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The Importance of Scientific Research in Canon Law Today

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Abstract

The practitioners of canon law claim that ecclesial law and civil law are in a relation of analogy, so that both of these juridical systems have common features but differ in aspects of specificity of matter and essence. In this way, civil law becomes a point of reference for the study of ecclesial law and the statement is true as well the other way round However, one can note a modality of identification only for the features of canon law which are equivalent to the features of civil law, canon law constituting a coherent system similarly to the civil law system. Consequently, canon law is a well-deffined juridical system, delimited by its own juridical norms and which regulates both the internal life of the Church and her external life, in relation to other civil and religious institutions. Therefore, by the topic approached in the present article we join this contemporary 'juridical trend', which relies on comparative law in order to know and harmonize the international legislation among all the law systems, the basis of dialogue revolving around the guaranteeing of man's fundamental rights and freedoms. Actually, the Church respects and participates in the fight for guaranteeing man's fundamental rights and freedoms because the Church carries in her being and mission the seal of the universal. Recently, the modern scientific juridical research has shown a real interest in the importance of canon law, the main empirical directions referring to the historical highlighting of canon law, the study of the methods dealing with the relations between the State and the Church, the organisms of ecclesial authority, especially those related to the system of justice, the comparative analysis of canon law, the existence and functionality of the canon law system in various religions of the world.

Keywords:

Canon law, juridical systems, law principles, relation between Church and State

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Introduction

The Orthodox Canon Law studies and researches the juridical principles, norms and institutions complying with the religious or ecclesial truths, according to which the Church is established, organized and led, under her visible aspect, as Christian religious society. "It deals with those manifestations and relations within the Orthodox Church that are related to her aspect of Christian religious society, not of Church under her invisible aspect. It can be called either canonical discipline or the study of canon law or the science of canon law. As discipline or study, the Orthodox Canon Law enables learning or intellectually acquiring certain truths, ordinances, principles, norms or laws according to which the Orthodox Church is organized or led" (Floca, 1990, p. 55). From a theological perspective, canon law highlights all the legal norms on which the social life of the Church is founded, and from a scientific-juridical perspective, it "deals with the research, study, methodical analysis and systematic presentation, namely by assembling, in a logical system, the ordinances, principles and legal norms based on which the Church is led" (Stan, 2017, p. 111).

The scientific-juridical methods that the analysis of the canon law science relies on are:

- the historical-genetic method, helping analyse the canonical juridical institutions, the history and development of canon law, the fundamental principles of law, the rise and development of the law sources, starting with the basis of the ecclesial legislation represented by the Holy Canons of the Ecumenical Councils.
- the comparative method by which the presentation of the Orthodox canon law is completed by the identification of parallel norms that can be found in the laws of other Christian Churches or Christian religious communities.

Modern scientific juridical research has shown a great interest in the importance of canon law, the main empirical trends referring to the historical importance of canon law, the study of the methods dealing with the relations between State and the Church, the church authority bodies, especially the ones related to the justice system (Church Consistories), the comparative analysis of canon law, the

existence and functionality of the canon law system in the various religions of the world.

The canon law science has the duty of presenting canon law harmoniously and clearly, allowing the identification of all the fundamental principles on which it is based and of its purpose. A systematic presentation of all the canon law rules can only be achieved by analyzing it from a scientific perspective. Law principles are the leading ideas (fundamental prescriptions) of the content of all the juridical norms. They have both a constructive and an enhancing role for the law system, in the sense that they include the society's objective requirements, having specific manifestations in the process of constituting and implementing the law.

The Church law science has a positive character, excluding any subjective argumentation, which, notwithstanding the lack of trust it inspires, does not suit the presentation of well-determined and well-established rules (Milaș, 1915, p. 11). The main purpose of canon law results naturally from its science, being to highlight the indisputable bases of its composition, its development and its evolution. The canon law science can reach this purpose if it factually defines itself as science of the ecclesial law and proves its total independence, on one hand from theological sciences, and, on the other hand, from juridical sciences.

In the canonists' and jurists' thinking, canon law is seen either as a theological discipline with a juridical method, or as a juridical system of faith (*ordinatio fidei*) (Wijlens, 1992) or as applied ecclesiology (Ombres, 1996). Ladislas Örsy suggests that cannon law can be defined as *ordinatio caritatis*, considering it as the minimum of charity (Örsy, 1992), while Jiménez Urresti sees canon law as a theological science or a theological discipline, but also a discipline of implementation (Urresti, 1993), making a gradual distinction between sciences of nature, sciences of faith, ecclesiastical sciences and juridical sciences.

In Canon Law, *in re* and *ex usu*, all the canonical norms are referred to and rely exclusively on the fundamental principles stated above, as levers and means of elaboration and drafting of the religious laws and norms according to the will of the Church, keeping at the same time its dogmatic and moral sources unaltered, in agreement with the entire canonical tradition and conscience. While Canon Law

is founded on dogmatic and juridical principles, in its turn, the lay law operates with specific law principles, which have the force and significance of superior norms, of high generality, which one must respect both while elaborating and while applying law. These principles are determined by the social relations, constituting the expression of the values promoted and defended by law. The general principles of law are a real support in the activity of the judge when a cause needs to be solved and legislative gaps, prater legem, hinder him from achieving the act of justice.

Scientific research of Canon Law in the past and today

Thus, canon law can be studied on two different levels: *theological*, analyzing the social aspect of the Church in her essence, in her transcendence, her inner value, her mystery; and *canonical-juridical*, examining the positive, social and phenomenological aspects of interhuman relations.

Canon law receives the teaching of faith or the theological teaching of the Church and then particularizes them into norms and laws. It is aimed at the community's or the Church's well-being. Ecclesial law moves on the instrumental and positive level, adapting social tools (normative laws), and prescribes a social behaviour with practical judgements, so that the canonical truth may attain the effectiveness and aim proposed by the canonical authority. Theology presents the divine will included in its doctrine, while canon law prescribes the manner in which this divine will needs to be fulfilled and applied in the social-ecclesial domain (Gherri, 2004), meaning that it studies the will of the Church, which needs to be supported in Christ the Saviour's will and commandment.

The French jurists distinguish between canon law and ecclesial or church law. They affirm that Canon Law is simply all those norms made and applied by the Church, while the ecclesiastical law represents the set of rules determining the conditions of existence and the relation between religious communities and the State. The latter is part of the constitutional law and differs from canon law, as in the dual relation source - object. The rules of ecclesiastic law, issued by the State sovereign, refer only to the Church, whose existence was acknowledged by the public law. At the same time, the norms and rules of canon law, now abrogated in France, were dealing with a multitude of problems, different from those of ecclesiastical law, and

were not issued by the French sovereign, but only by the leaders of the Catholic, Apostolic and Roman Church (Eschbach, 1843). After the French Revolution of 1789, civil law became independent from religious beliefs, while canon law has been removed completely from the law and life of the State.

Canon law also used to incorporate other matters of law that are today part of the field or branch of civil law: institutions like marriage, divorce, inheritance, assets, and aspects of contract law (Popescu, 2000) and criminal law: church courts' procedural contributions and jurisprudence. This is normal, because in a law system, juridical branches and institutions have convergent points, collaborate, intertwine and interact, hence canon law is recognized the decisive merit of having constituted a solid basis in the creation, development and progress of modern Romanist Law.

The western countries' law systems were greatly influenced by the Catholic or Western canon law, consisting of two bodies: divine law, based on the Holy Scripture and Divine Tradition, and human or secular canon law, based on *Opus juris canonici*, which includes Catholic normative acts of the 16th century. Catholic Canon Law has had a major influence on the development of civil law in Western countries, but a similar merit is also acknowledged for the Orthodox and Protestant Canon Laws, which contributed to the configuration of the great Roman-German law system (Bădescu, 2002).

The two great schisms, which tore the Christian unity apart, the Great Schism of 1054 and then the coming of the Protestant Reformation in the 16th century could have been avoided if the principles of the common canonical tradition of the first millennia had not been given up, which subsequently led to the confused codification of the canonical tradition by the jurist emeritus Gratian, in his collection entitled *Decretum Gratiani*, of the 12th century, a confusion continued also after the Reformation, by the rejection of the usefulness of canon law and by the lack of will and insight of the Roman Catholic Church to free herself from the codification made by Gratiani (Phidas, 1998). The German jurist and canonist Rudolph Sohm (1841-1917) believes that there is a contradiction between the concept of law and the Church essence, and the law system appeared since the beginning of Christianity (Sohm, 1986), when it entered the

communities, and which reached its culminating point by the medieval canonists' law.

After the Reformation, the Protestant Church excluded the existing law system and constituted its class of general special ecclesial laws (*Conclusa Corporis Evangelicorum*) (Falck, 1841), while the Roman-Catholic Church continued to focus on the ecclesial juridical side, feeling the need to return to a primary doctrinal purity (Bilotti, 2019). The Western canon law having also included norms from the sphere of social relations, in matters of civil and criminal law, some legal experts considered that canon law would also have a secular side, not only an ecclesial one.

In the Orthodox Canon Law, the judgments of the ecclesial courts have first of all a thaumaturgic-spiritual character and are aimed at the sinner's person and the salvation of his soul more than at the damage caused to the community by breaching the law, disrespecting the law and the legislator, enlightening in this sense being St. Basil the Great's exhortation in Can. 2: *The cure should be decided not by time, but by the manner of repentance* (Nicodemus the Hagiorite, 1957). This is the reason why the Orthodox Canon Law has no norm like the Western *latae sententiae* (Tourneau, 2002) in its system. This Latin saying designates a sentence applicable by itself, automatically, used in the norms of the Western canon law. Thus, the punishment follows *ipso facto*, by the force of the law itself, when it is violated.

The Orthodox canon law uses the term sanction, and its application has in view the correction of the one who sinned and committed any digression from the Church and canon laws teaching, and bringing him to the initial state of order and discipline, shared by the Christian community.

Thus, "the making of the Church is not related to the law as such, but comes from the very essence of the Church. Even from the beginnings, the Church entered history as a society with a well-determined form of making. In the so-called charismatic period, the Church already had the well-determined making of her historical existence. In history, one historical form was replaced by another. The historical forms of the ecclesial life are influenced by the content of the dogmatic teaching. The unity of the dogmatic teaching leads to a foundational unity of the historical forms of church life. The

communities of the Universal Church of the first centuries of Christianity bud the same church structures despite the total lack of administrative relations between them and the lack of a common canon law. The historical life of the Church is not able to embody the essence of the Church in full, yet it will approximate it more or less. For this reason, the possibility of any ideal canonical form is excluded. Recognising the existence of an ideal form would lead to an inadequate absolutization of the relativity" (Afanasiev, 2005, p. 40) of the historical compositions of the Church.

The canon law system results from the authority of the divine-human institution of the Church and from her Holy Canons, developed, adopted, sanctioned, interpreted and completed, abrogation being not used in the course of her existence, but only obsolescence, non-application or disappearance of the canon's subject. The ecclesial work of regulation of the Church's internal life is not ended and will not end for as long as the Church is present in this world, the aim and purpose of this juridical-canonical work being determined by her organization, her relations with the believers, with those who are outside her, with the State, with other religions and with the secular power. The Church, as authority and power, is not indifferent to man's civil life, but supports and accompanies man throughout his life, by all her activity, including canonical, this being the expression of the immutable divine truths included in the Revelation. Consequently, the main aim of the canon law's existence in the Church life needs to be the obtaining of the believers' salvation, but also to establish and observe the ecclesial order and discipline.

The role of Canon Law in social life

Today, the relation between Church and State, between canon law and civil law, is regulated by a series of international treaties and laws, assumed and respected by the national States through the adoption of laws in harmony with these. Canon law resonates with and observes the international treaties, legislations and legal institutions in terms of fundamental human rights, strengthening the believers' identity and their conception of life, respecting the right to religious freedom, the freedom to manifest a religion or a religious belief.

Canon law and civil law, although having competence and applicability in different fields and in different and specific matters, however cooperate for the common good, namely in support and

benefit of the people, the first one in the name of God and of the Church, from whom its power and authority come, and the latter, in the name of the State which gives it power and authority in order for human law to be respected and enforced. However, while regarding the State law from Romania "after a century and a half marked by the curse of forms without substance, a period when the Romanian legal experts were too often forced to run after foreign legislations and doctrines, in order to translate, into their own forms, norms and ideas thought and realized elsewhere, time was coming to review the principle of this way of seeing the effort of juridical creation in Romania" (Duţu, 2018, p. 462), the Orthodox canon law did not need to borrow or have a fleeting and individual legislation for each Autocephalous Orthodox Church; her regulations and canonical norms have been and will remain forever valid and applicable unitarily and universally on the general level in the entire Orthodoxy, and on a regional level in each local autocephalous Orthodox Church.

Most of the present juridical developments involve a certain degree of spiritualization of the law, in harmony with the divine will. Juridical systems evolve by spiritualization in several different ways, such as: promoting the dematerialisation of the juridical system, encouraging the limitation of domination, inspiring the reduction of force or coercion, stimulating the primacy of communion and love among people, causing a stronger interaction between people and environment (Domingo, 2019), and especially increasing the respect for law and the juridical systems.

The canonical conscience of the Church is a part of the self-conscience of the Church. Its content includes not just the entire teaching of faith, but also all the Church organization and leadership rules, and the rules regarding the manifestation of the faith and the behaviour of her believers in the internal social relations, referred to the relation with God and expressed clearly by the Christian cult. The canonical conscience gives expression to the canonicity, namely to the manner of living of the faith and to the manner of working of the grace, to the organization and leadership of the Church life by canons and laws, but also by her juridical custom. The canonical conscience of the Church relies on tge stable application of the Holy Canons, and their meeting with the truths of faith (Stan, Pe drumul tradiției și a canoanelor ortodoxe, 1958) and the Christian morals created for the

Church a permanent preoccupation for keeping her canonicity as part and parcel of her tradition.

The canon and legal life based on the norms of canon law includes the entire range of juridical phenomena needed to confirm the idea of independence of the canonical juridical system, by refering to canon law and the legal and social relations (Oborotov, 2015), to the canonical juridical conscience and the juridical culture, to the canonical juridical thinking and the ecclesial institutions with legal and administrative functions.

We are naturally led to asking for an independent place for the religious or sacred law in the general law system. The two great divisions of law, canon or church law and civil law, are two paths which converge and merge into the general notion of law. These two law systems represent but means when we have in view only man's religious destiny. But, while the religious aim remains always for the Church her main dimension, because to admit a Church and to attribute to her only an earthly purpose is obviously a contradiction and an error, law represents the purpose of the State's existence, considering its temporal limitation (Vering, 1879). Church law, on the contrary, needs to have the same nature as the Church (autocephaly and sovereignty), and enjoy, in front of any temporal authority, the same independence as the law of a State in relation to the law of another State. From this perspective, the law of the Church is a public law and can claim the same independence. Therefore, there is a canon law and a civil law, and both are part of the general law system.

Conclusions

A better knowledge and deeper study of the relations between divine law and lay law is meant to help towards an efficient collaboration and rapprochement of the Church to the State authority to establish new connective bridges of dialogue, by a common will and in an institutionalized and predictable way, as viable partners on the social, cultural and educational realm in a world which needs, increasingly more, true and safe milestones, which the Church safeguards and offers to mankind, for the development of the society and for progress in all the activity domains.

The origin, nature and matter of canon law resides in its importance both as an ontological given of man by the creation and by its historical value, canon law having a significance as great as Roman

law, both being considered common law, obligatory for all the peoples of Europe, basis of today's modern law.

Canon law and its juridical-moral norms are necessary as they serve the intrinsic needs and requirements of the Church institution and appear at the same time as the first forms of organization of the Christian communities of the first century. The emergence of Christianity in the world, which produced by its consequences the most important changes in the human society, gave birth to the establishment of new juridical relations. The existance of canon law is a unique phenomenon in the juridical world due to the unique nature of the Church, a society of divine origin, yet nevertheless human by her ecclesiastic authority (Kuttner, 1950), responsible and able to administrate the Divine authority of her Founder. The main aim of Canon Law is to regulate the relations in the Church, the relations of the Church with the State, but also with other churches or religious cults.

Canon Law, as the juridical regulations of the Christian society, comprises canonical norms, laws, structures and institutions that have been elaborated, interpreted, updated for the Church and which refer to the practical elements of the socio-ecclesial behaviour,to the ecclesiastic or positive law judgements, going beyond normativity by the quality of its content determined by the help of the divine grace (Ponzone, 2012).

The Canon Law norms cannot exist and have no fundament and teleological purpose except in a direct relation and subordination to the dogmatic and moral teaching, comprised in the divine Revelation. The Church legislation is only an aspect of its life and does not represent its essence, but her historical presence determined the creation of a law system and of specific juridical institutions. The appanage of the Church law system is the juxtaposition of the following three essential and existential elements: Christian theology, Roman law and institutional necessity (Rodes, 1964).

Theology gave the foundation of this system, namely the teaching and the moral and dogmatic norms, the Roman law gave the modality of application of Law, the form of the normative acts, of the principles, the object and the source of Canon Law, and the institutional necessity was represented by the historical-political realities of the emergence of the Church in the world, the need of

internal regulation and organization of the religious community, the social relations among the Church members.

Although law is tributary and indissolubly related to the State, nevertheless, religion, morals and ecclesial law have a special, particular, necessary and well-delineated role in the contemporary society, and on a global level, religious principles and faiths play today an increasingly important role in the relations among different actors from the framework of the international system, and the examination of the role that religion has in the international contemporary relations becomes an approach of capital importance.

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