paul II, Allocution to the Rota, January 28, 1979, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 148.

[93] Cf. Pius XI, Apostolic Constitution, *Ad incrementum*, August 15, 1934 in AAS 25 (1934), p. 497; Paul VI, Allocution to the Rota, January 11, 1965, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 80 & January 23, 1967, p. 86 & January 29, 1970, in Ibid., pp. 198-199; January 30, 1975, in Ibid., p. 130.

[94] Cf. Pius XII, Allocution to the Rota, October 29, 1947, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 49; John Paul II, January 30, 1986, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 190 & January 30, 1986, in Ibid., p. 187 & January 25, 1988, in Ibid., p. 197 & January 28, 1994, in Ibid., p. 227 & January 28, 1991, in Ibid., p. 218.

[95] Paul VI, Allocution to the Rota, February 9, 1976, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 136 & also January 28, 1978, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 148.

[96] John Paul II, Allocution to the Rota, January 24, 1981, in *Origins* 10/34 (1981), p. 126.

[97] John Paul II, Allocution to the Rota, January 24, 1981, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 168.

[98] John Paul II, Allocution to the Rota, February 26, 1983, no. 4, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 179.

[99] John Paul II, Allocution to the Rota, January 26, 1984, no 7, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 185.

cases presented, jurisprudence must be understood exclusively as that which emanates from the tribunal of the Roman Rota."[100]

- "The office entrusted to tribunals is situated within this framework of the Church's legal system (c. 16, §3) and, in a particular way and for a specific purpose, it is entrusted to the Roman Rota, inasmuch as the latter 'fosters unity of jurisprudence, and, by virtue of its own decisions, provides assistance to lower tribunals' (*Pastor bonus*, no. 126)."[101]
- "Lower courts 'must conform' to a wise and unambiguous jurisprudence, both as regards substantive law as well as procedural issues."[102]
- Rota is always essential as "the instrument of a wise and unambiguous jurisprudence to which other ecclesiastical tribunals must conform as to their authoritative model. This is the same reason for the now timely publication of your judicial decisions which concern matters of substantive law as well as procedural issues."[103]

With these clear exhortatory words of the supreme legislator on identity, dignity and indispensability of the Rota in canonical jurisprudence, one is not in doubt of the quasi judicial precedents of this higher tribunal in both unity and harmony of jurisprudence and their suppletory judicial interpretative value. The tribunal personnel should know that the papal addresses even though it is neither a law, apostolic constitution nor an authentic interpretation of law (can 16, §§1-2),[104] are nevertheless an expression of the mind of the legislator (can 17) and an ordinary teaching of magisterium which they owe religious submission of intellect and will (LG 25; can 752).[105]

The judges of the lower tribunals should, therefore, study these sentences, use them as guide and endeavour to conform their sentences to them within the ambient of harmony and unity of jurisprudence which Roman Rota serves (PB art. 126),[106] aware that "the worth and efficacy of a higher tribunal depend not only on the greater theoretical proficiency or practical experience of the judges that compose it, but also on their judicial prudence."[107] For this

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[100] John Paul II, Allocution to the Rota, January 23, 1992, in *L'Osservatore Romano*, January 29, 1992, pp. 1, 4 or in *Origins*, 2 (1991-1992), p. 601.

[101] John Paul II, Allocution to the Rota, January 30, 1993, no. 4, in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 225.

[102] John Paul II, Allocution to the Rota, January 17, 1998, , in William H. Woestman, *Papal Allocutions to the Roman Rota 1939-2002*, p. 247; John Paul II, Allocution to the Rota, January 23, 1992, pp. 1, 4, *L'Ossevatore Romano* or *Origins*, 2 (1991-1992), p. 601.

[103] John Paul II, Allocution to the Rota, January 17, 1998, p. 247.

[104] Cf. Cristian Begus, *L' Armonia della Jiurisprudenza Canonica*, cit., p. 37.

[105] See also James H. Provost, "Canon 1095: Past, Present, Future," in *The Jurist* 54 (1994), pp. 81-112, here in p. 107; Francis G. Morrisey, *The Canonical Significance of Papal and Curial Pronouncements*, Hartford, CT: CLSA 1974 &"Papal and Curial Pronouncements: Their Canonical Significance in Light of the 1983 Code of Canon Law," in *The Jurist* 50 (1990), pp. 102-125.

[106] It is good to note that this consistence and customary sentences of the Rota have been collected since 1337 by Thomas Falstof and has appeared in these publications *Roman Rota Decisions; Monitor Ecclesiasticus; Quarderni di studio rotale, Studia Canonica, The Jurist etc;* Augustine Mendonça, *Rotal Anthology: An annotated Index of Rotal Decisions from 1971 to 1988*, CLSA publication, 1992; and in the writings of learned authors[106] that appears constantly in other academic journals. These are published mostly in Latin language which creates problem for its awareness by some of the local tribunals. But recently in Journals like *Studia Canonica* published by the Faculty of Canon Law, St Paul University, Ottawa Canada, we have constantly since the 1990s the complete English translation of some of the outstanding Rotal Sentences and learned treatment of issues and trends in canonical jurisprudence according to this ordinary tribunal of the Apostolic See.

[107] C. Burke, October 18, 1990, in *Studia Canonica* 25 (1991), p. 197; see also, Mario F. Pompedda, "The Probative Value of the Declarations of the Parties in the New Jurisprudence of the Roma Rota," in AA. VV. *Simulation of Marriage Consent, Doctrine, Jurisprudence, Questionnaires*, William H. Woestman ed., Ottawa: St Paul University, 2000, pp. 146-170, here p. 158: "On the other hand, a sudden 'flight to the front' would be

reason, therefore, remarked, Patrick S. Morris, "It is clear that many Rotal sentences and Rotal jurisprudence (as an evolutionary science) are a rich source for the application of the law in the tribunals of particular Churches."[108]

With these eloquent status and integrity and definitely through custom[109] of uniform sentences over a long period of history, the Roman Rota provide the excellent juridical value as precedents for creative canonical jurisprudence, useful for the discernment of the will of the legislator and as suppletory sources of law (can 19), but always according to the established legal system, procedures and jurisprudential unity and harmony. This was expressed by Augustine Mendonça in these words:

Neither the norm of law c. 19 nor papal teaching insist that to have suppletive efficacy the interpretation must become a legally established custom, rather both presuppose that the interpretation of law be definite, constant over a long period of time. Therefore, consistent repetition of the pronouncement on a particular matter for a long a period of time is necessary. If this requirement is lacking there is no jurisprudence in the true sense of the word, it has no normative value; nevertheless each judicial pronouncement or several of them have the juridic value intrinsic of its doctrine and the prominence of its author.[110]

However as John Paul II emphatically expressed his mind in the understanding of canon 19 saying, "If then we limit the significance of this expression to cases of marriage nullity, it seems evident that, on the level of substantive law, i.e. in deciding the merit of the cases presented, jurisprudence must be understood exclusively as that which emanates from the Tribunal of the Roman Rota."[111]

The obvious reason for this position is that law is made by persons, for the community of faith and such requires the intervention of physical and concrete persons to interpret and apply as James Coriden added, "Law is not self-implementing….No law works automatically, nor is its application a purely mechanical robot-like function. All law is applied by persons. Interposed between the general and abstract norm of law and the community for which it is intended is always a human person whether judge or executive, counselor or citizen, the law is understood, interpreted and applied by persons."[112] In most cases legislative dispositions are presented in general terms that offers greater horizons for jurisprudential navigation and

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inconceivable on the part of a tribunal of the Holy See, whose decisions should be examples for other tribunals and should thus always inspire a reasonable prudence."

[108] Patrick S. Morris, "Alcoholism and Marital Consent," in *Studia Canonica* 34 (2000), pp. 155-195 here in p. 195, also p. 157.

[109] We remember the legal provision in canon 27 that states that "custom is the best interpreter of laws"; see also Cristian Begus, *L'Armonia della Giurisprudenza Canonica*, cit., pp. 39-40.

[110] Augustine Mendonça, *Rotal Anthology: An Annotated Index of Rotal Decisions from 1971 to 1988*, cit., p. 9, also pp. 10, 12, 17, 19; Augustine Mendonça, "Recent Trends in Rota Jurisprudence," in *Studia Canonica*, 28 (1994), pp. 167-230, here p. 168; see also, J. Castino, "Studi esegetico doctrinale sulle tre figure del can. 1095," in *Angelicum*, 69 (1992), p. 17; Mario F. Pompedda, "Jurisprudence as a Source of Law in the Canonical System of Marriage Legislation," in *Marriage Studies, Reflections in Canon Law & Theology*, vol 4, J. A. Alesandro ed., Washington DC, CLSA 1990, p. 111; c. Wynen, October 25, 1945, in *SRR Decisions* 37 (1945), p. 378; C. L. G. Wrenn, "Notes on Canonical Jurisprudence," in *The Jurist*, 29 (1969), p. 68; c. Ewers, April 4, 1981, in *Monitor Ecclesiasticus*, 106 (1981), pp. 295-302.

[111] John Paul II, Allocution to the Rota, January 23, 1992, pp. 1, 4, *L'Ossevatore Romano* or *Origins*, 2 (1991-1992), p. 601.

[112] James Corriden, "Rules for Interpreters," in *The Jurist* 42 (1982), pp. 277-303, here in p. 279; see also Richard A. Hill, "Reflections on the Interpretation of the Revised Code," in *The Jurist*, 42 (1982), p. 311 where he maintained that law is not self-actualizing it require the services of persons.

determination especially from the Roman Rota. Examples are taken from the formulation of canons 1095 and 1098 as the Legislator indicated in these words:

There still remain canons of great importance in matrimonial law, however, which have been necessarily formulated in a generic way and which await further determination, to which especially the expert jurisprudence of the Rota could make a valuable contribution. I am thinking, for example, of the determination of the 'grave lack of discretionary judgment', of the 'essential matrimonial rights and obligations' mentioned in c. 1095, as well as the further clarification of c. 1098 on error resulting from deceit, to mention only two canons.[113]

The Roman Rota remains not only sources of interpretation when there is *lacuna legis* (can 19) but also source of authentic and reasoned jurisprudence and even for the most part source of legislations. In the local Church we have testimonies of dearth of personnel[114] and efforts of the few available personnel to apply the law within their contexts. While on the one hand, some of these tribunals and their sentences are credible, on the other hand however, some demonstrate serious situations of laxity and flaws in the observation of canonical substantial and procedural laws. Some of these anomalies we have made effort to present in this academic exercise. It is really within this framework that we see the justification of the jurisdiction of tribunal of the Roman Rota in providing unity, harmony and guide to the local tribunal personnel. Within these tribunals, lies a heavy obligation to operate a healthy jurisprudence aimed at safeguarding the matrimonial bond and the defence of the rights of the faithful. The personnel operating in these tribunals should be imbued with the zeal for justice, unshakeable honesty, and fidelity to law- divine natural and positive law and ecclesiastical laws.[115] Thus exhorted Pius XII:

The conscientious observance of these norms is a matter of duty for the judge; but on the other hand in their application he must remember that they are not ends in themselves, but means to an end, that is, to attain and guarantee a moral certainty with an objective foundation as the reality of the fact. It should not come about that, what the will of the legislator intended as a help and security for discovering the truth, become instead an obstacle to its discovery. If ever the observance of formal rules of law results in injustice or is contrary to equity, there is always a right of recourse to the legislator.[116]

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[113] John Paul II, Allocution to the Rota, January 26, 1984 in William H. Woestman, ed. *Papal Allocutions to the Roman Rota, 1939-2002,* cit., p. 185; see also John Paul II, Allocution to the Rota, January 26, 1984, in AAS, 76 (1984), p. 648 or *The Pope Speaks*, 29 (1984), p, 177: "In the new Code, especially in the matter of marriage consent, not a few explanations of natural law from the rotal jurisprudence, have been codified"; Augustine Mendonça, "Consensual Incapacity for Marriage," in *The Jurist*, 54 (1994), pp. 477-559 here in p. 480.

[114] Cf. CIC/1983, can 819; John Paul II enjoined the Bishops of United States of America during their *ad limina* visit that, "concern for the future also demands (that) you spare no effort in ensuring a sound continuing education for the clergy, and in particular, to consider it an essential part of your governance to send young priests for advanced studies in the ecclesiastical sciences, especially theology and canon law"; Paul VI, Allocution to the Rota, February 12, 1968, in William H. Woestman, ed. *Papal Allocutions to the Roman Rota, 1939-2002,* p. 92; Paul VI, Allocution to the Rota, February 8, 1973, in Ibid., p. 122; *Dignitas Connubi*, Introduction, pp. 18-19; also Art. 33: "For this reason it falls to the Bishops, and this should weigh on their consciences, to see to it that suitable ministers of justice for their tribunals are trained in canon law appropriately and in a timely manner, and are prepared by suitable practice to instruct causes of marriage properly and decide them correctly";.

[115] Paul VI, Allocution tot he Rota, January 29, 1970; January 28, 1971, p. 110; John Paul II, Allocution to the Rota, February 4, 1980, p. 163.

[116] Pius XII, Allocution to the Rota, October 1, 1942, p. 20.

In this onerous duty, therefore, the tribunal officials should in applying the law take cognizance of the values underlying the laws, their proper interpretation and genuine application within socio-cultural context guided by the principle of equity,[117] and the jurisprudence of the Roman Rota. They[118] should up-date (can 279) [119] and widen their knowledge of the Code; legislative and doctrinal dispositions of the Church at both universal and particular Church levels; praxis and jurisprudence of the superior tribunals especially that of the Apostolic See; the publications of learned authors; Behavioural Sciences (i.e. Psychology, Psychiatry etc.) and Medical Law. He should attend professionally organized conferences and seminars in order to improve their knowledge. John Paul II exhorted:

The law (ius), which gives you the ideal measure or criterion of discernment to apply in the evaluation of the facts. This law (ius), which will guide you, giving you sure parameters, is the new Code of Canon Law. You must know it perfectly, not only in the procedural and marriage sections which are so familiar to you, but in its entirety, so that you may have complete knowledge of it, as magistrates (magistrate), that is, as masters of the law that you are. This knowledge presumes an assiduous scientific, deep study which is not limited to pointing out the possible variations with respect to the previous law or to establishing its purely literal or philological meaning, but which takes into consideration the mind of the legislator (mens legislatoris) and the reason of the law (ratio legis).This will give you a global view which enables you to penetrate the spirit of the new law. For the issue in substance is: The Code is a new law and it is to be evaluated primarily in the perspective of the Second Vatican Council to which it is intended to conform fully.[120]

Finally, the local Church tribunals and the apostolic tribunals have the obligation to hearken to these words of the Supreme Legislator in the implementation of Law. Granted that the Rota jurisprudence serves as suppletory law and help to local Church tribunal, however, the liberty of judges affirmed in the legislative dispositions (can 16, §3; 1642, §2) calls on both levels of Church's judicial praxis be open to one another in responsible co-operation,

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[117] Cf. Augustine Mendonça, "The Rights of the Parties to Inspect the Acts and Its Relation to the validity of a Definitive Sentence in a Marriage Nullity Process," in *Studia Canonica* 33 (1999), p. 314.

[118] Cf. Sacred Congregation of the Sacraments, Instruction, *Provida mater Ecclesiae*, August 15, 1936, in AAS 28 (1936), pp. 313-361, here p. 314: "However it must be observed that such rules will be insufficient to achieve their stated purpose unless diocesan judges know the sacred canons thoroughly and are well prepared through an experience of tribunal work;" Zenon Grocholewski, "Current Questions Concerning the State of Activity of Tribunals with Particular Reference to the United States of America," in *Incapacity for Marriage: Jurisprudence and Interpretation*, Robert M. Sable, ed., Rome , PUG, 1987, p. 227: "No one can carry out the above-mentioned responsibilities without a solid and specific preparation and a precise knowledge of substantive and procedural law as well as jurisprudence"; Richard A. Hill, "Reflections on the Interpretation of the Revised Code," in *The Jurist* 42 (1982), p. 318: called on the judge to study the law so as to serve the people.

[119] Cf. Congregation for the Evangelization of Peoples, *Pastoral Guide for Diocesan Priests in Churches Dependent on the Congregation for the Evangelization of Peoples*, 1 October 1989, p. 19.

[120] John Paul II, Allocution to the Rota, January 26, 1984, in William H. Woestman, ed. *Papal Allocutions to the Roman Rota, 1939-2002*, pp. 182-183; see also Sacred Congregation of the Sacraments, Instruction, *Provida mater Ecclesiae*, August 15, 1936, in AAS 28 (1936), pp. 313-361, here p. 314: "However it must be observed that such rules will be insufficient to achieve their stated purpose unless diocesan judges know the sacred canons thoroughly and are well prepared through an experience of tribunal work;" Zenon Grocholewski, "Current Questions Concerning the State of Activity of Tribunals with Particular Reference to the United States of America," in *Incapacity for Marriage: Jurisprudence and Interpretation*, Robert M. Sable, ed., Rome , PUG, 1987, p. 227: "No one can carry out the above-mentioned responsibilities without a solid and specific preparation and a precise knowledge of substantive and procedural law as well as jurisprudence"; Richard A. Hill, "Reflections on the Interpretation of the Revised Code," in *The Jurist* 42 (1982), p. 318: called on the judge to study the law so as to serve the people.

coordination and collective solidarity since the Spirit that guides the Church is profoundly present in all places and in the community of faith. This is all the more necessary especially when conflicting sentences emerge from Roman Rota, making it impossible for the local Church tribunal to discern the "true custom" to follow which is really according to the reason of the law and mind of the legislator.[121] Nevertheless, according to the mind of the legislator (as cited in this work), the local Church tribunals must definitely look up to the tribunal of the Roman Rota as precedents and authentic guidance both in interpretation and application of law in their various contexts.

6. CONCLUSION: THE INVITATION TO THE NEW CHURCH ORDER

The theology of Church and the dispositions of the Second Vatican Council remain sound foundations for the New Church Order in canonical jurisprudence. Since the science of theology presents the values in the Church, the Code is meant to appropriate them. But it was in the Council that "one of the Church's attempts to elaborate its beliefs and to declare its identity and role in the world"[122] occurred. Thus the interpreters will appreciate this foundation provided by both Theology and the Council. These foundations, therefore, invite all interpreters into a new world and challenge them to appropriate the new way of thinking inaugurated by the Council in all their pastoral initiatives in the Church.

Pope Paul VI who continued and concluded the Council (1962-1965)[123], called for a new attitude of mind i.e. a new way of thinking (*novus habitus mentis*) while inaugurating the Commission for the revision of Code[124]. This new way of thinking involves a mind with new disposition, new mentality with new expanded horizon to both appropriate the values underlying the legislative laws and the basic pastoral underpinnings of the Council.[125] This is an ongoing involvement and renewal in the Church that is always in reformation and with a law always challenged in its application to concrete human existential context.

The interpreters are drawn and invited to this necessary and indispensable framework, to widen their horizons, to intensify their studies of the Church documents and their various authoritative nuances, to be at home with the Council dispositions and theological teachings of the Church. Indeed, the interpreters will be true ministers of the Church at the service of the hierarchy, if they take as priority the knowledge of the teaching of the magisterium in its

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[121] Cf. Cristian Begus, *L'Armonia della Giurisprudenza Canonica*, cit., pp. 39-40; Aidan McGrath, "On the Gravity of Causes of a Psychological Nature in the Proof of Inability to Assume the Essential Obligation of Marriage," in *Studia Canonica*, 22 (1988), pp. 67-75, here p. 73: This was the observation of Aidan McGrath in relation to cases on canon 1095 that treats consensual incapacity. He said inter alia, "It has been argued, with more than a little validity, that the only normative jurisprudence for tribunals is that of the Roman Rota. The basis for this claim lies in c. 19.Yet given the rather diverse nature of Rotal jurisprudence on this aspect of inability/incapacity, where does the average judge look for guidance, for a norm to follow?"

[122] James Coriden, "Rules for Interpreters," cit., p. 292.

[123] Cf. Paul VI called the Council a "Great Synod" in his, Address to the First International Congress of Canon Law, 20 January, 1970, in AAS 62 (1970), pp. 108-109.

[124] Cf. Paul VI, "Allocution to the Code Commission" 20 November 1965, in AAS 57 (1965), p. 988; Cf. also Paul VI, "Allocution to the Students of the 'Course of Renewal in Canon Law' of the Gregorian University" 14 December, 1973; "Allocution to the Judges of the Roman Rota" 4 February 1977 in W.H. Woestman ed. *Papal Allocutions to the Roman Rota 1939-2002*, Ottawa, 2002.

[125] For treatment of this invitation of Paul VI, see Ladislas Orsy, "The Meaning of *Novus Habitus Mentis*: The Search for New Horizons," in *The Jurist*, 48 (1988), pp. 429-447 & "*Novus Habitus Mentis*: New Attitude of Mind," in *The Jurist*, 45 (1985), pp. 251-258 & "Models of Approaches to Canon Law and their Impact on Interpretation," in *The Jurist*, 50 (1990), pp. 83-101; Donald E. Heintschel, "…A New Way of Thinking," in *The Jurist*, 44 (1984), pp. 41-47.

various literary forms. However, there is need also for recourse to the principle of equity and to the 'quasi judicial precedents' of the apostolic tribunals (especially ordinary tribunal of the Rota) [126] as basic ancillary tools in canonical jurisprudence.

[126] Where tribunal of the Roman Rota is charged with "the unity of jurisprudence" (see *Pastor Bonus*, art. 126; *Dignitas Connubii*, art. 35, §3) and Apostolic Signatura charged with the "proper administration of justice" (see *Pastor Bonus*, art. 121, 124, 1°; can 1445, §3, 1°; *Dignitas Connubii*, Introduction, p. 17, Augustine Mendonça, *Rotal Anthology: An Annotated Index of Rotal Decisions from 1971 to 1988*, CLSA, Washington, D.C. 1992, p. 7); Cristian Begus, *L'Armonia della Giurisprudenza Canonica*, cit.