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Introduction

The understanding of the relationship between theology and canon law has captured the attention of several canon lawyers because the two are clearly organically connected. To search for a definition of this connection between theology and canon law makes good sense on several counts: it can enlighten us about our past history; it can help us to understand our present situation; and it can provide us with guidance for the planning of future developments.

The literature seeking to explore the relationship between theology and canon law is abundant but it is not easy to handle. The thinkers and writers, moreover, do not come from the same background; they start from differing philosophical, theological, and jurisprudential assumptions, often hidden behind their articulated positions. When this happens, the reader is compelled to conjecture the principles that inspired or determined the meaning of their direct statements. Further, as various "schools of thought"[1] developed, they tended to remain isolated within their own

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1. The word "school" might be too strong, but the alternative "trend" is too weak. These schools represent a certain group of canon lawyers, who adhere to a certain view on the relationship between theology and canon law. This does not imply that there are no differences in nuances within the different schools. There are, but the scholars cover quite some common ground. For a list (seven, according to the author) and a short description of each of them, see James A. Coriden, *Canon Law as Ministry* (New York/Mahwah: Paulist Press, 2000) 13–20.

boundaries (linguistic, national, or doctrinal). This is the case with the so-called "Navarra School" and "Munich School".[2] As these two cases exemplify, all such theories can lead to interpretations that lack internal balance and harmony: some virtually identify the nature of canon law with that of civil law and fail to account sufficiently for the religious and ecclesial character of canon law (cf. the "Navarra School"); some see canon law too much as a theological enterprise and fall short of doing justice to its humanity and juridical nature (cf. the "Munich School").

An approach that offers the prospect of a way beyond the polarity between the Navarra and Munich schools might be referred to as the "epistemological".[3] Teodoro Jiménez Urresti, a Spanish scholar, spent his entire academic life studying the epistemological approach to canon law and researching for an epistemological statute of the science of canon law.[4]

2. Among the positions that emerged, the "Navarra School" and the "Munich School" are the most famous:

- The "Navarra School", based in Pamplona (Spain), asserts an essential identity between the nature of civil law and canon law, but they affirm the power of the Church over canon law under every aspect: legislation, interpretation, and application. This external dependence sets canon law apart from other systems. The members of this school are almost all members of *Opus Dei* and the founders are considered Pedro Lombardia (1930–1986) and Javier Hervada (1934). See: Pedro Lombardia, *Lecciones de Derecho Canónico* (Madrid: Tecnos, 1984) and Javier Hervada, *Pensamientos de un canonista en la hora presente* (Pamplona: Universidad de Navarra, 1989). In English: Carlos J. Errázuriz, *Justice in the Church. A Fundamental Theory of Canon Law* (Montréal: Wilson LaFleur, 2009).
- The "Munich School", associated with Klaus Mörsdorf (1909–1989), founder and director of the Institute of Canon Law of that city, maintains that canon law is a theological discipline with a juridical method. For an introduction, see: Klaus Mörsdorf, *Schriften zum kanonischen Recht* (Paderborn: Schöning, 1989); also Eugenio Corecco, *The Theology of Canon Law: A Methodological Question* (Pittsburgh: Duquesne, 1992) and Myriam Wijlens, *Theology and Canon Law. The Theories of Klaus Mörsdorf and Eugenio Corecco* (Lanham, MD/London: University Press of America, 1992).

3. In the English speaking world the theologian and canonist Ladislas Örsy (1921) discusses the understanding of the relationship between theology and canon law on a cognitional and epistemological level using Bernard Lonergan's explanation of the cognitional-decisional process. See: Ladislas Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation* (Collegeville, MN: The Liturgical Press, 1992).

4. Teodoro Jiménez Urresti was born in Bilbao (Spain) in 1924 and was ordained priest in 1949. He earned a licence in dogmatic theology at the Pontifical Gregorian University and a doctorate in *utrumque ius* at the Pontifical Lateran University in 1957. He was a *peritus* in all the four sessions of the Vatican II, presented by the Conference of Bishops of Spain. He taught dogmatic theology at the University of Deusto (Spain) and canon law at the University of Salamanca (Spain). Together with his academic career, he held many ecclesiastical offices. He died in 1997.

As to the constructive significance of Jiménez Urresti works, the argument of this essay is to present his thought accordingly and subject it to analysis.[5]

The essay is divided in four parts: the first is focused on the project of *Concilium*; the second on the difference between theology and the science of canon law; the third on the normative science; the last one is about the epistemological statute of the science of canon law.

1. The Project of *Concilium*

The name of Jiménez Urresti is generally associated with the "*Concilium* Project" which is considered the most important one among the minority "schools of thought". The name "*Concilium* Project" comes from the Preface of number 8 (the number dedicated to canon law) of the 1965 volume of the journal.[6]

The Preface was signed by the two co-directors of the canon law section: Teodoro Jiménez Urresti and Neophytos Edelby[7], and the vice-director Peter Huizing.[8] According to the spirit of the journal, it opened four new perspectives both for theologians and canonists: (1) the difference be-

5. See my doctoral dissertation on the analysis and comparison between the theories of Jiménez Urresti and Örsy: Andrea Ponzone, *L'approccio epistemologico alla teologia del diritto canonico nel pensiero di T. Jiménez Urresti e L. Örsy* (Vatican City State: Lateran University Press, 2012).

6. The *Concilium* journal, founded in 1965, aimed at offering at regular intervals to those engaged in the pastoral work of the Church information about new questions and answers in all branches of theology. Each number contains original articles and, in the early years, was devoted to a particular branch of theology — dogmatic theology, moral theology, exegesis, pastoral theology, canon law, spirituality, Church history, liturgy, ecumenism – which was studied then afresh in the corresponding number in succeeding years.

7. Catholic Archbishop of Eastern Rite (Melkite). Born in Aleppo (Syria) in 1920 and died there in 1995. A Conciliar Father in all four sessions at Vatican II, he earned a degree in *utrumque ius* (both civil and canon law) in 1950 from the Pontifical Lateran University (Rome).

8. Peter Huizing, S.J. (1911–1995), had degrees in theology, philosophy, law and canon law. From 1965 until 1980 he was a Consultor to the Pontifical Commission for the revision of the *Codex Iuris Canonici*. He taught canon law at the Gregorian University (Rome) and in Nijmegen (Netherlands). Huizing has not specifically worked on the epistemological foundations of the relationship between theology and canon law; he is rather intuitively applying certain doctrinal principles which are capable of preserving both the organic unity and the specific autonomy of both disciplines. See K.C. Kuhn, *Kirchenordnung als rechtstheologisches Begrundungsmodell* (Frankfurt am Main/Bern/New York/Paris: Peter Lang, 1990).

tween "theology of canon law" and "theology in canon law", (2) theology is not identified with canon law, (3) the accusation of canon law of being rigid and inefficacious, (4) the principle of canonical relativity and generic theological imperatives.[9]

So, Jiménez Urresti, in order to pursue his project, chose to articulate an epistemological reflection on the subject and did so using the categories and logic of the scholasticism and Thomism. He wrote many articles on the subject[10] with his last work, *De la Teología a la Canónistica*[11], representing the *summa* of his thought.

2. The Difference between Theology and the Science of Canon Law

St. Thomas Aquinas characterized theology as *unitas scientiae* at the beginning of his *Summa theologiae*, asking whether sacred doctrine is a science, one science. Aquinas borrowed from Aristotle and applied the Aristotelian ideal of philosophy as a science to theology. In such a conception the revealed datum is not properly the subject matter or object of study; rather, the revealed datum is the principle on the basis of which the study is pursued according to the laws of Aristotelian demonstration, which consist in those things which are necessarily concluded from what is already known. Thus, in philosophy the principles are self-evident; in theology the principles are data revealed by God. These principles give order and system to all the objects and reasons which theology studies; from these principles, theology derives all its conclusions.[12]

On this basis, one obtains the *unitas scientiae*: (a) the different material objects, God and creatures, have a systemic unity, insofar as all creatures are referred to God as their principle and end; (b) the formal reasons of study are hierarchically organized under the more universal formal reason, a single reason insofar as they are divinely revealed; (c) the two logics which are

9. Neophytos Edelby, Teodoro I. Jiménez Urresti, Peter Huizing, "Preface," *Concilium* 8 (1965) 3–5.

10. He wrote his first article on that subject in 1959: T. Jiménez Urresti, "Ciencia y Teologìa del Derecho canónico o lógica jurìdica y lógica teológica," *Lumen* 8(1959) 140–155.

11. Teodoro I. Jiménez Urresti, *De la Teología a la Canónistica* (Salamanca: Publicaciones Universidad Pontificia de Salamanca, 1993).

12. See ibid., 29.

used, speculative and practical, are subsumed by theology which encompasses both under itself, just as God, by one and the same knowledge, knows God's self and what God has created, for theology is "principally concerned with God" and thus is "more speculative than practical". Also, theology treats human acts insofar as these are the ways in which a human being is directed to a perfect knowledge of God; practical theology is then subordinate to speculative theology; (d) when, at times, theology borrows elements from the philosophical disciplines, from the light of reason, it does not take these as if they came "from superior sciences", but uses them as subordinate and auxiliary sciences, for theology does not receive its principles from other sciences but immediately from God through revelation. Theology utilizes these other sciences not because it needs them, but on account of the limitations of our intellect, which is more easily led to a knowledge of what is above reason, which is treated in the science of theology, through a knowledge of those things which are known through natural reason, on which other sciences are based.[13]

Thus, in the Thomistic system theology is one science which studies everything under the light of faith and which takes revealed data as its proper, scientific principles, thereby achieving a dynamic, pyramidal systematization in which all is embraced and all is oriented toward its summit, which is God. Thus, if one wishes to study something in itself, for example canon law, one must inescapably study it in this context of totality as well. In other words, it must be studied in a theological context.

There are, nevertheless, two theologies in the terminology of St. Thomas: one speculative and the other practical. Better, there are two parts to this *unitas scientiae*, which is the whole of theology. These two parts differ not only by their material objects ("things" in the case of speculative theology, "acts" in the case of practical) but also by their method, for our intellect acts on the one hand according to the logic (or laws) of speculative reason and on the other hand according to the logic of practical reason. In his own words:

> The conclusions in speculative theology are doctrinal conclusions since they are derived from revealed truth by way of the enunciative logic exercised by the speculative reason, whose finality is to know revealed truth in order to

13. See ibid., 29.

know and to contemplate it. The results are commonly called "theological conclusions" and the argument used to reach them, a "theological argument". Such conclusions come within the ambit of revealed truth, the matter of faith, and so demand an act of faith.[14]

In contrast:

The conclusions in practical theology are practical conclusions, since they are derived from revealed principles of conduct which are called the "divine positive law", by way of normative logic exercised by the practical reason, whose finality is to formulate the concrete fulfilment of those revealed principles of conduct.[15]

He continues:

Both kinds of conclusions are equally theological: the former are theological-doctrinal; the latter, theological-practical. Both are derived from matters of faith: the former from revealed truths; the latter, from revealed principles of conduct. The former concern doctrine to be believed; the latter, conduct to be followed. Since the former formulate truth, they are classified as "orthodox" or "heterodox", as "true" or "false"; since the latter specify duty, they are classified as "correct" or "incorrect", as "proper" or "improper", or as "orthopractical" or "heteropractical".[16]

In this unitary and total theology canon law constitutes a section within its practical part, the other sections being ethics and socio-ecclesial morality. It is insufficient to speak of two parts of this unitary theology. One must add that these two parts constitute two distinct sciences by their respective logics and methods. Thus, the study of canonical reality, as ranked and contextualized in the panorama of unitary totality, constitutes the (doctrinal) theology of canon law. This gives canon law its radical justification precisely by placing it in this panorama or plan of revelation-redemption, a grounding which canonical science as such cannot do on its own due to the limits imposed by its logic and methods.

Moreover, doctrinal theology gives canonical science the principles which will be its proper principles; such are the data of the divine positive

14. Ibid., 31.
15. Ibid., 31.
16. Ibid., 31.

law which canon law receives and accepts as its own postulates. Thus one needs to speak of a revealed reality, the "divine positive law", in canon law and also of a (doctrinal) theology in canonical science.[17]

The function of canon law will be to formulate such "divine positive law" in a way to make it historical and achievable. Practical reason, along with its proper logic, devotes itself to this task. Thus one can consider canonical science as canonical practical theology. Still, this is insufficient. Canon law, in order to fulfil its purpose, must appeal to the methods and sciences of normative implementation and to formal technical and organizational sciences. Such recourse is necessary not precisely because of the limits of human intelligence (though this is a valid reason, at least partially and at the beginning) but because objectively God has left this an area of free human decision. Thus, canonical science has its own proper and autonomous area, and so we should speak of the science of canon law as a science of implementation.

With this systematic conception of theology as *unitas scientiae*, one can understand the implementation made by the Church's authority in regard to sacramental and ecclesiological matters as theological conclusions of practical reason and practical theology. As such, they can be described as *de jure divino* or *ex institutione divina*. This usage, which is appropriate to this theological system, has had considerable influence in the Church's history.[18]

3. The Normative Science

3.1 The Normative/Deontic Logic

Jiménez Urresti recalls the essence of other logics used by theologians in order to show better how they differ from the normative logic of the canonist.

3.1.1 Enunciative Logic

Enunciative logic, or the logic of being, or the logic of truth, is employed by speculative reason. In syllogistic reasoning, the major proposition and

17. See ibid., 32–33.
18. See ibid., 35–37.

the minor are linked by declarative or notional necessity, and the conclusion reached is necessary. Therefore, it is also called formal logic.

On account of that necessity, in each syllogism and in each series of syllogisms everyone comes to the same conclusion. Simple syllogisms or those concerning first principles are accepted by everyone. For example: A is equal to B; B is equal to C; therefore, A is equal to C. But, in a series of interconnected or more complex syllogisms, not everyone arrives at the conclusions, because not all follow the line of reasoning. Insofar as they do, they come to the same conclusion. St. Thomas Aquinas used the theorem of Pythagoras as an example: the angles of a triangle add up to two right angles; not all follow this, but those who do come to the same conclusion.

This is an example of enunciative logic regarding "words" or matters of the mind (*in verbis*). In real logic (*in re*) the minor posits an existential realization of the major. For example: man is a rational animal; Peter is a man; therefore, Peter is a rational animal. The minor proposition affirms the existence or realization of the subject of discourse or major proposition. Correspondingly, the predicate of the major is verified, and so one arrives at the conclusion.

This enunciative logic expresses the norms or laws of the right way of thinking or the correct way of conceiving things, the "*recta ratio cognoscendi*" or "*recta ratio cognoscibilium*". The adjectives which correspond to its conclusions are "true" or "false". The verbal tense it uses is descriptive or enunciative of truth: the indicative. Its conclusion which proceeds by notional necessity is affirmed with full certitude or infallible certitude. It is used in philosophy or knowledge of the truth and in speculative theology.[19]

3.1.2 The Logic of Doing

This logic corresponds to transitive action, action whose effect passes to the thing done. Human beings are makers or doers. This logic expresses the laws of the right or correct way of making things (*recta ratio faciendi* or *recta ratio factibilium*). It is exemplified in the so-called technical or applied sciences.

In actually making something, a person must deal with the natural laws pertaining to what is being made. In this activity one is guided by natural necessity which links the major and minor propositions of a syllogism. Their connection is one of physical, infallible certitude. This is the logic used in the technique of canon law.[20]

19. See ibid., 96–97.

3.1.3 Historical Logic

This is the logic that is used in knowing history or the human condition as already realized, which stems from free actuation or non-predetermination, which is not actuated by necessity.

This logic concerns the right way of knowing what has been done (rather than what will be done): *recta ratio cognoscendi acta* (*non agibilia*). Historical acts are free, but, once done, such facts cannot be undone; they have acquired a certain necessity. As acts which once were free, they could not be studied as physical or natural phenomena, and as facts which have already been actualized they cannot be studied as acts of future conduct.

As acts which once were free, it must be established what kind of facts they were. And the historical facts which we did not witness can only be known by the testimony of witnesses who were present and by a testimony which is in agreement. Only then can we trust them; only then can we believe in such testimony. It is a matter of practical judgment; we trust witnesses, because it commonly happens that the corroborating testimony of honest witnesses corresponds to the truth of the event, but we cannot exclude the possibility of error. Thus, we do not obtain infallible certitude but only a practical or moral certitude, historical certitude; a certitude like that of the judge who sentences on the basis of the information acquired by interrogating the witnesses.

All of this is of interest in order to establish the fact of what was revealed. Among these are the decisive facts of Christ in founding the Church and the decisive facts of the primitive Church. Once such facts have been proved through historical logic, study should continue by questioning the decisive value of such facts; a value which sometimes can be proved through the very words of Christ by way of this historical logic (testimony of the Gospels and other New Testament writings). At other times, however, we will have only the assertion of the fact, without the verbal explanation of the author. This is precisely the time to inquire about the nature of those decisive facts in

20. See ibid., 97–98.

order to discover their definitive or normative value in relation to later history. Such an inquiry is proper to the normative mentality and logic.[21]

3.1.4 Normative/Deontic Logic

Normative logic, that of the normative sciences, or deontic logic (from the Greek *deos/deontos*: "binding"), that of the moral sciences, formulates the laws of the right way of acting or the correct way of doing things (*recta ratio agendi* or *recta ratio agibilium*). This type of logic is concerned with the correct way of formulating imperatives or norms of future conduct, by bringing them to the concrete imperative of their fulfilment.

The laws of conduct do not try to describe or enunciate something which is, because the concrete conduct does not yet exist. Nor do they describe or announce future conduct which, to be free, can be contrary to the obligation. If they could describe future conduct, they would not be norms of conduct but prophecies. Norms of future conduct and the future of that conduct are distinct because laws do not describe but only prescribe conduct for the future. Accordingly, these laws are grammatically expressed by the imperative (or its equivalent). The conclusion of their syllogism, as we will see, is a simple conjectural probability (*probabilitas conjecturalis*), not a certainty.

Within this logic, one can distinguish three areas, characterized by the subject who intervenes to formulate the concrete obligation: (a) the ethical deontic logic, or the logic of personal conscience—in this case each person formulates for him or herself his or her proper obligations within the ample limits of moral liberty; (b) the moral deontic logic, or the logic of social conscience—in this case the practices and customs of each social group formulate imperatives for social activity; (c) the juridical deontic logic—in this case society (for itself or through the legislator who represents it) formulates norms of juridical conduct.[22]

3.1.5 The Norms or Principles of Conduct

With the exception of the very first principles, norms or principles of conduct are generic, abstract, and general, by definition. But the fulfilment of

21. See ibid., 97–98.
22. See ibid., 99–106.

these norms—that is, one's activity or conduct—can only be realized through specific, concrete, singular acts. Accordingly, each person, each group, and each society, in order to actualize these norms concretely, needs to specify, concretize, and individualize such principles in and for their concrete fulfilment; in order not to act blindly or with insufficient knowledge, but to act reasonably (*recte agere*).

These principles are abstract in their formulation and content, precisely because they are formulated a priori, in advance of their fulfilment. They are imperatives for many concretely different persons, times, places, and circumstances. These principles analogically play the part of essences to which should be joined concrete existences in order to be complete; essence and existence, principle (or norm) of conduct and its concretization are the co-principles of every being and of every concrete fulfilment.[23]

It is possible to affirm there are at least four principles in which practically all Christians agree in viewing as essential Church principles instituted by Christ: the "twelve" as the primary subject; the divine mission which they received endowed with the salvific power or *exousia*, as a goal to fulfil; and the sacraments of baptism and Eucharist respectively, as the two major means of realizing this universal divine mission. The "twelve", as those given responsibility, will have to seek as part of their own immediate responsibility the concrete forms of extending themselves "to all people", "unto the ends of the earth", and "until the consummation of the world", and to extend salvific power to all people in the totality of their lives. Thus, they will first have to establish "co-workers" and later "successors" by adopting appropriate forms or rites (imposition of hands, sacramental nature) and by specifying grades of membership in the College of successors (bishops, presbyters, deacons), and they will establish other forms of sharing the *exousia*—other sacraments according to their nature.[24]

These principles are also generic; they allow diverse historical forms for their fulfilment. Thus, the principles of which the "twelve" forms a unity as agents of actuation, "that they may be one" (Jn. 17:11), will be concretized in diverse forms of practical organization or unity for missionary action: collegial or monarchical government in particular communities; collegial government (synods, councils) or monarchical government (metropolitans,

23. See ibid., 137–142.
24. See ibid., 142–143.

primates, patriarchs) in particular regions; participation and distribution according to levels of the *exousia* and of belonging to the "group or college of successors" (bishops, presbyters, deacons); collegial government for the entire world (ecumenical councils) or monarchical government (the papacy, which deserves special attention). So, in analogy with the principle of the generic natural law that "every society needs an authority", similarly human ingenuity intervenes to concretize the historical forms of actuation by the "twelve" in order to fulfil their mission and salvific function.[25]

These principles are also general. Precisely because they are generic and abstract, these principles of conduct admit innumerable possibilities of concrete fulfilment which are not totally foreseen in advance. Accordingly, by means of foresight, on the basis of previous experience, the "formal" or more frequent cases are taken as normative. The principle of baptizing is a valid norm only "in cases which commonly occur" (*ut in pluribus accidit*); when water or a minister who can baptize is lacking, baptism of "desire" or of "martyrdom" suffices.[26]

3.2 The Positivization of the Principles and Its Forms

So Jiménez Urresti tries to determine the modes of realizing this specification, concretization, and individualization, that is, the "positivization" of these generic, abstract, and general principles.

3.2.1 The Conclusion of a Practical Syllogism: "the Law of Peoples" (*jus gentium*)

The syllogism followed by the practical reason by way of juridical logic is distinct from that followed by speculative reason and enunciative logic. In an enunciative syllogism, the minor proposition affirms the existence of a case or being of the subject of the major proposition, in order to come to a conclusion by applying to this being or case the predicate of the major proposition. In the normative juridical syllogism, such a minor proposition cannot express any existing thing, because the concrete fulfilment of the principle of conduct formulated in the major proposition does not yet exist; nor is it predetermined, since it is free. Thus, it is not predicted, nor by the same token is it evident. At most, and by certain means, it is only pre-viewable, presumable, presupposable, but not yet seen in itself, for the future is not seen, except for what we are taught by experience, history, or memory according to what customarily occurs and in whose light what will occur can be foreseen; we can only speculate about the future on the basis of what has happened, what has commonly occurred (*ut in pluribus accidit*). It is this pre-vision which is presented as the minor proposition of the practical syllogism of conduct.[27]

25. See ibid., 143–144.
26. See ibid., 268–269.

It should be noted that this minor proposition is neither evident nor ascertainable in advance, not only because future conduct pertains to the ambit of the human liberty of contradiction (to fulfil the precept or not), but also because its being a generic, abstract, and general principle implies some margin for the liberty of specification of the liberty of decision, that is, moral liberty. In his own words:

> The following is an example of such a syllogism:
> Major: One must do good and avoid evil.
> Minor: Killing is evil.
> Conclusion: One must avoid killing.[28]

The major proposition is a primary, universal, and evident principle. But the minor is not an absolute proposition which existentially establishes the major; experience teaches us to foresee notable exceptions, such as self-defence, defence of others, execution after a just capital sentence, killing in a just war. The minor then is valid "according to foresight", for most cases (*ut in pluribus*), yet killing is not always evil in every case (*in sensu composito*). Thus, the conclusion carries with it the restriction for most cases of the minor: "Killing is evil" is valid *ut in pluribus*; that is, there are exceptions.[29]

Accordingly, St. Thomas Aquinas notes that these natural principles are "true in most cases" (*verum ut in pluribus*) but, simultaneously, deficient or lacking in exceptional cases; that is, "defective in a few instances" (*deficit in paucioribus*). These principles, accepted and so formulated by everyone or by all people, yet valid or "true" only *ut in pluribus*, that is, as general in their

27. See ibid., 164–166.
28. Ibid., 201–202.
29. See ibid., 165–166.

content, constitute the *jus gentium*. If such is the case with natural principles of conduct, *a fortiori* the same must be said of positive principles of conduct, even positive divine principles, and even more so of the canonical laws of the church.

The conclusion of this syllogism, therefore, is not of "infallible certitude", as in the demonstrative sciences or in enunciative logic. Neither is it a matter of "historical certitude" or moral certitude, as in the historical sciences, nor is it a matter of physical certitude as in the positive or natural sciences. What is given us is only conjecture, according to the foresight available, according to what "usually happens in most cases" (*ut in pluribus accidere solet*). Such conjecture is sufficient for acting reasonably, prudentially, because no other form of actuation is possible.[30]

3.2.2 The Determination of the Decision of the Will: the "Human Positive Law" (*jus positivum humanum*)

In a continued process of syllogisms in deontic logic, the conclusion of the first syllogism, which is valid only "for most cases", is then taken as the major proposition in a second or subsequent syllogism. The conclusion of this next syllogism will carry with it the previous *ut in pluribus* and so will be imputed to the proper value of its new minor proposition, also formulated by such restrictions and so valid only *ut in pluribus*. The conclusion of the second syllogism will consequently be less *ut in pluribus* than was the first syllogism. And, assuming this second conclusion is a major proposition of a third successive syllogism, the third conclusion will be even less *ut in pluribus* than the second. By continuing this process, one comes to a point when the conclusion is indifferent, a point when there is no *ut in pluribus*. In other words, the more one descends from a principle to formulations which are less generic and less general, until one arrives at a concrete foresight of its existential or historical fulfilment, one ends by envisioning concrete possibilities which are indifferent and equally valid. In this manner one arrives at a field of free circulation, whose concretization allows free decision by the agent, who in our case is the legislator.

> Traffic example: the natural law or reason dictates that traffic must follow some order to avoid collisions, but it is indifferent whether the traffic circulates to the right or to the left; what is important is that there is one norm, and the mere fact that it is given with some fixed content fulfils the necessary social function of order.

Example of social authority: a society can decide on a monarchy, and that of different types, or a republic, again of various types, etc., with each of these being equally valid.[31]

Thus, we are more properly in the domain or field of "human positive law": *jus positivum humanum*. These human positive laws are also formulated as valid only *ut in pluribus*, according to what is envisioned in the decision taken. Thus they admit of exceptions as, in our traffic example, in urgent cases ambulances, police cars, and fire engines can travel contrary to the normal pattern. Thus, the established law, in similar instances, can be replaced by another.

This same process applies to the principles of divine positive law, for example, with the principle of salvific power or *exousía* given by Christ to his disciples: "receive the Holy Spirit; whose sins you will forgive, will be forgiven" (Jn. 20:22–23); and "What you will bind on earth will be bound in heaven" (Mt. 18:18), as followed by the Council of Trent.[32] It is worth reading the explanation of the six syllogisms from Jiménez Urresti's own words:

1. In a first syllogism, from this principle and through envisioning and reading history *ut in pluribus*, the Council of Trent concluded that such pardon is not only granted a single time (in baptism) but also to those who have fallen after baptism.
2. In a second syllogism or a further step of envisioning it was foreseen that this post-baptismal pardon is necessary many times, "*quovis tempore*" (*toties/ quoties*), and so concluded from these two steps of practical logic to other actualizations of post-baptismal pardon, other types of salvific actualization of the *exousía*, another sacrament, that of penance (*aliud ab ipso baptismo sacramentum*).
3. In a third practical syllogism the Council indicated that this post-baptismal pardon has two types of actuation—for the healthy and for the sick—and so distinguishes these two types of actuation as two sacra-

30. See ibid., 168–170.

31. Ibid., 205.

32. See ibid., 203.

ments: penance, and "extreme unction" or the anointing of the sick. Accordingly, in the exercise or historical concretization of this principle of *exousia*, there are forged three types of actualization of this power, which are by nature three sacraments, differentiated in their concrete existential signification: baptism, penance, anointing.

4. A fourth practical syllogism was realized by the Council, when it stated that, for granting pardon by an act of the ministers, the contrition of the penitent should in some way be made evident to them, lest they act in vain. Accordingly, the penitent must show him or herself penitent, indeed contrite, to the minister; the penitent must confess as a repentant sinner. Thus, the Council concluded that it is necessary for the penitent to confess to a minister.
5. A fifth practical syllogism advanced by the Council was its position that public confession does not suffice—but specifically secret confession to the minister.
6. A sixth syllogistic step was made by the Council when it required that this secret confession specify and enumerate all mortal sins, including hidden sins and the specific circumstances involved. This argues that the post-baptismal exercise of pardon is a "judgment" or "judicial act" (*judicium or actus judicialis*); the minister acts as "judge" (*praesidis et judex*) and the penitent as "defendant" (*reus*). The judge cannot pronounce sentence without knowledge of the cause but must observe equity in imposing penalties; thus, the penitent must confess all of his or her sins before this tribunal.[33]

Jiménez Urresti, with the sixth syllogism, seems to have arrived at a conclusion (as in the five preceding steps), in fact we are still in the area of free decisions which can be considered socio-ecclesially most opportune at the very moment of deciding. A proof that it is not a conclusion but a determination is the fact that before Trent and outside the Roman ambience this was not always the practice of the Church universal. Nor was it such even after Trent, for not only the Orthodox Churches but also Eastern-rite Catholics (when not Latinized) did not demand a specifically numerical confession.

33. Ibid., 203–205.

The reason advanced by Trent is valid as a pedagogical and cultural assertion; yet, viewing the exercise of post-baptismal penance as a "judgment" is not an exclusive argument, because one can equally advance the reason of "grace" or pardon, as do Eastern Christians. This is like asking why in continental Europe traffic bears to the right, while in Britain traffic keeps to the left; one could in each case give a socio-historical reason, but such a reason is contingent and changeable.[34]

4. The Epistemological Statute of the Science of Canon Law

Jiménez Urresti writes that the post-Conciliar climate is becoming steadily more opposed to "juridicist theology". This touches on the natures of both theology and canon law. Some theologians would hold canon law to be a "theological science" or a "theological discipline", whereas many canonists would hold it to be a discipline of implementation.

A useful analogy which might help to pacify both sides, both of which are in the right to a certain extent, could be the relationship between philosophy and law. There is a "philosophy of law", but the study of the law is not a philosophical discipline; it is the "legal science". Neither does the philosopher "do" law, though he studies the philosophy of the human phenomenon known as the law. The lawyer does not "do" philosophy but takes the principles he needs from it to apply them to his particular discipline. So the theologian does not "do" canon law, nor the canonist theology. There is a distinction and gradation in natural sciences, and in the sciences of faith, the ecclesial sciences.[35]

4.1 A Theological Science

The Church is an event as well as an institution, divine and human, the community of faith, hope and charity as well as a society visibly constituted. The nature and relationship of these aspects of event and institution as instituted by Christ, studied by the power of God's grace promised to her by the Lord, that is according to revealed truth, is the business of the science of theology.

The results of this theological study will form the basic data for the discipline of canon law. They are the "fundamental structure" of the Church,

34. See ibid., 205–207.
35. See ibid., 379–380.

which cannot be subject to reform but command faithful observance. So Canon Law embraces a theology.

We also know, and it is the task of theology to make it known, that in the Church the human is ordered to the divine, just as the social and visible is a sign and instrument of the invisible, of the life of the Church in the Trinity: the Church, as life-institution, is a "sacrament" by analogy with the Mystery of the Incarnate Word, its founder. This is its basic conception. The structural-social side of the Church, therefore, is "sacramental", in that it expresses the Mystery, and orders itself to the Mystery. This structure, which informs the whole of canon law, is a theological fact. It is all the theology of canon law. So there is a "theology of canon law" and a "theology in canon law". Canon law cannot exist, nor is it conceivable, without a theology, and this theology is a part of ecclesiology.[36]

4.2 The Science of Canon Law

The canonist receives and assumes these theological data as postulates derived from another field and science superior to his own. And among them is one that he knows to be the principal and definitive one for him: the fact that Christ, when he founded the Church, ordained it as a society with social structures. These are not entirely fixed and unchanging in form, but there are certain primary bases, such as the hierarchical structure with its threefold ministry and social media or sacraments. Even these have ample scope for variety of expression and concrete application, the theologians talk of the "generic institution" of the seven sacraments and the hierarchy.

That is to say that the canonist knows, from theology, that this "basic structure", this "substance" of divine law was instituted by Christ in general terms, leaving its particular forms and functioning to the decision of the hierarchy founded by him. For its historical application, this substance has to be given particular shape by the positive rulings of the hierarchy itself, by the rulings of ecclesiastical law.

And it is precisely the study of this ecclesiastical law, of this particularizing and ordering of the Church, that is the science proper to the canonist. Canon law has rightly been called "the juridic mode of theologicity".[37]

36. See ibid., 399–400.
37. See ibid., 21–24.

4.3 Canon Law and Theology: Two Different Sciences

So canon law can be studied on two different levels: the theological, which studies the social aspect of the Church in its essence, in its transcendent inner value, its Mystery; and the canonical, which studies it in its human, phenomenological, positive aspects.

Theology studies revealed data; its aim is to formulate revealed truth; it moves on a level appropriate to this truth, and defines it with doctrinal judgments. Canon law, on the other hand, receives these theological data in generic form as they concern the basic social structure of the Church, and particularizes them in its laws. Its end is the good of the body politic of the Church; it moves on the level of the instrumental and positive, adapting its social instruments (laws) to its end and prescribing a social conduct with practical judgments, so that canonical truth consists in the fitting of its means to the end intended by the legislator, in their efficacy.

Theology can only give one doctrinal judgment, that of fittingness to the objective truth revealed, although it can formulate this in different languages and perspectives, and with differing degrees of profundity. But canon law can formulate as many judgments on as many concrete or particular aspects as the substance of the theological question and the prudence of the legislator permit. In other words : theology studies what is the will of Christ, while canon law prescribes how this will of Christ is to be fulfilled in the social-ecclesial field; that is to say, it studies the will of the Church, which has to be upheld within the will of Christ.[38]

> For example: it is not the same thing, theologically, to say that the hierarchy, when it grants ministerial licences to priests, gives them jurisdiction to hear

38. Starting by these reflections, Prof. Paolo Gherri (Professor of "Theology of Canon Law" at the Pontifical Lateran University, Rome) presents canon law as *"norma missionis"*: because the ontological structure of the Church is missionary, the task of canon law is to regulate this mission. Then, the *norma missionis* is divided into a *"norma fidei"* (to participate to the community of believers in Christ by receiving the announcement of Salvation) and a *"norma communionis"* (to live as saved people in that Community according to the teaching of Christ). By these two fundamental and normative roots, all the other regulations (morals, liturgical, disciplinary, juridical), which the Church has known along the centuries, take place. The *norma fidei* has been realized in the magisterial and dogmatic activity with which the Church intends to deepen and preserve the kernel of the *depositum fidei* entrusted to her by Christ. The *norma communionis* is the matrix of the whole behavioural normativity of the Church. See Paolo Gherri, *Lezioni di Teologia del Diritto Canonico* (Vatican City State: Pontifical Lateran University, 2004) 297–314.

> confessions, as it is to say that it approves and does not annul the exercise of this jurisdiction which they received at their ordination. But canon law, which does not pretend to formulate theological doctrine, but to regulate conduct, can use either formula indiscriminately, since both, for practical purposes, define the same principle of the behaviour of the priest towards his constituted authority, i.e., his behaviour within the hierarchical communion. In this canon law is rather like mathematics: "the order of factors does not change the result".
>
> From all this it follows that theology and canon law have different immediate ends, different fields of action; they operate on different levels, and can and do use a different language and logic. They are two different sciences, differentiated above all by the notes of instrumentality and particularization which play a part in canon law and not in theology.[39]

That is important to understand the difference between "doctrinal dogmas" and "canonical dogmas".

4.4 Doctrinal Dogmas and Canonical Dogmas

Jiménez Urresti starts by explaining that dogmatic definitions, both theological/doctrinal and canonical/practical, can come under these conclusions when they are taught with complete ecclesial certitude by ecclesiastical authority. In the former case, they are sanctioned as a truth which is taught; in the latter, as a duty which is embodied in canon law. The former explains "what must be believed" (*quae credenda sunt*); the latter, "what must be held" (*quae tenenda sunt*). In the former, ecclesial authority acts as magisterium and speaks "concerning divine faith" (*de fide divina*); in the latter, the ecclesial authority acts as government and speaks "concerning divine law" (*de jure divino*). In the former, the conclusion is presented "from divine revelation" (*ex revelatione divina*); in the latter, "from divine institution" (*ex institutione divina*). A denial of a conclusion in the former case makes one a heretic, for one is denying the communion in the teaching of the faith; one is denying orthodoxy. A denial of a conclusion in the latter case makes one a schismatic, for one is denying the communion in conduct; one is denying orthopraxis. In the former case, one breaks with the magisterium by denying the "assent of faith" (*assensus fidei*) or "religious homage" (*obsequium religiosum*); in the latter case, one breaks with the governing authority by refusing obedience.

39. See ibid., 376.

However, in condemning either case, the same ecclesiastical formula is used: "it should be condemned" (*anathema sit*).[40]

Then, the Spanish canonist explains the difference between doctrinal and canonical dogmas.

Doctrinal dogmas are those which have been given through revealed teaching and which have been defined as such with infallible certitude or infallibility: *infallibilitas in docendo* and *infallibilitas in credendo*. In such definitions there is a transcending of the historical moral certitude which is proper to the assent given to the agreed-upon testimony of eye-witnesses (who originally were the "twelve", and later other agents, that is, the whole Church, and in a magisterial form the "witnesses of truth" or magisterial hierarchy). The Church and the magisterium do not reach this full grade of certitude through the self-consistency or naturalness of the human testimony, but through its sacramental quality of the assistance of the Holy Spirit.[41]

Canonical dogmas are those canonical laws, structures, and institutions which have been actualized for or in the Church and which have been judged with infallible certitude or infallibility to concern practical elements of socio-ecclesial conduct that are considered indefectible: "indefectibility in commanding" (*indefectibilitas in jubendo*) and "indefectibility in obeying" (*indefectibilitas in oboediendo*). Here, again, there is a transcending of that "conjectural probability" (*probabilitas conjecturalis*) proper to the practical judgments of canonical or positive ecclesiastical law beyond the normative quality of its determined content through the assistance of the Holy Spirit.[42]

These two classes of dogmas have differences, although the assistance of the Holy Spirit extends to both. Every dogmatic definition, both doctrinal and canonical, affects only the certitude with which the Church possesses and affirms that which is defined; it affects the subjectivity of the affirmative judgment. The definition does not change or alter the objective reality under consideration; the objectivity of the revealed truth and of the canonical law remains objectively the same before and after the definition and retains its same nature and consistency.

40. See ibid., 351–352.
41. See ibid., 356–357.
42. See ibid., 358–359.

A doctrinal dogma, precisely as being derived from revealed truth, thus as revealed as fact and, as such, truth, has two necessary aspects: what was revealed cannot have been revealed, nor can the revealed truth be other than it is. Consequently, the doctrinal dogma is immutable forever; its content cannot change, although it can be the object of new dogmatic definitions which are more balanced or precise in virtue of further distinctions, or it can be presented under new formulas or in new languages.

A canonical dogma, precisely as derived from a canonical law or decision, defines that such a positive ecclesial law or decision and its subsequent fulfillment are certain and do not exceed the generic scope of the related divine positive law. The content of canonical dogmas is ecclesially and evangelically valid and conducive to the end of the Church, and its fulfillment is the historizational fulfillment of the principle of the divine positive law which is concretized. The dogmatic definition is an assertive judgment of all of these practical values; it is a practical evaluative judgment and thus deserves to be qualified as indefectible.

The canonical law or norm is a positive actuation of the legislator over and for the social-ecclesial fulfillment of a principle of the divine positive law by deciding according to and within the foreseen possibilities, in line with an historical appraisal of the past and present situations. In this way, though this historical appraisal and these futuristic projections have influenced the legislative act, the decision of the legislator rests neither on this historical appraisal of the past or present, nor upon future projections, nor even upon the future itself, but only upon that which is contained in the legal disposition. Similarly, the dogmatic definition rests on this decision, on its content, on its legal disposition.[43]

The problem is not the certitude about the principle of the divine positive law (which is generic), since as revealed this has the certitude of faith and can include a doctrinal dogmatic certitude if it comes under a dogmatic definition. Nor is the problem about the certitude of the contents of the canonical law as seen in itself; these contents, as decisions, have the certitude of the legislative will. The problem is in the concrete historical proportion and adequation of the content of the canonical law with the principle of the divine positive law, since the canonical legislator presents this content as the concrete, historical, normative fulfillment of a principle of the divine

43. See ibid., 347–351.

positive law. About this proportion and adequation, which is a matter of human/Christian actuation, about what is only a "conjectural probability" (*probabilitas conjecturalis*) or a "conjectural probability of faith" (*probabilitas conjecturalis fidei*) the Church can have full, indefectible, dogmatic certitude, insofar as it rests upon a dogmatic definition assisted by the Holy Spirit, an assistance which can extend to practical implications.[44]

But this concrete historical proportion and adequation (i.e., this historization of a principle of the divine positive law) in each case maintains its proper specificity, as a conclusion or determination, or as invention or decision through a-categorical means, or as the result of praxis. Accordingly, canon law can be changed in response to the changes of history or the changed criteria of the legislator, according to the distinct specificities of the decision, even though the canonical law rests upon a dogmatic definition. On the other hand, laws are an important factor in the configuration of history, but not the unique factor; thus, if laws influence history, a fortiori history influences laws. Thus, a dogmatic definition about canonical laws does not paralyze history and does not definitively condition the future, either of the world, or of the Church, or of the law which rests upon this definition. A definition does not change a mutable law into an immutable one; the definition does make the law a prophecy. The indefectibility of a law does not mean that it cannot or will not change but only that its content is evangelically and ecclesially valid or proportioned, as long as the historical factors which have produced this specific historization of the law do not advise a change in the law. For example, a new law can rest upon a new dogmatic definition.[45]

Finally, all canonical laws as such are valid "for most cases" (*ut in pluribus*). History teaches that, with the dynamism of social life and the rhythm of succeeding generations, it can happen that what was foreseen in one specific historical period as valid *ut in pluribus* and was recognized as such by the law eventually comes to be valid only "for a few cases" (*ut in paucioribus*); i.e., what was once a general principle can be converted into an exceptional case. For example, in ancient and even in medieval times, the political regime was monarchical and vertical and as such was a model valid *ut in pluribus* at the time of structuring new societies; presently, this political

44. See ibid., 352–354.
45. See ibid., 354–356.

model exists only *ut in paucioribus* and, even in these few instances, with a different content.[46]

> A canonical example would be the Latin and Western Tridentine discipline of the numerical, specific confession of sins. In an historical ambit of the "myth of truth" and of chivalry, such a discipline fit the psycho-social conditions. At present, particularly in the past post-conciliar decades, in an ambit of the "myth of liberty," and of intimacy, such a discipline encounters increasing psycho-social opposition; the pedagogical-spiritual reasons which once made that discipline advisable in a mostly illiterate society now lose their force in a mature, literate society. So it is evident today, at least in most Western European countries, that there has been a notable drop in confessions of such detail, without a corresponding drop in the number of communions.[47]

4.5 The Relationship between Theology and Canon Law

Jiménez Urresti continues on the relationship between the two sciences and how the scholars should relate to each other.

The theologian should not forget that canonical judgments are never, in themselves and by themselves, theological judgments; he should not take canonical expressions as theological expressions or as theological argument. The expressions may sometimes be the same, particularly in cases where a theological norm is not generic, but so particular in itself that it is canonically viable without needing to be made any more explicit by ecclesiastical law. This will not be learned from the canonical expression alone, but by comparing with the theological law. The theologian should take the canonical argument without its overtones of legal particularization, so as to extract the theological essence from it.

The canonist, for his part, although he knows that there is a theology at the heart of canon law, also knows that any social ordering has its own autonomy, its own rules, concepts and expressions, and that its various canons, articles and laws form their own system, orientated to the implementation of particular matters. In pursuing his own specific ends, he will have formed his own logical processes and system of reasoning and justification, but he will not propose these to the theologian.

46. See ibid., 360.
47. Ibid., 360.

But just as the theologian proposes data to the canonist, so the canonist proposes practical canonical results to the theologian. These, being the socialized concrete expressions of the divine law of the Church, are not only canonical facts but also theological facts, facts with a theological essence which must fit into the generic constitution of the divine law of the Church, and so into theological doctrinal explanations and systematizations.[48]

So the task of canon law is to effect the actualization of generic divine law while being faithful to its theological basis, to make it function while being faithful to its inner sacramentary nature, and to order the ecclesial structure in fidelity to its transcendent aim of "*salus animarum*". It can, however, be unfaithful to this threefold task. In this case, theology will tell it that this possible infidelity cannot be substantial, since the charisms of indefectibility and infallibility enjoyed by the Church apply to its substantive mission and so also to the practical functioning of its social structures; that is, to the practical conduct of canon law. And theology will deliver its judgments (of theological valuation) on whether canon law is being unfaithful or not, within the limits possible, in order to decide whether its reform is necessary. But theology must find a place and a justification in its doctrinal system for every canonical act considered legitimate, and so faithful to its theological roots, by Church authority (both magisterial and canonical), if it is not to appear insufficient. So the canonist, familiar as he is with the canonical relativity of the numerous and divergent legitimate disciplines offered by history, will help the theologian to take cognizance of the generic character of the theological principles underlying canon law, and so to open his theological horizons and not restrict them to the accidents of canonical acts.[49]

> If the theologian forgets this lesson, he will run the grave risk, into which some say theology has already fallen, of producing a "theology of *faits accomplis*"; that is, simply to treat particular historical canonical acts as though they belonged to the category of theology, without stripping them first of their skin of canonical particularization to get at the theological kernel they enclose. If he falls into this trap, the theologian will strangle canon law with the absolute tie of theological truth which he attributes to the surface of canon law.[50]

48. See ibid., 341–342.
49. See ibid., 363–366.
50. Ibid., 367.

As this crime already seems to have been committed more than once, it is not surprising that one hears the expression "detheologizing" canon law, not in the sense of depriving it of its theological kernel, but of extracting this kernel without extraneous pieces hanging on. Furthermore, the theologian who is guilty of this crime is restricting the breadth which theological principles, by their generic nature, should possess, by identifying the principle with one of its possible particular applications. This is "juridicizing" theology, and is the reason for current demands for the "dejuridicizing" of theology, for the replacement of "juridicist theology".[51]

In other cases theology fails to shed sufficient light on theological principles which will form the basis for subsequent canonical decisions. Then canon law will defend itself as best it can, trying not to compromise doctrinal principles and generally holding back, which means that it will not be able to reflect the visage of the Church with the clarity desirable. But this would hardly be the fault of canon law.[52]

> There is a particular difficulty involved in trying to confine the two disciplines to their proper spheres: that the Church moves in both at the same time. It exercises a doctrinal magisterium and so moves in the sphere of theology, and at the same time, being a visible society, possesses and effects a social order, and so moves in the sphere of implementation. But as the Church is not practising a scientific discipline as such and is not too careful about confining its expression to terminology proper to one particular science or another, it often carries the same terminology over from one sphere to the other. So there is a sort of symbiosis in the life of the Church between one science and the other.
>
> This involves the theologians in a fair amount of work and not a few delicate problems, and leaves the canonists somewhat chagrined. It means that the first task of both is to determine by their use of terms which science and logic are being used by the authority of the Church in any given pronouncement, since they will often find that the authority is exercising its doctrinal magisterium in canonical terms and establishing laws in theological terms. Vatican II spotted the difficulty; hence its efforts always to express the theology of the Church in strictly theological terms—not always completely successful.
>
> On the other hand, the Church, a supernatural society, a "sacrament" and a "mystery", is also a society in a sense analogous to civil society, and so its "canon" law is "law" in a sense analogous to that of civil law. This is why canon law finds its roots, nature and end in theology, not in civil law, a fact which sometimes in practice has been overlooked. This is why many theologians and canonists are now rightly demanding a return of canon law to theology, a greater "theologizing" of canon law.
>
> This is not to deny its relationship with civil law. Since it is a science on its own, and an autonomous one, being a science of implementation, it shares this with civil law, from which it can learn much in its autonomous aspect, i.e., in its work of particularization. This means that maintaining it in the proper relationship to both theology and civil law is one more task for, and source of tension between, theologians and canonists. That canonists have realized this is shown by the abundant literature of recent years dealing with the particular, "juridical" nature of canonical order, different in essence from civil order though coinciding with it in many of its forms.[53]

51. See ibid., 367–369.
52. See ibid., 376–377.

5. Conclusion

The thought of Jiménez Urresti is important for a correct understanding of canon law because he showed that positive canon law belongs to the human and historical side of the Church, and to the social part of that side, that is to the most external part, so it should not cause surprise to state that canon law, as perhaps no other positive aspect of the Church, can reflects the pilgrim, historical, contingent and changing aspect which the Church possesses in the midst of its unchanging condition.

Canon law is continually reminding the Church hat it is immersed in the world, time and space, and so undergoes the pressures and limitations natural to these factors. It even reminds it that it is weak and needs the comfort of the power of God's grace if it is not to waver from perfect fidelity,

53. Ibid., 377–378.

that its holiness is imperfect, since it embraces sinners, and is in need of constant and perpetual reform.

For the Church to enter into the history of mankind and be a social reality of history, with all the consequences of this, but at the same time remaining true to its institutions, which pertain to the present time, it must take on the appearance of this passing time.