

DIVERSITY IN UNITY: APPROACHES TO CHURCH ORDER IN ROME AND IN BYZANTIUM*

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This evening I propose to offer you some of the results of my research for a book I have recently completed.¹ I examined the work of canonists, in the Eastern and Western parts of the Christian community. I explained what they did and indicated the contribution they made to the development of canon law in the first millennium of Christianity. The book deals primarily with Rome and Constantinople, though there is an excursus into Methodius and the Slavs and into the Churches in Syria and Persia. What binds the chapters together, and makes them more than a collection of disparate essays, is the parallel discussion of three issues. These are: the constitution and governance of the Church (monarchical, patriarchal/imperial, synodal), the discipline of the clergy (married or celibate) and the question of re-marriage in church after divorce

By describing how these questions were faced in the canon law of four large branches of the Christian community, I highlight the unity and the diversity within the Church in the first millennium: unity in faith and doctrine but diversity in discipline. An original aspect of the book lies in the fact that the comparison is based upon an examination of the principal canon law collections of these Churches. It is also a contribution to the biographical history of canon law since it shows how individual canonists exerted an influence on the development of the law. Much can be learnt about the ecclesiology of these compilers both from what they included in their collections and from what they omitted. Since intercontextuality is important, I have tried to place these men in their historical and political context.

Why did the highly centralised papal monarchy develop in the West as it did? How did it come about that the Christian Churches in the East and in the West developed such different traditions in discipline, liturgy and spirituality? Why did the discipline of a celibate clergy arise only in the Latin Church? How has it come about that the Eastern Churches have such a different approach to divorce and re-marriage from the Latin Church? These are central questions in the Church today. The discussion of their history in the first millennium would, I thought, be of interest not only to canonists and medievalists but also to ecumenists. I examined the following two sixth-century canonical collections:

1. The collection produced by Dionysius Exiguus towards the beginning of the sixth century in Rome. Dionysius is the first great canonist of the Western Church known to us by name. The *Dionysiana* was the first of its kind to gain widespread influence in the Latin Church: all subsequent western collections would be affected by it. Dionysius begins by providing a translation of the first fifty of the eighty-five Apostolic Canons (taken from the Apostolic Constitutions, Book VIII). It is now clear that these do not go back to the Apostles, but it is generally agreed that they reflect

* This is the text of the Lyndwood Lecture delivered in London on 27 October 2000.

¹ The book will be published by the Centre for Byzantine, Ottoman and Modern Greek Studies, University of Birmingham, in the series: *Byzantine and Ottoman Monographs*. The title will be: *Church Law and Church Order in Rome and Byzantium. A Comparative Study*. The Publisher will be Ashgate Publishing Limited.

the customs of the early centuries.² These are followed by 165 canons from seven councils held in the Eastern empire in the fourth century: Nicaea I (325), Ancyra (314), Neocaesarea (before 325), Gangra in Paphlagonia (c.341), Antioch (c. 330), Laodicea (345-365), Constantinople I (381); then twenty-seven canons from the Council of Chalcedon (451). To these Dionysius added twenty-one canons from the Council of Sardica (343) as well as 138 canons which he attributes to the Council of Carthage of 419, and which preserved for the West a whole code of canons of the Church in North Africa.³ By providing this new, accurate Latin translation of the Greek canons Dionysius made available to Rome and the West the canonical authorities that were regarded as the *ius vigen*s by the Church in Constantinople: it is not unlikely that one of the aims of his work was to foster closer unity between the Greek Church and the Latins. He demonstrated the importance of the Eastern councils and his translation ensured that the canons of these Eastern councils became the foundation for the development of canon law in the West.

Dionysius went on to produce another collection of quite a different kind. To the collection of canons he added a selection of so-called 'canons' from thirty-eight decretal letters of the Bishop of Rome—from Pope Siricius (384) to Pope Anastasius II (d.498).⁴ These decretals were replies popes had given to questions sent to them by bishops concerning various points of law. By making these papal replies to particular questions part of what was to become the general law-book for the Western Church, Dionysius took a step of enormous importance for the development of western canon law. A collection of papal decisions, given for particular individuals, was put forward as the general law of the Church and as having an authority similar to that of conciliar canons.

2. The second collection I examined was the Greek collection produced by John Scholastikos in Constantinople, also in the sixth century, when Justinian was Emperor (the first edition was produced in Antioch around the year 550). He called his collection: *Συναγωγή κανόνων ἐκκλησιαστικῶν ἐν 50 τίτλοις διηρημένη*—*A Compilation of Ecclesiastical Canons Divided into Fifty Titles*. This is the oldest Greek canonical collection we possess and it became the basis for all later collections in Constantinople. The sources for his collection of canons are substantially the same as those used by Dionysius:

- (1) 85 Apostolic Canons (Dionysius had included only the first 50 of these)
- (2) Canons from: Nicaea I, Ancyra, Neocaesarea, Sardica, Gangra, Antioch, Laodicea, Constantinople I and Chalcedon.

² The *Apostolic Canons (Regulae Ecclesiasticae Sanctorum Apostolorum)* was a collection of eighty-five laws allegedly given to Pope Clement I by the Apostles. They were probably put together in Antioch towards the end of the fourth century and are concerned mainly with the duties of the clergy. They were regarded in the West as apocryphal and Dionysius translated only the first fifty of them. They were accepted as sources of church law in Constantinople and included in their official canonical collections. See J. Gaudemet, *Les sources du droit de l'Église en occident du iie au viie siècle* (Editions du Cerf, Paris 1985) pp 24–26.

³ In his first version Dionysius had included canons from the Council of Carthage of 419. In his second edition he interpolated a large number of canons from earlier councils held at Carthage under Aurelius. Aurelius held the primatial see of Carthage from c.391 until his death in 427, and, under the influence of St Augustine, called a number of episcopal synods between 393 and 419. See J. Munier, *Concilia Africae A.345–A.425*, (*Corpus Christianorum Series Latina*, 149) (Turnhout 1974). See F. L. Cross, 'History and Fiction in the African Canons', *Journal of Theological Studies*, NS 12 (1961), pp 227–247. As we shall see, this *Codex canonum Ecclesiae Africanae* was translated into Greek and included in the *Synagoge* of John Scholastikos.

⁴ There is no obvious explanation as to why Dionysius chose to publish these particular 38 Decretal Letters out of the 460 we know existed at that time. See J.B. Pitra in *Analecta Novissima*, t.I, p 37.

(3) Sixty-eight so-called ‘canons’ of St Basil. These are taken from letters of St Basil to Amphilochius, Bishop of Iconium, and deal with moral problems and public penances. By including these ‘canons’ in his Synagoge, John Scholastikos was in fact proposing, as general church law, the advice St Basil had given to a bishop who had consulted him.

(4) Eighty-seven excerpts from the *Novellae* of Justinian. These were taken from imperial constitutions issued after the promulgation of the *Codex* in 529. The excerpts selected by John Scholastikos for his Synagoge show how wide-ranging imperial legislation was in church matters.

A key century for the development of church law, both in the East and in the West, was the ninth century. The two most influential ninth-century canonical collections clearly show how the basic work done by Dionysius and John Scholastikos was enlarged and developed. The collections are the Pseudo-Isidorian Decretals in the West and the so-called Nomokanon of Photius in Constantinople. Each of them constitutes a remarkable development of its sixth-century predecessor. I chose these collections because the Nomokanon was the quasi-official code for the Byzantine Church in the ninth century, and the Pseudo-Isidorian Decretals, while not an official collection, constituted a compendium of canons and decretals which illustrate clearly the direction in which canon law was developing in the Western Church.⁵

1. The Nomokanon in XIV Titles

Byzantine canon law developed steadily in the centuries following Justinian’s codification and the Synagoge of John Scholastikos. The precise way in which it developed was influenced by individual canonists who made compilations of canons which were subsequently taken over and approved by the authorities. This is how the Nomokanon in XIV Titles came into existence. The method used by John Scholastikos was modified by a canonist in Constantinople, who made a new collection consisting of three parts. Part I was a new systematic arrangement, in which John’s fifty titles were reduced to fourteen. Under each title canons which were relevant to the subject matter of the title were listed but the text of the canon was not given.⁶ For the text of the canons the reader was referred to Part II of the collection.

⁵ The fact that about one hundred medieval manuscripts of the *Pseudo-Isidorian Decretals* still survive show that it was probably the most frequently copied collection of the century. Its influence on the development of western canon law can hardly be exaggerated. See James A. Brundage, *Medieval Canon Law* (London and New York 1995) pp 26–27.

⁶ The following is a list of the fourteen titles indicating both how the matter is divided and the contents of the collection. There were really two parts to this Nomokanon: in the first part there was the systematic collection in fourteen titles, containing the imperial constitutions, the *nomoi*; and in the second part there was the chronological collection of all the canons, as listed in the second canon of the Council in Trullo, with the addition of the canons that had been promulgated since Trullo. Because only references to the canons were given in the first part, it was essential to have access to the second part as well.

Title I On theology and the orthodox faith (38 chapters)

Cap 1: Concerning theology and the orthodox faith. References to the following canons:

Canones Apostolorum, canons 49–50; Synod of Constantinople, cc.1.5; Synod of Carthage, canon 2

[later, Synod VI, cc. 1, 73, 81]

Lex. Lib I Codicis, constitutio 1,5,6,7,8.

Title II On the building and consecration of churches (3 chapters).

Title III On prayers and psalms; on the duties and vestments of readers, cantors and ministers (22 chapters).

Title IV On the catechumenate and holy baptism (17 chapters).

Title V On those who treat the church with disrespect, and on those who eat in church (3 chapters).

Title VI On the offering of fruits (3 chapters).

/com.

Part II was a compilation of all the canons from the church councils arranged in chronological order. The canons from John Scholastikos's *Synagoge* were included with some additions: the canons from a Council of Constantinople (394) and of the Council of Carthage of 419, which Dionysius had included in his collection. Along with these conciliar canons the compiler added a series of extracts or 'canons', taken from the writings of twelve Fathers of the Eastern Churches. Part III consists of a collection of imperial constitutions, (probably taken from an existing collection of Roman Law, the *Tripartita*).⁷

Around 630 AD this *Synagoge* in XIV Titles underwent an important transformation. A jurist in Constantinople transformed the *Synagoge* by combining canons and civil laws together. He took the excerpts of imperial constitutions from Part III of the *Synagoge* and placed them under the appropriate Titles of Part I. This meant that the conciliar canons and the ecclesiastical laws were now put together in the collection: hence the name (which only came into use much later) of the *Nomokanon*, in which laws (*νομοι*) and canons were placed together. Putting imperial constitutions side by side with the canons of church councils suggests a certain equality in law between the strictly church legislators and the emperor. The *nomoi* were to be seen as authoritative for the Church as the canons. In 545 AD Justinian had given the conciliar canons the force of law in the empire.⁸ All this makes an important ecclesiological statement concerning the place of the emperor in the Church.

The *Nomokanon* of XIV Titles contained the following canons: the 85 Apostolic canons; canons of the four ecumenical councils: Nicaea I, Constantinople I, Ephesus and Chalcedon; canons of the seven regional councils which had been included in the earlier collections: Ancyra, Neocaesarea, Gangra, Antioch, Laodicea, Sardica, Constantinople (394); canons of the regional council of Carthage (419 AD). After the canons, there are added the extracts or 'canons' from the following twelve Fathers of the Eastern Churches:⁹

⁶ /cont.

Title VII On Lent, Easter and Pentecost; on Sundays and Saturdays and on genuflection (5 chapters).

Title VIII On parishes and on the behaviour of bishops and clerics; on pilgrimages and annual synods; on doctrine and letters of peace; and on the honour to be shown each other (19 chapters).

Title IX On sins and judgments of bishops and clerics; on excommunication and deposition; on penance and absolution of sins (39 chapters).

Title X On the administration of church property and on the private property of the bishop (8 chapters).

Title XI On monasteries and monks (16 chapters).

Title XII On heretics, Jews and gentiles (18 chapters).

Title XIII On the laity [duties, marriage, and other matters] (41 chapters).

Title XIV On matters pertaining to all in common (7 chapters).

⁷ This *Collectio Tripartita* should not be confused with the *Tripartita*, a Latin collection of canon law attributed to Ivo of Chartres and used by Gratian. The Greek collection of civil laws is divided into three sections:

I. Extracts from Justinian's *Codex*

II. Texts taken from the *Digest* and *Institutiones*.

III. Summaries of a number of Justinian's *Novellae*. See *Collectio Tripartita, Justinian on Religious and Ecclesiastical Affairs*, edited by N. van der Wal and B. H. Stolte (Egbert Forsten, Groningen 1994).

⁸ *Novella* 131, (545 AD) Chapter I: 'Therefore we confirm that those holy ecclesiastical rules have the force of law, which were issued or confirmed by the four holy councils; that is, by the 318 fathers at Nicaea, and the 150 holy fathers at Constantinople, and in the first [synod] at Ephesus in which Nestorius was condemned, and at Chalcedon, in which Eutyches was excommunicated along with Nestorius. For we accept the dogmas of the above-mentioned four councils just like Holy Scripture and we keep their rules just like laws'.

⁹ These 'canons' from the Fathers can be found in P.P. Joannou (editor), *Discipline Générale Antique (Ile-IXe s.)*, vol II, *Les canons des Pères Grecs* (Rome 1962). Also, *Patrologia Graeca*, vol 138, cols 455-936.

St Dionysius the Great, Bishop of Alexandria (248–264)	8 canons
St Peter, Bishop of Alexandria (300–311)	15 canon
St Gregory Thaumaturgus, Bishop of Neocaesarea (d.270)	11 canons
St Athanasius, Bishop of Alexandria (328–373)	3 canons
St Basil the Great, Bishop of Caesarea (370–379)	93 canons
St Gregory, Bishop of Nyssa (d. 395)	8 canons
Timothy, Bishop of Alexandria (385)	72 canons
Theophilus, Bishop of Alexandria (385–412)	14 canons
St Cyril, Bishop of Alexandria (412–444)	7 canons
St Gregory Nazianzen, Bishop of Constantinople (381–389)	1 canon
St Amphilochius, Bishop of Iconium (340–395)	1 canon
Gennadius, Bishop of Constantinople (fl.471)	1 canon

The Nomokanon was frequently copied and augmented. So when the bishops assembled in Constantinople in 691 for the Council in Trullo, they had at hand the collection of canons that formed Part II of the Nomokanon. This is clear from the list of sources of law that is given in the second canon promulgated by that council.¹⁰ The canons promulgated by the Trullan Council in 692 are of key importance in the development of Byzantine church law. The council was convoked by Justinian II as a supplement to the fifth and sixth ecumenical councils (Constantinople II in 553, condemning the Three Chapters, and Constantinople III in 680–81, to settle the controversy over monothelitism). These councils had passed doctrinal decrees but no disciplinary canons. The emperor decided that there was need for a revision of the canon law, so he called a council which has come down as the Trullan Council. Because it was considered to be the disciplinary supplement to the Fifth and Sixth Councils, the Council in Trullo is often referred to as the Quinisext. Moreover, since it is considered part of these councils, it shares their ecumenical authority. For the Greek Orthodox Church, therefore, the canons promulgated by this council can be abrogated only by another ecumenical council.¹¹

The Council in Trullo promulgated 102 canons.¹² In some of these a divergence from and antagonism to Rome are clearly visible.¹³ For this reason the canons were not at

¹⁰ It is called the Synod in Trullo because it was held in the domed hall (τροῦλλος/ cupola) of the imperial palace in Constantinople and not in *Hagia Sophia*. Editions of the 102 Trullan canons in Greek can be found in G.A. Rhalles—M. Potles, *Συνταγμα των θειων και ιερων κανωνων*, (Athens 1852–1859) vol II, pp 295–554; P.P. Joannou, *Discipline Générale Antique* (IIe–IXe s.), vol I, 1, *Les canons des conciles oecuméniques* (Rome 1962) pp 101–241 (in Greek, Latin and French); G. Nedungatt and Michael Featherstone, *The Council in Trullo Revisited* (Rome 1995) pp 43–185 (in Greek, Latin and English).

¹¹ On the Trullan Council, see V. Laurent, 'L'oeuvre canonique du Concile in Trullo (691–692), source primaire du droit de l'Eglise Orientale,' in *Revue des Etudes Byzantines*, 25 (1965), pp 7–41; Heinz Ohme, *Das Concilium Quinisextum und seine Bischofsliste: Studien zum Konstantinopolitan Konzil von 692* (Berlin and New York 1990) (This is a critical edition of the list of the signatories to the Quinisext canons of 692—225 bishops headed by the signature of the emperor Justinian II); J.M. Hussey, *The Orthodox Church in the Byzantine Empire* (Oxford 1986) pp 24–29; Heinz Ohme, 'Begegnung zwischen Ost und West in den kanones des Concilium Quinisextum,' *Atti del Congresso Internazionale: Incontro fra Canonici d'Oriente e d'Occidente* (Bari, 1994) vol 2, pp 101–122; C. Gallagher S.J. 'Sacri Canonones nel Decretum di Graziano,' *Ius in Vita et Missione Ecclesiae* (Vatican 1994) pp 762–771; Dimitri Salachas, 'La Normativa del Concilio Trullano commentata dai canonisti bizantini del XII secolo,' *Oriente Cristiano* 2–3/1991, pp 3–103.

¹² Canons 1–2, confirming previous legislation: canons 3–39, concerning the clergy; canons 40–49, concerning monks; canons 50–103, concerning the laity.

¹³ Most of the canons simply renewed the legislation of previous councils, but a few were directly opposed to the usages of the Church at Rome. For example, canon 13, which permitted priests and deacons to live as married men, claiming that this was more in keeping with the
loc. cit.

first accepted by Rome, and Pope Sergius I (687–701) refused to sign the acts of the council. Later popes agreed to accept the Trullan canons, but only insofar as they were not contrary to Roman customs.¹⁴ The ecclesiological vision they incorporated shows a different perception of ecclesial order from that seen in the western collections.¹⁵ The second Trullan canon is of key importance. It provided—for the first and only time in a general council—an official list of the canonical sources that are to be observed in the Church (Antioch and Alexandria were also represented at the council as well as a number of bishops from the Latin West).¹⁶ This canon was confirmed by the first canon of the Second Council of Nicaea in 787.¹⁷ It lists the same canonical sources that were to be found in the chronological section of the *Synagoge* in XIV Titles, thus giving ecumenical authority to the collection we have been discussing.

A new edition of the Nomokanon in XIV Titles was produced about the year 882, when the difficulties with Rome had been resolved and Photius was in his second period as Patriarch.¹⁸ This new edition augmented the collection by adding the canons that had been promulgated by councils in Constantinople since the first *Synagoge* (c. 630). The following canons were added in the so-called ‘Photian’ edition:

¹³ *cont.*

strict Apostolic tradition: canon 36, which repeated canon 3 of the First Council of Constantinople and canon 28 of the Council of Chalcedon, which granted Constantinople privileges ‘equal to those of the see of older Rome’; canon 55, which proscribed the Roman practice of fasting on Saturdays in Lent; canon 67, which stipulated that one had to abstain from blood and from what is strangled, a usage permitted in the Western Church; canon 82, which forbade that Christ be portrayed as a lamb, another Western custom. This is, admittedly, a small number of canons, but they betray an aggressive stance towards Rome, which is new, and which was unacceptable in Rome. See V. Laurent, ‘L’oeuvre canonique du Concile in Trullo (691–692)’, pp 32–33.

¹⁴ Pope John VIII (872–882) formulated the approach that would be taken at Rome towards the Trullan canons. ‘Ergo regulas quas Graeci a sexto synodo perhibent editas ita in hac synodo [i.e. Nicaea II, 787] principalis Sedes admittit ut nullatenus ex his illae recipiantur quae prioribus canonibus vel decretis sanctorum Sedis huius pontificum aut certe bonis moribus ineveniuntur adversae.’ [Therefore the principal See accepts in this synod [i.e. Nicaea II, 787] the regulations that the Greeks hold were produced by the sixth synod, but in such a way that on no account are those accepted which go against earlier canons or decrees of the holy pontiffs of this See or which are certainly contrary to sound morals]. Anastasius Bibliothecarius quotes these words of Pope John VIII in his introduction to the *Acta* of the Second Council of Nicaea. See V. Laurent, *op.cit.*, p 36. The Patriarch Tarasius, at this Second Council of Nicaea, claimed that the Quinisext canons belonged with the Sixth Ecumenical Council, the Third Council of Constantinople (681), as a supplement. This is now generally accepted. See Heinz Ohme, ‘Die sogenannten “antirömischen Kanones” des Concilium Quinisextum (692)—Vereinheitlichung als Gefahr für die Einheit der Kirche,’ in G. Nedungatt and Michael Featherstone, *The Council in Trullo Revisited* (Rome 1995) pp 307–321.

¹⁵ See G. Every, *The Byzantine Patriarchate, 451–1204*. (2nd edn revised, London 1962) pp 102–112.

¹⁶ The bishops who took part were almost all from eastern dioceses. Rome did not send a delegation but there were some western bishops present.

¹⁷ ‘We joyfully embrace the sacred canons and we maintain complete and unshaken their regulation, both those expounded by those trumpets of the Spirit, the apostles worthy of all praise, and those from the six holy universal synods assembled locally for the promulgation of such decrees, and from our holy fathers.’ Nicaea II (787), canon 1. (English translation in N. Tanner, *Decrees of the Ecumenical Councils* (London and Washington 1990) vol I, p 139). Ivan Žužek argues that the opening paragraphs of the apostolic constitution, *Sacri Canonis*, is virtually a recognition of the importance of the Trullan canons by Pope John Paul II. See Ivan Žužek S.J. ‘Common Canons and Ecclesial Experience in the Oriental Catholic Churches,’ *Understanding the Eastern Code* (Rome 1997) p 53.

¹⁸ An edition of Part I, by C. Justell (Paris 1615) is reproduced in *Patrologia Graeca*, vol 104. *Nomokanon cum commentariis Theodori Balsamonis Patriarchae Antiocheni*, coll. 975–1218. Part II, the chronological collection of canons, is published in *Patrologia Graeca*, vols 137 and 138 (according to the edition by W. Beveridge’s *Synodikon*, of 1672). The two parts are separated in this way in Migne’s *Patrologia* because the Nomokanon is listed under the works of Photius, whereas the chronological collection is included under the writings of the twelfth-century commentator, Theodore Balsamon.

- (a) the 102 canons of the Council in Trullo;
- (b) twenty-two canons of Nicaea II (787);
- (c) the seventeen canons of the 'Photian Council' of 861;
- (d) the three canons of the second 'Photian Council' in 879—the council that reinstated Photius as Patriarch.

The canons of the Council of Constantinople of 869/70 are omitted. There is sound evidence to show that the 869/70 council was repudiated by Pope John VIII, at least insofar as the condemnations of Photius are concerned. It is now thought by many that the council of 879/880, at which peace was re-established between Rome and Constantinople, should be the council that is remembered as official. The continued inclusion of the acts of this so-called 'Fourth Council of Constantinople' of 869 in Catholic collections has done great harm to relations between Rome and Constantinople. Photius was the greatest scholar of his time. He is held in high honour as a saint in the Byzantine church. He was reconciled with Rome and it is now agreed that there was no second Photian schism.¹⁹ The acts of the council of 869 include expressions of severe criticism of Photius: 'through the folly, cunning and evil machinations of the wretched Photius.' 'For the wretched Photius was truly like the person who did not make God his refuge; but trusted in the abundance of his cunning and sought refuge in the vanities of his iniquities', and so on, as well as the canons condemning Photius.²⁰ Continuing to include such writing among the acts of the councils of the Church has done much to obscure the fact that there was a reconciliation between Photius and the pope. Dvornik has shown that there was no 'second excommunication' of Photius and that the patriarch died in full communion with Rome.²¹

The ninth-century Nomokanon does, however, accept the Council of Constantinople of 879–880. This is a most interesting council from an ecclesiological and canonical point of view. It dealt with the restoration of Photius to the patriarchal throne in Constantinople and put an end to what is commonly referred to as 'the Photian schism.'²² It was a council of reconciliation and should be seen as an important ecclesiastical event. It both rehabilitated Patriarch Photius and restored unity between Rome and Constantinople.²³ Some Byzantine writers consider it the eighth ecumenical council in the Orthodox Church.²⁴ The council published a statement of faith which condemned all additions to the Creed. The wording was in general terms, though its meaning was clear, and it said nothing about the theological implications of the *filioque*. The *filioque* had been introduced into the Creed towards the beginning of the ninth century by the Frankish Church, but it was only

¹⁹ See F. Dvornik, *The Photian Schism* (Cambridge 1948) pp 175ff. J. M. Hussey, *The Orthodox Church in the Byzantine Empire* (Oxford 1986) pp 83–86.

²⁰ N. Tanner, *Decrees of the Ecumenical Councils*, vol I, pp 163–165.

²¹ For a discussion of the different ideas of the Church that are mirrored in each of these two councils, see P. Stephanou, 'Deux conciles, deux ecclésiologies? Les conciles de Constantinople en 869 et en 879,' in *Orientalia Christiana Periodica*, vol 39 (1973) pp 363–407.

²² For the *acta*, see G.D. Mansi, *Sacrorum Conciliorum nova et amplissima collectio*, vol XVII, 468–473.

²³ There is a well-documented discussion of Patriarch Photius and his relations with Rome by Hans-Georg Beck in *Handbook of Church History*, Vol III, *The Church in the Age of Feudalism*, 'The Byzantine Church in the Age of Photius' (London 1969) pp 184–193.

²⁴ John L. Boomjara, 'The Photian Synod of 878–879 and the Commonitorium (879),' *Byzantine Studies*, 9 (1982) p 23: 'Beyond its immediate decisions regarding Photius and the restoration of peace within the Byzantine Church and between the Churches of Rome and Constantinople, the affirmation of mutuality and equality in customary and disciplinary procedures may prove to be an ecumenical reference point from which to begin a serious ecumenical dialogue.' For a detailed discussion of this synod, see Johan Meijer, *A Successful Council of Union. A Theological Analysis of the Photian Synod of 879–880* (Analecta Vlatadon, Thessaloniki 1975).

much later, in the eleventh century, that this Frankish influence made itself felt in Rome.²⁵

2. The False Decretals

The Carolingian reform movement in the eighth and ninth centuries had done much to restore the heritage of the early Church and had linked the Frankish Church more closely to Rome. But after the death of Charlemagne and the division of his empire, the reforming spirit lost its effectiveness. There was no longer a central government able to hold Charlemagne's empire together. Church property became more and more subject to secular rulers. Kings treated bishops as their vassals. They kept bishoprics vacant for long periods, while taking over the administration of their revenues. They had bishops appointed and removed as they pleased. In this way bishops became more dependant on civil rulers and were helpless against a secular power that ignored church law. A number of synods had been held and attempts at reform made. These had proved unsuccessful. The institution of proprietary churches, for example, was a source of particular difficulties. How could this system be corrected? How could the Frankish bishops be protected against domination by civil authorities? How could the clergy be freed from having to perform secular duties, such as military service? To meet such urgent needs a new approach was needed and new methods called for. The existing canonical collections seemed inadequate to meet the problems.

It was in these circumstances that, somewhere in northern France, a canonist of genius devised a new and original solution. A new series of canonical collections came to light in Gaul in the middle of the ninth century. This is the origin of the collection that was known as the Collection of Isidore the Merchant. Since the sixteenth century, for reasons I will mention in a moment, it has been known as 'the False Decretals'. How the collections came into existence is a fascinating story and constitutes one of the most daring and successful frauds in history: a work of genius! Ancient laws were forged to meet the needs of the Church in ninth-century Gaul!

It was decided that two types of law would be required for effective reform: secular laws which, it was hoped, would be recognised as binding by the civil authorities and conciliar canons and papal decretals which, purporting, as they did, to come from venerable and ancient authorities, would be accepted as binding by all. The compilers of these collections would have been outraged if they had been accused of trying to deceive. They were out to reform the Church and bring it back into its pristine state of fidelity to its origins, removing obvious abuses that had crept in.²⁶ What was

²⁵ The words *filioque* (and from the son) were added to the Nicene Creed at a Spanish council in Toledo in 589. This was intended to underline the divinity of the Son and had support in the teaching of St Augustine. For a clear and well-documented study of the Trinitarian controversy, see R. Haugh, *Photius and the Carolingians. The Trinitarian Controversy* (Massachusetts 1975). The Frankish missionaries used this interpolated Creed in the ninth century. This was unacceptable to Eastern Christians, both because it was an insertion into the Creed and because they considered that it entailed an unsound theology of the Holy Trinity. Photius, in his *Mystagogia*, totally rejected the theology behind the introduction of the *filioque* by the Carolingians and his arguments are still used today by Orthodox theologians. The expression was not introduced into the Creed in Rome until the eleventh century, and this was at the insistence of the Saxon emperors. See R. G. Heath, 'The Western Schism of the Franks and the *Filioque*,' *Journal of Ecclesiastical History*, vol XXIII (1972) pp 97–113. For an official clarification of the Catholic Church's teaching on the *filioque*, see the document published in September 1995 by the Pontifical Council for the Promotion of Christian Unity. See 'Greek and Latin Traditions Regarding the Procession of the Holy Spirit,' *Eastern Churches Journal*, vol 2 no.3 (1995), pp 35–46.

²⁶ In the Middle Ages and earlier there was, of course, quite a different attitude towards forgery and plagiarism than there is today. All texts were treated with greater freedom than would now be tolerated. One thinks of the speeches in Thucydides and Tacitus, for example. However, it has to be admitted that the Pseudo-Isidorian forgers brought this to a fine art!

wanted was a body of ancient law that would strengthen the power of the bishops in their dioceses. One way of doing this would be to reinforce the universal authority of the Bishop of Rome: so important matters would be termed *Causae Miores*, and automatically reserved to the Pope. The reformers wanted to be able to appeal, therefore to the ancient rights of the Roman Pontiffs and the Emperors.

These are the circumstances that led to the production of the Pseudo-Isidorian Forgeries. In fact, four distinct collections of laws were fabricated: two canonical collections and two collections of civil decrees.²⁷ I will deal here only with the largest and most influential of these collections.²⁸ This is the one we now refer to as 'the False Decretals'.²⁹ It contains papal decretals and conciliar canons from the time of Pope Clement I to that of Pope Gregory II (716–731). The author claims to be Isidorus, a pseudonym probably used to suggest the famous seventh-century Spanish canonist St Isidore of Seville (600–636).³⁰ About one hundred medieval manuscripts of this collection are known today, so it had a wide circulation. It is divided into three parts. The first part begins, as did the *Dionysiana*, with 50 of the *Canones Apostolorum*. It then contains sixty decretal letters, purporting to have been written by pre-Nicene Popes from Pope Clement I to Pope Melchiades (311–313). All of these—except for the first two—are now known to be apocryphal (made up by the compiler). The second part begins with a few introductory documents, among which is the document that was then accepted as a proof for the temporal power of the popes, the famous Donation of Constantine.³¹ This is also now known to be a complete forgery, but it was fabricated probably in the mid-eighth century and in Rome.³² There follows a collection of conciliar canons from the First Council of Nicaea (325) to the Second Council of Seville (619). Most of these are genuine canons, taken from the first part of a collection known as the *Hispana Gallica Augustodunensis*, though even here there are serious alterations.³³

The third part of the False Decretals consists of a second collection of papal decretals and conciliar canons from the time of Pope Sylvester I (+335) to Pope Gregory

²⁷ The earliest product of the workshop was a collection of canons and decretal letters, now known as the *Hispana Gallica Augustodunensis*. There followed two collections of civil laws and decrees: *The Ordinances of Angilram* (a treatise on procedural law), and *The Capitularies of Benedict the Levite*, purporting to be a collection of decrees from the Frankish royal chancery, mainly in defence of the clergy.

²⁸ There will be a more detailed treatment of all four collections in my book.

²⁹ It is a large collection, filling one volume of Migne's *Patrologia Latina*, vol 130. This reproduces the 1530 Paris edition by J. Merlin. The most thorough discussion of the False Decretals is by Horst Fuhrmann, *Einfluss und Verbreitung der pseudoisidorischen Fälschungen von ihren Auftauchen bis in die neuere Zeit (Schriften der Monumenta Germaniae Historica, 24, I, II, III)* 3 vols (Stuttgart, 1972–1974). See also H. Fuhrmann, 'False Decretals', *New Catholic Encyclopedia* (New York–London 1967) vol 5, pp 820–824.

³⁰ As has already been remarked, the name of St Isidore is often associated with the seventh-century Spanish canonical collection, the *Hispana*. It is now generally agreed that the *Hispana* was not the work of St Isidore, but the result of joint activity by the Spanish bishops.

³¹ *Edictum Domini Constantini Imperatoris*, Migne *Patrologia Latina*, vol 130, cols 245–252. An edition by H. Fuhrmann is in *Monumenta Germaniae Historica, Fontes iuris Germanici antiqui*, X (1968), pp 278–80.

³² *The Donatio Constantini*. This purports to be a constitutional grant by Constantine the Great to Pope St Sylvester I in which the emperor, in thanksgiving for his baptism and his cure, handed over to the Bishop of Rome imperial power, the Lateran Palace and rulership over Rome, Italy and the West. Constantine then left for Constantinople. It is probably an eighth-century forgery. It was quoted frequently by popes from the time of Pope Hadrian in the eighth century. Pope Leo IX in 1053 made official use of it and it was included in the *Decretum* of Gratian (D.96. can.14). It is an interesting expression of the political doctrine of the Bishops of Rome at that time. It would be used later by Balsamon, in twelfth-century Constantinople, to support the claims of Constantine V. It was proved to be a forgery in the fifteenth century by Nicolas Cusa and Lorenzo Valla. See W. Ullmann, 'Donation of Constantine,' *New Catholic Encyclopedia*, vol 4, pp 1000–1001.

³³ *Patrologia Latina*, vol 130, cols 243–610.

II (+731), including a long series of ninety-seven decretals of Pope Leo the Great. These follow the order of the second part of the *Hispana Gallica Augustodunensis*, but to the authentic decretals are added thirty false decretals made up by the forger. There are also many forged interpolations in the otherwise authentic decretals.

It is now agreed that these collections originated in Gaul about the middle of the ninth century. It is likely that we are dealing not with a single author, but with a group of people who worked together under the direction of a leader. There does seem to be the guidance of a single mind behind the enterprise—of a person who was an expert canonist and with an amazing mastery of the history of canon law and its sources. We shall probably never know who the forger was. The main objectives of the forgers appear to have been to free church property from usurpation by the secular rulers and to return it to the religious purposes for which it was intended. Clerics were forbidden to take part in business and other occupations that were judged incompatible with the clerical state. In particular, they were forbidden to go on military service. The Isidorian Decretals also include a number of authentic canons laying down severe penalties for priests and deacons who do not practice sexual continence.

In particular the False Decretals stress the supreme authority of the Bishop of Rome and papal authority is frequently referred to. Many decisions are classified as *Causae Miores* reserved to Rome; councils, whether national or provincial, were under the authority of Rome: appeals were permitted to the Bishop of Rome in many instances. One of the principal objectives of the forgers appears to have been the protection of the authority of the diocesan bishops in Gaul, but the stress put on papal primacy in virtue of this did much in fact to enhance the power and prestige of papal authority throughout the Western Church. The authority of the local bishop was stressed. On the one hand, he was protected from the metropolitan, who was proposed as *primus inter pares*—first among equals—in the province, and all common matters had to be dealt with in the provincial synod. On the other hand, obedience to the bishop was urged.

These were the aims of the False Decretals.³⁴ There is little evidence that the forgeries had much practical effect in helping the bishops in the Frankish kingdoms in the ninth century; nor were they ever taken over officially by the Church in the West. However, they show in very clear terms the direction in which western canon law was moving in the ninth century. Their influence on all subsequent canonical collections in the Western Church was substantial. The manuscript evidence alone shows that these forged documents were very widely used throughout the Middle Ages and continued to be used as genuine authorities right up to the sixteenth century.³⁵

3. The Two Collections Compared

The Nomokanon in XIV Titles is accepted as authoritative by the Orthodox Churches. The Byzantine commentators wrote their commentaries on it and it remains the *ius vigens* to this day.³⁶ I shall now compare this with the False Decretals

³⁴ H. Fuhrmann, *New Catholic Encyclopedia*, vol 5, p 821. See also H. Fuhrmann, *Einfluss und Verbreitung der pseudoisidorischen Fälschungen*, vol I, pp 137–150.

³⁵ Schafer Williams listed 80 codices containing the whole work of which ten are from the ninth century. Others have since been discovered. He also lists 47 *excerpta* which were made from the False Decretals. See S. Williams, *Codices Pseudo-Isidoriani* (New York 1971). H. Mordek noted five further manuscripts, 'Codices Pseudo-Isidoriani: Addenda zu dem gleichnamigen Buch von Schafer Williams,' *Archiv für Katholisches Kirchenrecht*, 147 (1978), pp 471–478.

³⁶ It is interesting to note that St Saba of Serbia (a monk of Mount Athos) between 1190 and 1200, made a selection from this 'Nomokanon of Photius' with the commentary of Aristenas (not that of Balsamon) and translated this into Slavonic. This is the origin of the *Kormčaja Kniga*, the Book of the Rudder, which became the most important canonical collection for the Russian Orthodox Church. See Ivan uek, *Kormčaja Kniga. Studies in the Chief Code of Russian Canon Law* (Rome 1964).

which I have taken as embodying the tendencies of canon law in the Western Church.³⁷ They can be seen as a direct and logical development of the Dionysiana, adding to that collection a number of canons from regional councils in the West and a large number of 'new' papal decretals—most of them forgeries.

In the Nomokanon in XIV Titles we see a similar direct and logical development of the Synagoge in 50 Titles. The number of conciliar canons has increased considerably. The number of imperial constitutions has also greatly increased; and recourse to the 'canons' of the patriarchs and Eastern Fathers has been taken forward a long way. John had 68 'canons' from Basil the Great. Now there were 234 'canons' from twelve Fathers of the Eastern Churches—six patriarchs of Alexandria, two patriarchs of Constantinople, and four other Eastern bishops. The Nomokanon now included the 102 canons from the Council in Trullo (691/2) and the canons of the 879 Council of Constantinople. The Trullan canons are not included in the Isidorian Decretals. These do include a large number of canons from regional councils held in Spain and Gaul, but no 'canons' from the patriarchs and Fathers of the Eastern Churches, and the Eastern Nomokanon had no decretals promulgated by the Bishop of Rome. What can be seen emerging much more clearly than before are two quite different views concerning church government and discipline.

a. Church Government and administration.

This divergence can be seen in the very names of the compilations: Nomokanon (implying imperial laws and conciliar canons) and Isidorian Decretals (where the important element consists in papal decretals). In the West papal legislation reflects a vision of the Church which is in sharp contrast to that of the Nomokanon. The False Decretals had an important influence on the development of the canon law of the Latin Church. This is particularly true with regard to the notion of papal primacy. Such influence should not be exaggerated. A primacy of the Bishop of Rome, as successor of St Peter, was accepted in the East and in the West long before the False Decretals and cannot be said to be an invention of the ninth-century forgers.³⁸ This is true, but the False Decretals did much to ensure that the primacy of the Bishop of Rome came to be exercised more frequently and more extensively. They were influential too on the way in which the Roman primacy was exercised. The authority of the Roman Pontiff was appealed to increasingly by local churches and there was a notable increase in the number of *causae maiores*, reserved by law to the Pope. The emphasis was on direct decretal legislation by the Roman Pontiff rather than on decisions made by bishops in council. In fact, the law of the Latin Church would be referred to simply as the *ius decretalium*. So a particular view of church structures and discipline was confirmed by these forged documents.

The False Decretals presuppose an idealised form of centralised government in the Western Church, with the Bishop of Rome as the central point of reference for all matters of importance. As far as possible, secular rulers are excluded from church administration. The inclusion of the spurious Donation of Constantine, also encouraged the Bishop of Rome to get more and more directly involved in temporal

³⁷ See E. Herman, 'Ius Iustinianum qua ratione conservatum sit in iure ecclesiastico orientali.' *Acta Congressus Iuridici Internationalis*, vol II (Rome 1935) pp 145–156.

³⁸ In fact, a full *primatus iuris* was claimed by Leo I, Gelasius I, Vigilius and others, and the Byzantines recognised this when it suited them, as, for example, the appeal of the supporters of Patriarch Ignatius against the appointment of Photius as Patriarch in 861, and, towards the end of the ninth century, by the Emperor Leo VI concerning his fourth marriage. Pope Sergius III recognised the validity of the marriage, going against the decision of the Patriarch of Constantinople, who was forthwith deposed by the emperor. See J. Hussey, *The Orthodox Church in the Byzantine Empire* (Oxford 1986) p 105.

administration in Italy.³⁹ There is strong evidence that this forgery was widely copied and used by the papacy from the eighth century onwards as a papal title-deed, among other things, to refute Greek imperial pretensions in the West.⁴⁰ The role assigned to the Bishop of Rome in the False Decretals was primarily intended by the forgers to provide protection for the local bishop. It is ironic that what later became a most effective juridical instrument for the increasingly centralised activity of the Bishop of Rome did not have its origins in Rome but in the kingdom of the Franks.

A clear example of how the Pseudo-Isidorian Decretals would, two hundred years later, be used to bolster papal power can be seen in Anselm of Lucca's *Collectio canonum*, compiled for Pope Gregory VII around 1083. This collection was an important instrument in promoting the Gregorian Reform and enjoyed wide popularity. It was 'a main source through which the False Decretals were popularised in Italy and beyond.'⁴¹ The appeals to Rome, laid down in the False Decretals, were meant to provide a guarantee for the local bishop, and one not too near home. Anselm of Lucca, however, approached them from the Roman point of view and made them clear statements of the supremacy of the Bishop of Rome. 'He set about transforming the expression of episcopal guarantees into universal and all-encompassing stipulations of apostolic powers.'⁴² By doing so he helped to provide that authoritative basis the Gregorian Reformers were looking for to support an increasingly centralised exercise of papal authority throughout the Western Church.⁴³

Moreover, a number of important innovations were brought in by the False Decretals. In sharp contrast to the tradition sanctioned by the canons of early general councils, permission from Rome was required for a synod of bishops to be celebrated anywhere. In several forged letters to the Eastern bishops, attributed to Pope St Julius I (337–352), it was laid down that provincial councils could not be convoked

³⁹ According to the (forged) *Constitutum Constantini*, Constantine is alleged to have decreed, out of reverence for blessed Peter, that Pope Sylvester 'should have primacy over the four principal Sees of Antioch, Alexandria, Constantinople and Jerusalem, as well as over all the churches of God throughout the whole world; and the Pontiff who occupies at any given moment the See of that same holy Roman Church shall rank as the highest and chief among all the priests of the whole world and by his decision all things are to be arranged concerning the worship of God or the security of the faith of Christians.' The forgery continues: 'To correspond to our own Empire and so that the supreme Pontifical authority may not be dishonored, but may rather be adorned with glorious power greater than the dignity of any earthly empire, behold, we give to the often-mentioned most holy Pontiff, our father Sylvester, the Universal Pope, not only the above-mentioned palace [the Lateran palace in Rome], but also the city of Rome and all the provinces, districts and cities of Italy and the Western regions, relinquishing them to the authority of himself and his successors as Pontiffs by this our Imperial grant.' The emperor goes on to say that since he is going to transfer his throne to Constantinople, it is only right that no earthly emperor should rule over the place where the head of the Christian religion had been set up by the 'celestial emperor'. He adds that anyone who does not accept this decree 'shall perish with the devil and all the wicked by burning in the lowest hell!' *The Pseudo-Isidorian Decretals in Patrologia Latina*, vol 130, cols 250–252. The English translation is from C.J. Barry, O.S.B. (Editor), *Readings in Church History* (Maryland 1985) p 239.

⁴⁰ See Walter Ullmann's review of Y. Congar's *L'Écclésiologie du haut Moyen Âge*, *Journal of Theological Studies*, 21 (1970) pp 224–225.

⁴¹ See J. Gilchrist in *The New Catholic Encyclopedia*, vol I. (1967) p 585. Kathleen G. Cushing, *Papacy and Law in the Gregorian Revolution. The Canonistic Work of Anselm of Lucca* (Oxford 1998) especially pp 72–78.

⁴² K.G. Cushing, *Papacy and Law in the Gregorian Revolution*, p 75.

⁴³ For a well-documented discussion of this point, see K.G. Cushing, *Papacy and Law in the Gregorian Revolution*, pp 72–78; and pp 210–212, where she provides a table showing the 'Dispersion and Disposition of Pseudo-Isidorian Texts in the *Collectio canonum*.' According to this, Anselm had taken over thirty-three Pseudo-Isidorian texts that dealt with the power and authority of the Apostolic See of Rome.

without the authority of the Apostolic See.⁴⁴ A definitive sentence against a bishop could only be passed by the Roman Pontiff and not by the metropolitan or the provincial synod.⁴⁵ The authority of the metropolitan was greatly diminished. In fact, forged papal letters from the False Decretals played an important part in reducing all effective synodal structures within the Latin Church of the West, at both regional and metropolitan levels.⁴⁶ One effect of this forged legislation, through the multiplication of appeals to Rome, was to encourage the development of a more centralised government by Rome. This departure from the traditions of earlier centuries was done in the interests of reform. The Gregorian Reformers in the eleventh century would exploit these forgeries for their own ends. My point here is that the canonical collections were providing the required laws for such ends.⁴⁷ A clear distinction should be made at this point between theory and practice. In fact, in the late ninth century and in the tenth century the Roman papacy was in a pitiable state and completely under the control of the political rulers. I am discussing the theory that was embodied in legal collections, but what happened in practice could often be quite different. My point is that the legal collections provided the juridical basis for developments that would take place later, when the time was ripe and the opportunities existed.⁴⁸

In ninth-century Constantinople, on the other hand, the Nomokanon shows an emphasis on a more synodal/collegial form of government by the patriarch and the

⁴⁴ See *Patrologia Latina*, vol 130, col 620. In another forged letter to Eastern Bishops at Antioch, Pope Julius is said to have written that, 'without the authority of this holy See, no one ought to celebrate councils, or call bishops to a synod or condemn them, all of which you have not been afraid to violate.' 'ut absque ejus sanctae Sedis auctoritate nullus deberet, aut concilia celebrare, aut episcopos ad synodum convocare, vel damnare, quae omnia vos temerare non timuistis.' *Patrologia Latina*, vol 130, col 627. This would be taken over by Gratian in the *Decretum* (C.3, q.6, can.9). Gratian has his own comment on this. While in fact it is true that many bishops had been condemned and replaced without any consultation of the Roman See, Gratian noted that this was tolerated 'pro bono pacis' (C.3, q.6, d.p.c.9). It is ironic that such forged letters should be attributed to Pope Julius I, because in fact he was the author of diplomatic letters to Eastern bishops concerning St Athanasius. (See St Athanasius, *Apologia contra Arianos*, *Patrologia Graeca*, vol 25, cols 282–291).

⁴⁵ See the Letter of Pope Damasus I to St Jerome and Archbishop Stephen and three African Councils in which he states that it is manifest to everyone from the witness of innumerable decrees that a bishop should not be condemned without the decision of the Prince of the Apostles. *Patrologia Latina*, vol 130, col 665.

⁴⁶ For a number of texts from the False Decretals on the Roman primacy that were included in later canonical collections, see Cushing, *Papacy and Law in the Gregorian Revolution*, pp 74–75 and p 112 with note 34; also pp 72–78, and pp 210–212.

⁴⁷ For a brief account of the development of a centralised, monarchic ecclesiology in the Latin Church, see E. Ménéard, *L'Écclesiologie Hier et Aujourd'hui* (Paris 1966). Also Yves Congar, *Power and Poverty in the Church* (London 1964), C. Gallagher, 'Canon Law and Ecclesiology I', *The Way*, January 1982, pp 50–60.

⁴⁸ As Eamon Duffy observes, 'Deprived of the support of the empire, the papacy became the possession of the great Roman families, a ticket to local dominance for which men were prepared to rape, murder and steal. A third of the popes elected between 872 and 1012 died in suspicious circumstances—John VIII (872–82) bludgeoned to death by his own entourage, Stephen VI (896–7) strangled, Leo V (903) murdered by his successor Sergius III (904–911), John X (914–28) suffocated, Stephen VIII (939–42) horribly mutilated.' *Saints and Sinners. A History of the Popes* (Yale University Press 1997) pp 82–83. One of the most distressing cases is that of Pope John XII. He was elected when he was only eighteen, at the insistence of his father, Alberic, and died at the age of twenty-seven, 'allegedly from a stroke while in bed with a married woman'. E. Duffy, *op. cit.*, p 83. Edward Gibbon comments on this short reign of John XII. After mentioning the charges of simony and licentious pursuits of gaming and hunting that were made against the young pope, Gibbon continues: 'But we read with some surprise that the worthy grandson of Marozia lived in public adultery with the matrons of Rome; that the Lateran palace was turned into a school for prostitution; and that his rapes of virgins and widows had deterred the female pilgrims from visiting the tomb of St Peter, lest, in the devout act, they should be violated by his successor'. E. Gibbon, *The History of the Decline and Fall of the Roman Empire* (London 1901) vol V, p 298.

bishops, while the emperor is recognised as having an important role in the administration of the Church. Within this one body there was a double authority, that of the ordained episcopal authority and that of the lay imperial authority. This authority came from God and in its exercise there was a division of labour. The religious understanding of the emperor's role that had grown up in pagan imperial Rome did not disappear with the conversion of Constantine. The emperor continued to be regarded as the divinely appointed protector of the Church.⁴⁹ How Justinian considered this imperial duty of supervision in church affairs is set out clearly in the preface to *Novella 6*, a constitution addressed in 535 to Epiphanius, the 'Ecumenical Patriarch' of Constantinople, in which the emperor lays down the regulations that should be followed concerning the ordination of bishops and other clergy.⁵⁰

The Holy Roman Emperor of Byzantium had a God-given task to perform within the Church. He was the anointed delegate of God—the ikon of Christ—and his sphere of authority included the ecclesiastical as well as the secular order. It was the emperor, for example, who convoked ecumenical councils and saw to the promulgation of their decrees. He appointed the patriarch of Constantinople from a 'terna' presented to him by the Permanent Synod.⁵¹ Of course, he had to be a Christian and maintain and preserve Holy Scripture. He took an oath in which he confirmed the decrees of the ecumenical councils and the privileges of the Church. In general the emperor played a large part in ecclesiastical organisation as is clear, for example, in the law books issued by Leo VI.⁵² Both form and content of the *Nomokanon* reflect a vision of the Church whose structure and discipline are based primarily on conciliar canons and traditions handed down by the Fathers of the Church, but they are also increasingly governed by direct imperial ecclesiastical legislation. Church authorities and civil authorities in Constantinople were closely linked together to form one harmonious whole: the laws and the canons stand side by side.⁵³

The metropolitans retained their traditional role in church administration. Synodal government of the Church was prescribed. Canon 8 of the Council in Trullo states that a synod of the bishops of a province should be held each year, continuing the tradition of regular provincial councils that was clearly expressed in the early councils.⁵⁴

⁴⁹ 'Before and after Constantine, the Roman emperor was regarded as the providential manager of earthly affairs.' John Meyendorff, *Imperial Unity and Christian Divisions. The Church 450–600 AD* (St Vladimir's Seminary Press, New York 1989) p 30.

⁵⁰ See *Corpus Iuris Civilis*. Vol III. *Novellae*, edited by R. Schoel and G. Kroll (Dublin/Zürich, 1972) p 36.

⁵¹ See E. Herman, *The Cambridge Medieval History*. Vol IV, Part II (Cambridge 1967), Chapter XXIII, 'The Secular Church', pp 105–133. See also *Ecloga Basilicorum*, ed. L. Burgmann, in *Forschungen zur Byzantinischen Rechtsgeschichte*, ed. Dieter Simon, 15 (Frankfurt am Main 1988) pp.140, 264, 353. The *Ecloga Basilicorum* was a legal commentary composed in 1142 on a selection of laws from the *Basilika* (from the first ten books). It should not be confused with the earlier *Ecloga*, a law book issued in Constantinople in 741 which provided, in eighteen titles, a concise compendium of the law. This was replaced in the ninth century by the *Eisagoge* (*Epanagoge*).

⁵² See H.-G. Beck, 'Nomos, Kanon und Staatsraison in Byzanz', *Österreichischer Akademie der Wissenschaft. Philosoph.- Hist. Kl., Sitzungsberichte* 384 (Vienna 1981).

⁵³ For a discussion of this point, see Ruth Macrides, 'Nomos and Kanon on paper and in court', in *Church and People in Byzantium*, edited by Rosemary Morris (Birmingham 1986) pp 61–85.

⁵⁴ 'In our desire to observe all the decrees of our holy Fathers, we renew the canon which declares that Synods of the bishops of each province are to be held each year, wherever the metropolitan should decide.' Council in Trullo, canon 8. This was renewing and confirming clear legislation from earlier councils: the First Council of Nicaea (325), canon 5; Chalcedon, canon 19 [included in Gratian, D.18, canon 6], Apostolic Canons, canon 37; Council of Antioch (341), canon 20. This canon is included by Gratian in D.18, c.15, and attributed to a council held by Pope Martin. The Roman *Correctores* point out that this 'Pope Martin' was a bishop of Braga (Bracarenensis) from whose collection of the Greek synods Gratian often quotes: the *Correctores* also note, 'For bishops in old times were usually called popes' (*Antiquitus enim episcopi papae dicebantur*). Council of Carthage, canons 76, 95. We have already seen how episcopal synods were frequently held by the African Church in the fourth and the fifth century.

This canon was expressly confirmed by canon 6 of the Second Council of Nicaea in 787. 'We also renew this canon, and should a ruler be found who prevents its observance, let him be excommunicated; ... when such a synod is held to discuss canonical and evangelical matters, the gathered bishops should pay particular care and attention to the divine and life-giving laws of God.'⁵⁵ In all this a much more collegial approach to church authority is evident than is seen in the ninth-century forged papal decretals.⁵⁶ Again, I am referring to the ideal that was envisaged in the laws. In fact, there were times, and not infrequently, when the emperor appointed and deposed patriarchs at will.

b. The Clergy: Married or Celibate

Both the *Dionysiana* in Rome and the *Synagoge in 50 Titles* in Constantinople presupposed that there would be married clergy. In neither of these sixth-century collections is there any law on clerical celibacy. Until the beginning of the fourth century there is no mention anywhere of celibacy or continence being imposed by law on deacons, priests or bishops in the East or in the West. Some recent writers have attempted to prove that a legal obligation of clerical continence goes back to Apostolic times,⁵⁷ but many find the arguments put forward to sustain this thesis uncon-

⁵⁵ N. Tanner, *Decrees of the Ecumenical Councils*, vol I, p 144. These canons are not to be found in the False Decretals since that compilation does not include the canons of the Second Council of Nicaea. Nor does it include the Trullan canons. See Gratian, *Concordia Discordantium canonum*, D.18, c.7.

⁵⁶ The first seven ecumenical councils—from Nicaea I (325) to Nicaea II (787)—were, and are still, accepted as authoritative by both Rome and Constantinople. W. De Vries, *Orient et Occident. Les structures ecclésiastiques vues dans l'histoire des sept premiers conciles oecuméniques*, Paris 1974. De Vries has made a study of these councils with a view to finding out how the structures of the Church were understood in these first eight centuries of Christianity. His research has shown that there were divergent views about the exercise of authority in the Church right from the time of the Council of Chalcedon in 451. The Eastern bishops stressed the collegial nature of church authority, while Pope Leo the Great stressed the monarchical. De Vries maintains, for example, that the bishops at the Council of Chalcedon did not simply accept as decisive the *Tomus Leonis*, on its own. Otherwise there would have been no need for a debate on it in the council (*Orient et Occident*, pp 141–145). De Vries has shown that the study of the first seven councils shows that the Greek East and the Latin West differed profoundly on the way of conceiving the Church as an institution. As Y. Congar points out in his presentation of De Vries's book, we already knew that there were divergent views in the East and in the West with regard to the exercise of the power of jurisdiction. What de Vries has done has been to demonstrate this with precise historical documentation. He has encouraged us to re-read the history of these centuries with a more critical eye (*Orient et Occident*, p. 3). See also Y. Congar, *L'Écclésiologie du haut Moyen Âge* (Paris 1968) especially Section C: 'L'Orient. Accord et Divergences Écclésiologiques avec Rome et l'Occident', pp 324–393. Here Congar illustrates how two canonical traditions resulted in two conceptions of the life of the Church.

⁵⁷ For example, C. Cochini, *The Apostolic Origins of Priestly Celibacy* (San Francisco 1990). The thesis of Cochini's book is that the *obligation* of continence for bishops and priests goes back to Apostolic times. Not everyone has found his arguments convincing. See, for example, the detailed review by Henri Crouzel, 'Une nouvelle étude sur les origines du célibat ecclésiastique,' in *Bulletin de Littérature Ecclésiastique* 83 (1982), pp 293–97. Roman Cholij, accepting the views of Cochini, attempted to prove the thesis that, despite the fact that for many centuries the early Church had sacred ministers who were married, from the Apostolic Age onwards they were *required by law* to abstain from conjugal relations after ordination: Roman Cholij, *Clerical Celibacy in East and West* (Fowler Wright Books, 1988). This too has been found unconvincing by many. See, for example, the review by D. Callam in *The Journal of Theological Studies*, vol 41 (1990), pp 725–729; also C.H. Lawrence's review in *The Tablet*, 6 January 1990, p 14; C.H. Lawrence, 'Origins and Development of Clerical Celibacy,' in *The Clergy Review*, 1975, pp 138–146. Also the review by the Orthodox archbishop, Peter L'Huilier in *Sobornost*, 12 (1990), pp 180–182. More recently, however, a Catholic priest in Germany has produced a re-examination of the patristic texts and argues in favour of the thesis of Cochini and Cholij. He claims that there is convincing evidence for an *obligation* to continence on the part of married clergy long before the fourth-century papal decretals. See Stefan Heid, *Zölibat in der frühen Kirche. Die Anfänge einer Enthaltenspflicht für Kleriker in Ost und West* (Paderborn 1997). I am also informed that Cardinal Alfons Stickler has published an important contribution to

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vincing. What has been established is that there was an ideal rather than a law of clerical continence in the early Church, but it is now generally agreed that in those early centuries many of the clergy, including bishops, were married and this was considered to be normal.⁵⁸ However, from the fourth century onwards, a number of regional councils in the East passed laws concerning the marriage of the clergy which implied that the clergy could not marry after ordination.⁵⁹ A provincial council held at Elvira, near Granada, at the beginning of the fourth century, in canon 33, required that the higher clergy who had been married before ordination must observe continence under pain of deposition. This is the earliest Western legislation that has come down to us concerning priestly continence. It is an isolated canon not generally known at that time, even in the West, and it did not make celibacy obligatory.⁶⁰ The earliest papal decretal on the matter is a reply of Pope St Siricius (384 to 399) to a letter that Himerius, metropolitan of the province of Tarragona, had sent to his predecessor, Pope St Damasus (366–384). This decretal (385 AD)⁶¹ contained instructions with regard to clerical continence. He had received, the Pope said, news from Spain that many clerics there continued to live with their wives and have children. This, he maintained, was a serious violation of the Church's discipline of clerical continence.⁶² In the following year Pope Siricius sent out a letter to a number of provinces, including Africa, in which he included a long exhortation on clerical continence.⁶³ At about the same time, in a letter to the bishops of Gaul, the Pope ruled

⁵⁷ *leont.*

this discussion in *The Case for Celibacy* (San Francisco 1995). Unfortunately, I have not yet been able to obtain a copy of this book. But perhaps Cardinal Stickler's views on the subject can be seen in his 1986 *Foreword* to R. Cholij's book, where he writes: 'In my opinion the works of both Fr. Christian Cochini S.J. and of Fr. Roman Cholij are to be considered the two definitive studies on celibacy of the clergy in the Christian Church.' R. Cholij, *Clerical Celibacy*, p ix.

⁵⁸ St Gregory Nazianzen's father was a bishop, Bishop Gregory the Elder of Nazianzen. St Gregory of Nyssa was also married: see Roger Gryson, *Les origines du célibat ecclésiastique* (Gembloux 1970). For a lengthy list of bishops, priests and deacons who were married in the first seven centuries of the Church, both in the East and in the West, see C. Cochini, *The Apostolic Origins of Priestly Celibacy*, pp 84–134.

⁵⁹ At the Council held at Ancyra, the capital of Galatia, around the year 314, canon 10 implies that those in major orders could not marry after ordination: 'They who have been made deacons, declaring when they were ordained that they must marry, because they were not able to abide so, and who afterward have married, shall continue in the ministry, because it was conceded to them by the bishop. But if any were silent on this matter, undertaking at their ordination to abide as they were, and afterwards proceeded to marriage, these shall cease from the diaconate': H. R. Percival (editor), *The Nicene and Post-Nicene Fathers*, Vol XIV: *The Seven Ecumenical Councils of the Undivided Church* (Edinburgh Michigan 1991) p 67. Very soon after this, between 314 and 325, a synod held at Neocaesarea in Pontus, declared in its first canon: 'If a presbyter marry let him be removed from his order; but if he commit fornication or adultery, let him be altogether cast out [i.e. of communion] and put to penance.' *ibid.*, p 79. Gratian has included this canon in the *Decretum*, D.28, c., but, following Isidore, Gratian has added 'among the laity' (*inter laicos*), which is not in the Greek text.

⁶⁰ 'It has seemed good absolutely to forbid the bishops, the priests, and the deacons, i.e. all the clerics in the service of the ministry, to have [sexual] relations with their wives and procreate children; should anyone do so, let him be excluded from the honor of the clergy': see, C. Cochini, *The Apostolic Origins of Priestly Celibacy*, p 159. Samuel Laeuchli, *Power and Sexuality: The Emergence of Canon Law at the Synod of Elvira* (Philadelphia 1972).

⁶¹ It is the earliest decretal we have and it is modelled directly on imperial rescripts which provided rulings that were meant to establish legal precedents.

⁶² See the decretal letter, *Directa in Patrologia Latina*, vol 13, cols 1138a–1139b, quoted by C. Cochini, *op. cit.*, p 9. On these decretals of Pope Siricius, see Daniel Callam, 'Clerical Continence in the Fourth Century: Three Papal Decretals', *Theological Studies* 41 (1980), pp 3–50. What was stressed in these early decretals as a primary motive for clerical continence was ritual purity in preparation for celebrating the Eucharist. See Paul Beaudette, "'In the World but not of It': Clerical Celibacy as a Symbol of the Medieval Church,' in *Medieval Purity and Piety: Essays on Medieval Clerical Celibacy and Religious Reform*, edited by Michael Frassetto (Garland Publishing, New York and London 1998) pp 23–46.

⁶³ Decretal letter *Cum in unum*, in *Patrologia Latina*, vol 13, 1160a–1161a, quoted by C. Cochini, *op. cit.*, p 11.

that a married man might be ordained but he had to cease to have sexual relations with his wife, under pain of deposition.⁶⁴ We have seen how canon 33 of the Council of Elvira required continence of all clergy under pain of deposition.⁶⁵ This canon was included in Part II of the False Decretals along with many other western canons on this subject. A number of genuine canons in the Pseudo-Isidorian collection emphasise the importance of clerical continence and the punishment to be inflicted on clerics who failed to live up to this ideal. These canons were clearly not being observed, as can be seen from some ferocious legislation in seventh-century Spain.⁶⁶ Some provincial councils stipulated the penalty of enslavement for the wives, mistresses, and children of clerics in sacred orders.⁶⁷ A few examples will illustrate the drastic measures taken by church authorities in Spain:

Those who seek out the unlawful company of clerics are to be sold into slavery by the bishop. There are certain clerics, who are not lawfully married, but who seek out the company of servant girls or women from outside. Therefore any women who form liaisons of this kind with clerics are to be taken away and sold into slavery by the bishop, the clerics in question are to be put in chains for a time to do penance because of the people they have infected by their lust.⁶⁸

This legislation does not seem to have succeeded in eradicating the problem, for, about twenty years later, at another council in Toledo, the bishops decided to extend the punishment in such a way that it would strike not only the perpetrators of the crime, but also their offspring:

With regard to all clerics—from a bishop to a subdeacon—who while in Holy Orders form a detestable liaison with a maid or a free woman and beget children (it is decreed): those from whom the children are born are to be condemned to a canonical penance; As for the children born from another's defilement (*aliena pollutione*), not only will they never receive any part of the inheritance, but also they will remain in perpetual servitude to the church of the priest or minister, from whose ignominious behaviour they have been born.⁶⁹

⁶⁴ Decretal letter, *Dominus inter*, attributed variously to Pope Siricius or to Pope Innocent I (401–417), or to Pope Damasus (386–384), *Patrologia Latina*, vol 13, cols 1184a–1186a. See C. Cochini, op. cit. pp 14–15.

⁶⁵ 'Placuit in totum prohibere episcopis, presbyteris, diaconibus, ac subdiaconibus positus in ministerio abstinere se a conjugibus suis, et non generare filios. Quod quicumque fecerit, ab honore clericatus exterminetur.' Concilium Elibertinum, canon 33 in *Isidori Mercatoris Decretalium Collectio*, *Patrologia Latina*, vol 130, col 417.

⁶⁶ See James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago 1987) pp 171–172.

⁶⁷ D.81, c.30; C.15 q. 8, c.3

⁶⁸ 'Quidam clerici legitime non habentes conjugium, extranearum mulierum vel ancillarum suarum interdicta sibi consortia appetunt, ideo quae conjuncte taliter cum clericis sunt ab episcopo auferantur et veniuntur, illis pro tempore religatis ad paenitentiam quos sua libidine infererunt', *Isidori Mercatoris Decretalium Collectio*, Fourth Council of Toledo (633), canon xlii in *Patrologia Latina*, vol 130, col 474.

⁶⁹ 'Cum multae super incontinentia ordinis clericorum hactenus emanaverint sententiae Patrum, et nullatenus ipsorum formari quiverit correctio morum, usque adeo sententiam judicantium protractavere commissa culparum, ut non tantum ferretur ultio in auctoribus scelerum, verum et in progenie damnatorum. Ideoque quilibet ab episcopo usque ad subdiaconum deinceps vel ex ancillae vel ex ingenuae detestando connubio in honore constituti filios procrearent, illi quidem ex quibus geniti probantur canonica censura damnentur. Proles autem aliena pollutione non solum haereditatem parentum nusquam accipiet, sed etiam in servitutum ejus ecclesiae, de cujus sacerdotis vel ministri ignominia nati sunt jure perenni manebunt.' *Isidori Mercatoris Decretalium Collectio*, *Concilium Nonum Toletanum* (655), canon x, *Patrologia Latina*, vol 130, col 524, (in Gratian's *Decretum*, C.15, q.8, can.3).

These canons were included in the False Decretals.⁷⁰ In the East, as in the West, there had always been a strong movement that encouraged sexual continence among the clergy and it would be inaccurate to say that eastern clerics were completely free to marry. Patristic teaching proposed continence as particularly fitting for the priest because of the dignity of virginity and the need for the priest to be completely detached in order more effectively to do God's work. However, within certain limits the Greek Church permitted the ordination of married men and they were allowed to live as married men. The Nomokanon in XIV Titles has clear legislation on the legitimacy of clerical marriage. One of the clearest statements on the subject is canon 13 of the Council in Trullo (691).⁷¹ It has been argued that this canon was an innovation in the Church and went against what had been the tradition both in the East and the West until that time, but, as has already been remarked, this view has not been generally accepted by scholars.⁷² Canon 13 of Trullo has precedents and is in harmony with a number of earlier canons from eastern councils. It was accepted as an expression of a tradition that the Church followed from Apostolic times. Canon 5 of the Apostolic Canons, which reflect the discipline followed in fourth-century Antioch, states: 'Let not a bishop, presbyter or deacon put away his wife under pretence of religion; but if he put her away, let him be excommunicated; and if he persists let him be deposed.'⁷³ There are other canons in the official canonical collection prescribing the same discipline.⁷⁴ Justinian I had forbidden the appointment to the episcopate of married men who had children and had formally limited the episcopate to men who were celibate, widowers, or separated from their wives.⁷⁵ This legislation was taken over by Trullo in canon 12, which prohibits a bishop from cohabiting with his wife after his episcopal ordination. The Trullan Council, however, did not formally prohibit the episcopal ordination of married men, nor did it say anything about having children being an impediment to episcopal ordination. However, canons 12 and 48 of the Trullan Council led to the current practice of only ordaining to the episcopate celibate priests. The Council in Trullo is the point which marks the divergence in discipline between East and West with regard to marriage or celibacy for the clergy.⁷⁶ The Trullan legislation remains substantially the legislation that is followed today by the Orthodox Churches as well as the pre-Chalcedonians.

⁷⁰ See James A. Brundage, *Law, Sex and Christian Society in Medieval Europe*, (University of Chicago Press, Chicago and London 1987) pp 171–172. Concilium Auracense (Orange), canon 22: *Ut clerici conjugati, nisi continentiam profiteantur, diaconi non fiant*. 'Sedit praeterea ut deinceps non ordinentur diacones conjugati, nisi qui prius conversionis proposito confessi fuerint castitatem.' canon 23: *De his qui post acceptum diaconatum incontinentes inveniuntur*. 'Si quis autem post acceptam benedictionem leviticam cum uxore suo incontinens invenitur, ab officio abjiciatur.' *Patrologia Latina*, vol 130, col 393. (also can.24). Concilium Agathense: canons 9 and 10.

⁷¹ Canon 13 of the Council in Trullo.

⁷² R. Cholij, for example, in *Clerical Celibacy*, pp 196–197.

⁷³ H. R. Percival (editor), *The Canons of the Holy and Altogether August Apostles*, Canon 5, in *The Nicene and Post-Nicene Fathers*, vol XIV, *The Seven Ecumenical Councils of the Undivided Church* (Michigan 1991) p 594.

⁷⁴ See, for example, Council of Gangra, canon 4; Council of Carthage, canons 3, 4, and 23; Dionysius, canon 3; Timothy, canons 5 and 13.

⁷⁵ *Codex Justinianus*, edited by P. Kruger (Berlin 1954) I, 3, 41.2–4, 47; *Novella VI*, 1, p.36–37 (535AD).

⁷⁶ It is interesting to note how this canon 13 of Trullo has now been explicitly accepted by the Catholic Church as one of the sources for canon 373 in the Code of Canons for the Eastern Churches promulgated by the Pope in 1990: 'Clerical celibacy chosen for the sake of the kingdom of heaven and so suited to the priesthood is to be greatly esteemed everywhere, as supported by the tradition of the whole Church; likewise the state of clerics joined in matrimony, as sanctioned by the praxis of the primitive Church and for centuries in the Eastern Churches is to be held in honour.' The ancient Eastern sources that are given for this canon are: Apostolic Canons, canon 5; Carthage, canon 3; Quinisext, canons 3, 6, 13, 30; Cyril of Alexandria, canon 4.

c. Different Approaches to Divorce and Re-Marriage

In the Western Church there was always a clear profession of fidelity to Christ's teaching on the indissolubility of marriage. This was received as the will of God revealed in Jesus Christ. However, problems arose about what could or should be done for individual Christians who found themselves in very difficult marital situations? Until the end of the fourth century there was no general legislation expressly stipulating a strict interpretation of Matthew 19:9. A number of Latin Fathers, such as Ambrose (339–397), Jerome (340–420) and Augustine (354–430), towards the end of the fourth century and the beginning of the fifth, taught unequivocally that Christian marriage was indissoluble and that there could be no re-marriage after divorce.⁷⁷ In the fourth century a number of regional councils in the West and in Africa contain strict legislation prohibiting divorce and re-marriage.⁷⁸ Pope Innocent I (402–417), in a letter to the Bishop of Toulouse, states clearly that those who, after divorce, marry again are to be considered adulterers.⁷⁹ All these canons are included in the Pseudo-Isidorian Decretals, where it is made plain that marriage should be both monogamous and indissoluble.⁸⁰ In this they expressed the teaching that would become the accepted teaching of the Latin Church in the West. Different traditions did arise from different mentalities;⁸¹ and during the first millennium there were moves here and there to be more tolerant. The Penitential of Archbishop Theodore of Canterbury (d.690) allowed re-marriage to the husband whose wife has committed adultery. Theodore was a Greek from Tarsus and he referred to a canon from St Basil that we will consider shortly. In the eighth century several local councils permitted divorce and re-marriage in certain circumstances.⁸² However, gradually a stricter approach was adopted in the West which condemned all re-marriage after divorce while the partner is alive. The texts chosen by Gratian for his *Concordia Discordantium Canonum* rule out any possibility of marriage after divorce.⁸³ Opposition to the usages of the Greek Church in this matter became clearer.⁸⁴

⁷⁷ Canon 1013 para 2 of the 1917 Code of Canon Law states that the essential properties of marriage are unity and indissolubility. The *fontes* listed from the first millennium for this canon are almost all from St Augustine, as cited by Gratian. See, for example, *Concordia Discordantium Canonum*, C.32, q.7, cc. 1, 27.

⁷⁸ For example, canons 8 and 9 of the Council of Elvira (c.306); canon 10 of the Council of Arles (314); and canon 17 of the Council of Milevis in North Africa. G.D. Mansi, *Sacrorum Conciliorum Nova et Amplissima Collectio*, vol IV, p 331; *Patrologia Latina*, vol 130, col 372.

⁷⁹ Innocent I, G.D. Mansi, *Sacrorum Conciliorum Nova et Amplissima Collectio*, vol III, p 1049. (Rousseau, 'Divorce and Re-marriage: East and West,' p 68); *Patrologia Latina*, vol 130, col 704–705.

⁸⁰ See, for example, P. Hinschius, *Decretales Pseudoisidorianae*, pp 87–88; 265–266 and 340–343.

⁸¹ See Philip Lyndon Reynolds, *Marriage in the Western Church. The Christianization of Marriage During the Patristic and Early Medieval periods* (E.J. Brill, New York 1994), especially chapter VIII: 'The Matthean Exception in the Fathers,' and Chapter IX: 'The Matthean Exception and the Doctrine of Indissolubility,' (pp.173–240). Olivier Rousseau, 'Divorce and Re-marriage: East and West,' in *Concilium*, vol 4, no. 3 (1967) pp

⁸² 'On the other hand, the Councils of Verberie in 756 and Compiègne in 757 allow re-marriage in the case of incestuous adultery on the part of the guilty husband.' O. Rousseau, *op. cit.*, p 64.

⁸³ See, for example, C.32, q.7, cc. 1, 27;

⁸⁴ 'Nevertheless, in the official documents of the Roman Church of that period which concern the Greeks, no mention is made of divorce. It is not mentioned in the letter of Innocent IV for the Greeks of Cyprus which nonetheless recommended many Latin usages, nor in the profession of faith imposed after the Council of Lyons of 1274 on the emperor Michael Palaeologus: the profession is content to state in a general manner that it is not permissible for husbands to have several wives at the same time or for wives to have several husbands. At the Council of Florence, when the question was proposed in the very last place by Pope Eugene IV, after the decree of unification had been signed, the Greeks answered that if they sometimes allowed divorce this was not without reason (*ouk alogos*)—we recognise Origen's formula herein—and the matter was not pursued any further.' Rousseau, *op.cit.*, p 64. It should be remembered too that Trent modified the first version of canon 7 of Session XXIV, which prohibited divorce, precisely because of the custom of the Greeks. In this way some sort of respect was being shown to an

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In the East, Orthodox theologians and canonists were in agreement about the permanence of marriage. Canonical and liturgical traditions maintain that second marriages are inconsistent with the Christian norm. The principle of the indissolubility of Christian marriage is founded on Christ's command in the Gospels which the Orthodox Churches claim to take seriously.⁸⁵ In principle, the marriage bond should not be broken. However, because of man's sinful condition, marriages do in fact break down. The Orthodox Church's granting permission for re-marriage after divorce is the acceptance of this situation. It is granted to the innocent party in certain circumstances and is an attempt to provide a compassionate solution to a problem of those Christians who would otherwise be condemned to a life of enforced continence through no fault of their own. This is a long tradition in the Eastern Churches, dating back to long before the division between Rome and Constantinople, and it is based on their interpretation of the clause of exception in St Matthew's Gospel 19:9: 'I say to you: whoever divorces his wife, except for unchastity, [μὴ ἐπὶ πορνείᾳ] commits adultery.'

However, divorce legislation was introduced by Christian emperors and they never made any assertions about marriage being indissoluble. On the contrary, re-marriage after divorce was positively permitted in certain cases and there was no indication that this was inconsistent with Christian teaching. Justinian was well-read in theology and regularly sought the counsel of theologians. His *Codex* began 'in the name of our Lord Jesus Christ,' and went on at once to set out the emperor's confession of faith.⁸⁶ There was, in fact, no systematic treatment of marriage in the first centuries of the Church, either in the East or in the West. Only very gradually did a matrimonial canon law develop and Justinian's legislation influenced greatly the whole theory and practice concerning divorce in the Church in Constantinople. As Professor Noonan has observed, 'The calm acceptance of dissolubility by the law shows that at this time, between 331 and 566, no definitive Christian position had been established on re-marriage and divorce.'⁸⁷ Meyendorff observes that while the possibility of divorce was an integral part of Byzantine civil law at all times, this was not formally challenged by the Church. He notes that while the Greek Fathers were often quite fearless in challenging the imperial power, they never protested against the civil legislation on divorce.⁸⁸ None of the early church councils promulgated canons that specifically forbade re-marriage after divorce.

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immemorial custom of the Greek Church. For a short but informed discussion of this question, see Piet Fransen, 'Divorce on the grounds of adultery in the Council of Trent (1563),' *Concilium*, vol.5, no.6, May 1970, pp.89–100. See also the well-documented discussion of the Tridentine canon by Luigi Bressan, *Il Canone Tridentino sul Divorzio per Adulterio e l'Interpretazione degli autori* (Rome 1973). This was followed in 1976 by another fine study by Bressan, *Il Divorzio nelle Chiese Orientali. Ricerca Storica sull'Atteggiamento Cattolico* (Bologna 1976).

⁸⁵ The teaching of Christ was clearly contrary to divorce and re-marriage: Matthew 19:3–9 'What therefore God hath joined together, let no man put asunder ... And I say to you: whoever divorces his wife, except for unchastity, and marries another, commits adultery'. See also Matthew 5:31–32.

⁸⁶ *Codex Iustinianus*, 1.1.5.

⁸⁷ John T. Noonan, 'Novel 22' in *The Bond of Marriage*, edited by William W. Bassett (University of Notre Dame, 1968) p 87.

⁸⁸ 'The possibility of divorce remained an integral part of Byzantine civil legislation at all times. In the framework of the 'symphony' between Church and state, it was never challenged, a fact which cannot be explained simply by reference to caesaropapism. The Byzantine Church never lacked saints who were ready to castigate imperial despotism, social injustice, and other evils contrary to the Gospel. John Chrysostom (398–404), Theodore the Studite (+820), or Patriarch Polyuktos (956–970) were able to challenge the power of the state without fear; none of them, however, protested against the legislation concerning divorce.' J. Meyendorff, *Byzantine Theology* (New York 1983) p 197–198. On the other hand, this assumption that the Eastern Church in the early centuries did not oppose the civil provision for divorce with the right of

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In this context, canon 8 of the First Council of Nicaea (325) raises interesting questions. This canon deals with the so-called Cathars, probably Novationists.⁸⁹ These, when they wish to return to full communion, are to be allowed to remain among the clergy, 'but before all this it is fitting that they give a written undertaking that they will accept and follow the decrees of the Catholic Church, namely that they will be in communion with those who have entered a second marriage and with those who have lapsed in time of persecution, and for whom a period [of penance] has been fixed and an occasion [for reconciliation] allotted.'⁹⁰ It has generally been assumed, in the West at any rate, that these *διλάμοι* were persons who had married a second time after the death of their first spouse. This may well have been the case, but it is not self-evident. It has been argued that 'while the Church during the early patristic period may have excommunicated and subjected to penance persons who had remarried after illicit divorce, satisfaction did not originally require, as it did in the West in due course, that the penitent should renounce the new partner at least to the extent of permanently abstaining from sexual relations with her or him.'⁹¹ If this is a correct interpretation of the First Council of Nicaea, it means that re-married divorcees would have been included among the *διλάμοι*, who were in full communion with the Catholic church, in spite of being re-married. This would imply that the Eastern Church's manner of treating re-married divorcees goes back to the very first ecumenical council and pre-dates the stricter development of the Western Church under the influence of St Augustine.⁹² St Basil held that a man not only may, but must divorce a wife guilty of adultery, and that such a man could be re-admitted to communion.⁹³ The civil laws on divorce and re-marriage that we have enumerated were, by and large, taken over into the *Nomokanon* in XIV Titles and the conciliar canons and patristic texts were included in the chronological collection of canons.

The comparison between the canon law of the ninth century that guided the Church in the East and in the West has brought out the similarity and the diversity in the different traditions. There was doctrinal union and ecclesial communion between Constantinople and Rome, diverse administrative, disciplinary and liturgical usages legitimately co-existed within one Church. These Christians recited the same Creed.

⁸⁸ /cont.

re-marriage has been challenged by Henri Crouzel, *L'Église primitive face au divorce au cinquième siècle* (Paris 1971). This is a scholarly study of the Roman Catholic Church's teaching and practice with regard to marriage and divorce in the first five centuries. The author argues that there is very meagre evidence in those centuries of a tradition permitting re-marriage after divorce during the lifetime of the first spouse. Crouzel has argued his case well and convinced many that the evidence in the first five centuries for a tradition permitting re-marriage after divorce during the lifetime of the first spouse, is so meagre as to be virtually negligible. However, he has not convinced everyone. Some have questioned his principles of interpretation when reading early patristic texts. See the review of his book by J. A. Sherlock in *Theological Studies*, 33 (1972), pp 333–338.

⁸⁹ The Novationists were a rigorist party in the early Church which disapproved of any concessions to those who had compromised with paganism under persecution.

⁹⁰ N. Tanner, *Decrees of the Ecumenical Councils*, vol I, p 10.

⁹¹ P. L. Reynolds, *Marriage in the Western Church*, p148, where Reynolds refers to the arguments put forward by G. Cereti in *Divorzio, nuove nozze e penitenza nella Chiesa primitiva* (Bologna 1977) pp 270–354.

⁹² G. Cereti has re-stated his case more recently in 'The Reconciliation of Remarried Divorcees According to Canon 8 of the Council of Nicaea' in a festschrift presented to J. M. Huizing, *Ius Sequitur Vitam. Law Follows Life*, edited by J.H. Provost and E. K. Walf (Leuven University Press 1991) pp 193–207. It is true that, as already noted, Henri Crouzel has made a careful study of the same conciliar and patristic texts on which Cereti bases his case, and has come to quite a different conclusion. However, Cereti has argued his case carefully and in a field in which the number of incontrovertible texts is very small. His position merits serious examination.

⁹³ St Basil re-admitted to the Eucharist a man who had been divorced because of his wife's adultery and had remarried. St Basil *Ep.* 217, 77, *Patrologia Graeca*, vol 32, cols 804ff. Also *Ep.* 188, 9 (PG vol 32, col. 677ff.; and *Ep.* 199, 21, (PG vol 32, col. 721). These canons are discussed in W. Kasper, *Theology of Christian Marriage*, (London 1980) pp 54–55.

read the same Holy Scriptures, and professed the same faith in Jesus Christ and in his One, Holy, Catholic and Apostolic Church. Yet the Christian community did not have a uniform structure and a uniform discipline.⁹⁴ Constantinople had its own canonical collection, distinct from that of the West, and it included no papal decretals. The Church of the West, while having in common with Constantinople the canons of the early Eastern councils, was more and more administered by means of papal decretal letters. The canonical collections contained few if any 'canons' from the Greek Fathers.

4. GRATIAN'S *CONCORDIA DISCORDANTIUM CANONUM*

In the fourth and fifth chapters of the book I went on to examine two collections that provide a summary of the canonical legislation of the first millennium. The first of these was the *Concordia Discordantium Canonum* of Gratian in Bologna published about 1141; it is usually referred to as the *Decretum*. The second collection I discussed was the twelfth-century commentaries on the Nomokanon in XIV Titles by Theodore Balsamon in Constantinople (c.1170). Gratian's *Decretum* grew out of the collections of the Gregorian Reform Movement and mirrored their spirit and aims. The supreme authority of the Roman Pontiff is particularly stressed. The *Decretum* superseded all earlier collections and became the book of canon law, a text-book that would be in constant use for centuries. As a result, Gratian's *Decretum* contributed perhaps more than any other single influence to the final establishment throughout western Europe of the theory of absolute papal supremacy. It was on this foundation that succeeding popes built. Gratian compiled his *Concordia* at a time when the Investiture Controversy was still fresh in everybody's mind. This had been resolved by the Concordat of Worms as recently as 1122 and Gratian would have been working on his *Decretum* only a few years after this. A canonist could not but be affected by this long controversy that had gone on between pope and emperor since 1075. The development of canon law in the West was greatly influenced by the arrangement and re-arrangement of canonical texts to back up the various points of view in the controversy. Both sides looked for support in the law. They searched the archives and selected their texts accordingly. There are many canons in the *Decretum* that illustrate Gratian's very definite views on the Bishop of Rome as the supreme legislator and the Church of Rome as the head that must be obeyed by all.⁹⁵ It is clear that he selected his canons carefully with this in mind. Gratian, therefore, inherited from his sources and developed a canonistic tradition which embodied a particular ecclesiology. In adopting this approach Gratian in fact laid a solid legal foundation for the papal policy that would be followed and developed by Pope Innocent III and later by Pope Innocent IV, who went so far as to depose the Emperor Frederick II in 1245 at the Council of Lyons.

Sir Richard Southern has dedicated to Gratian the last part of his magisterial study of the twelfth century, *Scholastic Humanism and the Unification of Europe*. He des-

⁹⁴ For example, concerning marriage: 'Thus the ever-increasing difference between the two conceptions is visible: the Eastern tradition tending to relate everything to the mystery and the Scriptures (while necessarily interpreting Matthew 19:9 broadly), and the West on the contrary fixing its attention on another aspect and ultimately terminating in the consideration of the contractual element as the basis on which grace has come to be conferred.' O. Rousseau, 'Divorce and Re-marriage: East and West,' in *Concilium*, vol 4, no. 3 (1967) p 61.

⁹⁵ See, for example, *Distinctio* 21, d. c. 1; *Distinctio* 22, c. 2; *Distinctio* 12, cc 1–2; *Causa* 25, q. 1, d. p. c. 16: 'Sacrosancta Romana Ecclesia ius et auctoritatem sacris canonibus impertit, sed non eis alligatur' (The most holy Roman Church gives law and authority to the canons, it is not bound by them). See, Y. Congar, *L'Eglise de Saint Augustin*, pp 145–147. Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* (2nd enlarged edition, Brill, Leiden/New York 1998) especially pp 28–29.

cribes the *Concordia Discordantium Canonum* as ‘The First Masterpiece of Scholastic Humanism’.⁹⁶ He writes:

Gratian’s work has the singular eminence, at one and the same time, of outlining a new system of practical ecclesiastical law, and of creating a whole new scholastic discipline with a new set of technical terms grounded in the new processes of the ecclesiastical law-courts.⁹⁷

Concerning legislative authority in the Church, Professor Southern has this to say:

It must finally be added that Gratian’s great work is essentially a theological and political document, preparing the way - and intended to prepare the way—for the practical asserting of the supreme authority of the papacy as lawgiver of Christendom.⁹⁸

In canons 6 and 7 of the Second Lateran Council of 1139, the Latin Church’s legislation on clerical celibacy was complete. The reception of Holy Orders was made a diriment impediment for matrimony. In the *Decretum* it is clear that Gratian was in full agreement with the Reform Movement’s insistence on the strict observance throughout the Western Church of clerical celibacy. He collected in the *Decretum* many authoritative prohibitions of clerical marriage, including the celibacy decree of the Second Lateran Council (1139) and warned that clerics in holy orders who kept wives or concubines were subject to dismissal from their posts and degradation from the clerical state.⁹⁹ In fact the *Decretum* contains a virtual handbook of decrees and decisions supporting the Reformers’ teaching on celibacy. Gratian’s *Decretum* provides a vivid picture of how the Latin Church legislated concerning clerical celibacy in the twelfth century and in the centuries leading up to his time. In general, the Gregorian Reform was largely successful in restoring the observance of clerical celibacy in the West. Gratian included in his *Decretum* much of the legislation that was instrumental in that restoration. However, from his *Decretum* it is clear that he was aware that there was a different regime in the Eastern Church on this matter. Gratian mentions this without indicating any sort of disapproval of the custom.¹⁰⁰ Concerning divorce and re-marriage, Gratian was uncompromising. Although he proposed his own theory about what was required to constitute a complete marriage, which affected his teaching on divorce, there is no evidence that he interpreted the exception clause in Matthew to permit divorce and re-marriage.

5. THEODORE BALSAMON AND THE COMMENTARY ON THE NOMOKANON

The vision of the Church that we find in Balsamon’s commentary reflects the nature and structure of the canonical collection that he is commenting on. His commentary on the systematic Nomokanon deals entirely with imperial legislation on ecclesiastical affairs. Balsamon had been invited by the emperor to revise the Nomokanon and bring harmony into the law. His commentary on the chronological collection of con-

⁹⁶ R.W. Southern, *Scholastic Humanism and the Unification of Europe. Vol I, Foundations* (Blackwell 1995) p 305.

⁹⁷ *Ibid.* p 291.

⁹⁸ *Ibid.* p. 286.

⁹⁹ *Distinctio* 32,c.10, 11.

¹⁰⁰ *Distinctio* 56, d.p.c.13, where Gratian mentions that in earlier times there had been married clergy in the Latin Church and that this had been legitimate until it was prohibited, as it is still legitimate in the Eastern Church (*Cum ergo ex sacerdotibus nati in summos Pontifices, supra leguntur esse promoti, non sunt intelligendi de fornicatione, sed de legitimis coniugiis nati, que sacerdotibus ante prohibitionem ubique licita erant, et in orientali ecclesia usque hodie eis licere probatur*).

ciliar canons and patristic texts displays another important difference between the *Concordia Discordantium Canonum* of Gratian and the collection commented on by Balsamon. They have in common the canons of the first seven ecumenical councils up to Nicaea II, along with the canons from the eastern regional synods that John Scholastikos had included in his *Synagoge* and Dionysius had translated in Rome in the sixth century. For the rest, where Gratian has an abundance of papal decretal letters and a very large number of canons from the Latin Fathers (particularly from St Augustine), Balsamon has not a single decretal from the Patriarch of the West; instead he has a large number of canons from the Patriarch of Constantinople, the Patriarch of Alexandria and other Eastern bishops. So it is clear from the structure of the collections and from the authorities that were used in each that Gratian's *Decretum* and Balsamon's Commentaries embody two different ideas about the nature of ecclesiastical legislation and the sources of legislative authority in the Church. The role of the emperor is of crucial importance. We can get a clearer idea of the vision of the Church that lies behind Balsamon's commentaries if we consider two key concepts in his thinking: the role of the emperor within the Church and the role of the Pentarchy in ecclesiastical government, as well as the place he assigns to the Bishop of Rome.

There can be no doubt that Gratian and Balsamon influenced the development of canonical science, both in the West and in the East, in ways that would be difficult to exaggerate. They did more than this. Their work had a practical influence on the life of the church. They are clear proof that the work of canon lawyers, then as now, should not be regarded as merely academic; their formulations of the law can have far-reaching effects on the day to day life of the Christian community.

Gratian's *Concordia Discordantium Canonum* and Balsamon's Commentaries on the Nomokanon in XIV Titles are monuments to two very different canonistic traditions. Each is firmly rooted in the conciliar canons of the early Church but each embodies its own distinct ideas about church government and church discipline. Both writers shared the same fundamental belief about the nature of the Church as mystery and sacramental reality. Both shared the same faith in the Trinity and in Christ and his Gospel of salvation. However, concerning the external life of the Church and its administration they were poles apart. To our modern way of thinking in the West, Balsamon exaggerated what he held to be the God-given powers of the emperor within the church; yet, on the other hand, he did stress the importance of the five patriarchates as structures for realizing an ideal of communion and co-operation between the churches. For this reason, he maintained that patriarchs and bishops, when important decisions were to be taken, must never act alone. They must always act together in council, and all decisions must be taken with reference to the canons of the Fathers and of the councils of the Church. Such collegial sentiments would be shared by many Christians today in both East and West. He also thought that the primacy of the Bishop of Rome, the Patriarch of the West, could have a meaningful role, provided this was understood within the framework of patriarchal (pentarchical) collegiality and the communion of the churches.

In the West, however, a highly centralised, monarchical mode of exercising the Petrine ministry developed steadily particularly from the eleventh century onwards. Even before the ninth-century False Decretals, ecclesiastical discipline throughout the Western Church gradually came to be governed increasingly by papal decretal letters from the centre, rather than by regional conciliar canons. From the time of the Gregorian Reform Movement onward, the Roman See tended more and more to treat all the local Churches of the West as if they formed part of a metropolitan province, with the Bishop of Rome as the supreme metropolitan. Gratian inherited

this tradition, crystallised it and laid firm foundations for its further development.¹⁰¹ Gratian and Balsamon can, therefore, be seen as key representatives of two diverse canonistic traditions, which grew out of different ecclesiologies, contrasting visions of the structure of the Church. This conclusion comes, of course, as no great surprise. The divergence in outlook and attitude goes back to Chalcedon and beyond, as recent studies have demonstrated.¹⁰² However, Gratian and Balsamon provide an instructive illustration of how different ecclesiologies are taken over by canon lawyers, brought into sharper focus and consolidated, with legal precision, into juridical structures and procedures. Procedures form attitudes and the structures themselves that we live with are symbols that condition the way we think and act.

6. BAR HEBRAEUS AND EBEDJESUS

So far I have been considering Rome and Constantinople. This could give the impression that in these two Churches were to be found the majority of Christians living in the Middle Ages. This would be a mistaken impression. In fact, Constantinople stood midway between the Latin Church in the West and two large and flourishing ancient Christian Churches of the East, in Syria and in Persia, with missions stretching out to India and to China. What was the state of the canon law of these Eastern Churches outside the Byzantine Empire—the Christians in Syria and Persia, in Egypt and in Armenia? How did canon law develop in the Islamic environment? In what way did the Arab and Syriac canonists adapt the Church's law to fit in with their Islamic rulers? There is also the important point that these Churches were made up of people who did not feel they were heirs to the Roman Empire. It is interesting to see how church law developed in Christian communities that were outside the spheres of influence of the papal monarchy of Rome, on the one hand, and the Byzantine Empire on the other. In these Churches of the East there are at least four important medieval canonical collections that merit attention and should be examined.

They are the following: the Nomokanon of Bar Hebraeus of the Syrian Orthodox Church (written in Syriac between 1253 and 1264); the two canonical collections of the Assyrian Church of the East, by Ebedjesus—Abdisho Bar Berikha (written in Syriac in the late thirteenth century and early fourteenth); the Coptic Nomokanon written in Arabic by Ibn al'Assal (c.1250, in Egypt);¹⁰³ and the monumental Armen-

¹⁰¹ See R.W. Southern, *Scholastic Humanism and the Unification of Europe* (Blackwells, Oxford 1995) especially Part Two, Chapter 9, pp 283–318, for a comprehensive discussion of the importance of Gratian in the development of Roman centralization. Professor Anders Winthrop has recently published an important book on Gratian and his collection: Anders Winthro, *The Making of Gratian's Decretum* (Cambridge University Press 2000). Winthrop has made the remarkable discovery that there were in fact two editions of the *Concordia Discordantium Canonum*, the first around the year 1141 and the second about fifteen or so years later. The first edition he discovered in four twelfth-century manuscripts and it is considerable shorter than the final version. Winthrop's book also contains an up-to-date account of Gratian studies: Winthrop, *op.cit.*, pp 1–18.

¹⁰² On the different approaches to the theology of the Church, the diverse ecclesiologies, see Y. Congar, *After Nine Hundred Years: The Background to the Schism between the Eastern and Western Churches* (New York, 1959); W. De Vries S.J., *Orient et Occident. Les structures ecclésiastiques vues dans l'histoire des sept premiers conciles oecuméniques* (Paris 1974).

¹⁰³ The Coptic Nomokanon of Al - Safi Ibn al-Assal is an important example of medieval canon law outside the Empire, a complete manual of law for the Jacobite community of Egypt. It provides information about the state of the Coptic Church in the middle of the thirteenth century. The sources for this collection include canons from the Council of Nicaea (325); canons from the regional councils: Ancyra, Neocaesarea, Gangria, Antioch, and Laodicaea, as well as the Pseudo-Apostolic canons of Hippolytus and the Didaskalia, and some canons from St Basil. It also provides Arabic translations of the ninth-century Byzantine *Procheiros Nomos* (*Law Handbook or Law Ready to Hand*) and the fifth-century compilation of Roman Law, called the *Syro-Roman Lawbook*.

ian *Constitution of the Courts, or Judicial Book*, produced by Mkhithar Goš in about 1184, which included civil and ecclesiastical law.¹⁰⁴

I have examined two of these collections: the canonical collections of the Syrian Orthodox Church and the Assyrian Church of the East and I have compared them with what we have been looking at in Rome and Constantinople. This was made possible because each of these Churches produced, in the period immediately following the period we have been considering, an outstanding canonist whose work enables us to get a clear idea of how canon law had developed outside the Roman and Byzantine Empires. Both Bar Hebraeus (of the Syrian Orthodox Church) and Ebedjesus (of the Assyrian Church of the East) in their canonical collections, allow us to see the law as it had developed within the two Churches. This can be seen in the canonical sources that they quote. I examined these collections with the same questions I had in mind with the others. Concerning clerical marriage and divorce and re-marriage, these two Churches are in substantial agreement with the legislation of the Greek Nomokanon in XIV Titles. With regard to church government, they both stress mostly synodal legislation, and a large part of their legislation consists in decisions of episcopal synods, though in the Assyrian Church of the East, the patriarch seemed to exercise considerable power. (Though they both explicitly recognise the five patriarchates and the primacy of the See of Rome)

CONCLUSION

A point that recurs again and again in all the early collections is the key role that councils of bishops played. The normal way of going about solving problems, or healing disunity or promoting Christian reform was to call a council of the bishops of the region. Constantine called the first ecumenical council in 325 as the most effective way of trying to restore unity to a divided Church. Throughout the fourth century regional bishops proceeded in a similar way in different parts of the East. The Church in Africa acted in the same way. St Augustine advised the Bishop of Carthage that the most effective way of bringing about reform would be to hold regular episcopal synods. The result was the series of synods that were held in Carthage between 393 AD and 419 AD. In this way church law was the sum of the decisions reached by bishops in council throughout the Church. Hence the canons stipulating that the bishops of every region should meet in council twice a year. This was regarded as so important that we find canons on the subject in a number of the early councils. As, for example, in canon 5 of the First Council of Nicaea:

It is agreed that it would be well for synods to be held in each province twice a year, so that these inquiries may be conducted by all the bishops of the province assembled together, and in this way by general consent those who have offended against their own bishop may be recognised by all to be reasonably excommunicated, until all the bishops in common may decide to pronounce a more lenient sentence on these persons.¹⁰⁵

Similar laws were re-enacted many times in the early centuries, but by mid-fifth-century they were not being implemented everywhere, as is evident from canon 19 of the Council of Chalcedon:

¹⁰⁴ An edition in Armenian was published by Chosrov Thorosian, Erevan, 1975. Professor Robert Thomson of Oxford University has recently published an English translation and commentary of this Nomokanon. Robert W. Thomson, *The Lawcode [Datastanagirk] of Mxit'ar Goš* (Rodopi, Amsterdam 2000). See Messrob K. Krikorian, "'Ius Graeco-Romanum'" and Canon Rules in the Tradition of the Armenian Church,' in *Incontro fra Canonisti d'Oriente e d'Occidente*, edited by Raffaele Coppola (Bari 1994) vol I, pp165–191.

¹⁰⁵ Canon 5 of the Council of Nicaea, in N. Tanner, *Decrees of the Ecumenical Councils*, vol I, p 8.

We have heard that in the provinces the synods of bishops prescribed by canon law are not taking place, and that as a result many ecclesiastical matters that need putting right are being neglected. So the sacred synod decrees that in accordance with the canons of the fathers, the bishops in each province are to foregather twice a year at a place approved by the bishop of the metropolis and deal with any matters arising.¹⁰⁶

When Justinian II wanted to promote needed reform in the Church of the late seventh century, he decided that the best way would be by means of a council of bishops. So he convoked the Council in Trullo in 691. This council too renewed the canon stipulating regular synods.¹⁰⁷ The question of regular synods was again discussed at the Second Council of Nicaea in 787, at which it was decided that it would be sufficient to hold provincial councils once a year.¹⁰⁸ All this demonstrates how the collegiality of the bishops (to use modern terminology) was recognised and exercised in practice. Regional synods of bishops were the normal way to approach difficulties and to promote reform.¹⁰⁹

Against this background we get some idea of how the Roman primacy was exercised throughout the first millennium. The collections show clearly that the Churches of the East governed their Churches according to their own laws and customs, without intervention by the Bishop of Rome. Constantinople did appeal to the Bishop of Rome on a number of critical situations and acknowledged a Roman primacy, but there is little evidence that the Eastern patriarchs subscribed to the papal supremacy of jurisdiction, such as that claimed by Leo the Great (440–461) or Pope Nicholas I (+867). In any case, none of the popes of the first millennium made laws for the Churches of Constantinople or Antioch or Alexandria, in the way that they came to do for the whole of the Western patriarchate. There was no move towards uniformity in discipline and custom in the first millennium. The primacy of the Bishop of Rome that was acceptable to Patriarch Photius and to Pope John VIII, and expressed both in the acta and in the canons of the Council of Reunion of 879/880, was something notably different from that defined a thousand years later in the third paragraph of Pastor Aeternus of the First Vatican Council.¹¹⁰

Yet the canonical collections show clearly that all the Churches acknowledged a certain primacy of Rome because it was the See of the Apostle Peter and continued

¹⁰⁶ Canon 19 of the Council of Chalcedon, in N. Tanner, *Decrees of the Ecumenical Councils*, vol I, p 96.

¹⁰⁷ The Council in Trullo, canon 8.

¹⁰⁸ Canon 6 of the Second Council of Nicaea (787) in in N. Tanner, *Decrees of the Ecumenical Councils*, vol I, pp 143–144. This long canon provides a good description of how the canons were held in reverence in the early Church as 'divine and life-giving laws of God'.

¹⁰⁹ Gratian includes a number of these canons in the *Decretum*, but he gives them a new slant, maintaining that the authority to call and approve councils rests with the Holy See in Rome. See D.17, d.a.c. 1, and D.18, on provincial councils. A number of his canons here, of course, are forgeries from the Pseudo-Isidorian Decretals, and they show how the early approach had been largely superseded by a very centralised papal authority in Rome.

¹¹⁰ 'Wherefore we teach and declare that, by divine ordinance, the Roman church possesses a pre-eminence of ordinary power over every other church, and that this jurisdictional power of the Roman pontiff is both episcopal and immediate. Both clergy and faithful, of whatever rite and dignity, both singly and collectively, are bound to submit to this power by the duty of hierarchical subordination and true obedience, and this not only in matters concerning faith and morals, but also in those which regard the discipline and government of the church throughout the world. In this way, by unity with the Roman pontiff in communion and in profession of the same faith, the church of Christ becomes one flock under one supreme shepherd. This is the teaching of the catholic truth, and no one can depart from it without endangering his faith and salvation'. In N. Tanner, *Decrees of the Ecumenical Councils*, vol II, pp 813–814. This use of terms like 'ordinary power' that is both 'episcopal and immediate' caused great difficulties after the Council and had to be carefully explained.

the role of Peter in strengthening the faith of his brethren. This did not entail Roman legislation for the whole Church.¹¹¹ During the first millennium of the Church's history, diverse administrative, disciplinary and liturgical usages could co-exist with unity in the faith in Jesus Christ. These divergences were accepted on each side. There was no strong movement for uniformity of discipline and conformity of customs until the Gregorian Reform within the Latin Church. My investigation has shown that there were different ways of exercising legislative authority in the Church. In Rome and the Western Church, there developed a strong, monarchical and centralised mode of government by the Bishop of Rome. In Constantinople and the Eastern Empire, patriarchal synodal government through the Holy Synod was central, though this was modified by strong imperial legislation; the ideal aimed at was harmony between imperial and patriarchal government.

In the Churches in Syria and in Persia, the canon law (based on the early Eastern councils) was formed by synodical canons, promulgated by the Holy Synod, though there was also strong, patriarchal government, especially in the East Syrian Church. Each system developed within its own cultural environment and with an autonomy that did not spring from privileges granted by Rome, but which came from the law itself which these Churches possessed since Apostolic times.¹¹²

Throughout the first millennium of the Church's history, there existed great diversity in discipline, in forms of liturgical worship, in spirituality and theological expression of the Christian faith within the Christian community. Differences about theological expressions did cause division, as in the case of the Syrian Orthodox Church and the Syrian Church of the East. Yet these Churches shared the faith in the mystery of the Incarnation and in the divinity of Christ, and professed fidelity to the Creed as formulated at Nicaea in 325 and to the canons of the early councils. In this context, what is noticeable is the, at times, almost decisive influence that the political situation had on the development of the Church's administration, and on its unity. This is as true of the West as it is of the East. The political situation in Italy and in the Frankish kingdoms influenced greatly the development of the papacy in Rome, as did the position of the emperor in Constantinople. Ambiguities in theological formulations and the political antagonism between Alexandria and Constantinople, as well as the antagonism between the strong personalities involved, played an important part in the forming of divisions in the Church. Agreements have now been reached concerning theological formulae that once shattered the unity of the Christian community and kept it disunited for centuries.¹¹³ We now see more clearly that it

¹¹¹ At this point one cannot but think about the recently promulgated *Code of Canons for the Eastern Churches*, promulgated by the Roman Pontiff in 1990 for all the Eastern Catholic Churches in communion with Rome. This was not entirely an innovation, since it was bringing up to date the legislation that had been promulgated for the Eastern Catholic Churches by Pope Pius XII between 1949 and 1957, but long before its promulgation in October 1990 it was criticised by a number of the leaders of these Churches. They thought that the promulgation of a new code ought to be, not an act of the pope alone, but a collegial act of the pope with the patriarch (or major archbishop) and the synod of each Eastern Church. See V. J. Pospishil, *Ex Occidente Lex* (New Jersey 1979) pp 159 and 162). The proposal fell on deaf ears. The *Code of Canons of the Eastern Churches* does, in fact, implement a number of the conciliar directives concerning the Eastern Churches. However, the new code has not succeeded fully in embodying the ecclesiological vision of the Church as a communion of sister Churches that the Second Vatican Council put before us. For this reason it has been a disappointment for many Eastern Catholics.

¹¹² This has been acknowledged by the present Pope in recent years: see *Euntes in mundum*, n.10, An Apostolic Letter of Pope John Paul II of 25 January 1988 on the occasion of the millennium of the conversion of Russia to Christianity. *Acta Apostolicae Sedis*, vol 80, Part 2(1988), p 950.

¹¹³ 'Quarrels about words and formulations' was how Bar Hebraeus described the division between the Churches in the thirteenth century. This view has received some confirmation in the
lcont.

is possible to have different formulations of the one faith, which are complementary not contradictory.¹¹⁴ This realisation can have a liberating effect. It can free us from the fear of finding heresy in every formulation that differs from our own and allow us to be open to all Christian traditions and treat them with sympathy and respect. It can reduce the danger of intolerance and intransigence.

The study of canon law in the first millennium has shown that the Christian community has never had a uniform structure and discipline. There has always been diversity. Different customs have grown up in accordance with different times and cultures; and, as is stated in canon 1506 of the Code of Canons for the Eastern Churches: 'A custom of the Christian community, in as much as it corresponds to the action of the Holy Spirit in the body of the Church, can obtain the force of law.'¹¹⁵ This declaration that customs spring up under the guidance of the Spirit would have been welcomed by one of the great popes of the first millennium. Gregory the Great was a champion of diversity in unity. In the words of Robert Markus, 'Diversity in unity was the keynote of his conception of the Christian community. It became the guiding thread of the pastoral principles formulated in the *Regula pastoralis*, and this it remained throughout his practice as a bishop.'¹¹⁶ Gregory was a Roman aristocrat and appointed Prefect of the City of Rome when he was in his thirties. Soon he sold his property, gave the proceeds to the poor and withdrew to a monastery. After a few years he was recalled by Pope Pelagius II, who ordained him deacon and, in 578, sent him to Constantinople as his permanent representative at the imperial court, where he spent about seven years.¹¹⁷ This was the background of the man who, in 590, was elected Bishop of Rome. He would have been well aware of the different customs and usages that obtained in different places and, in particular, he would have been familiar with the diverse customs of life and liturgy of the Church in Constantinople. Such a man would have realised clearly what he was doing when he

¹¹³ *Icont.*

recent agreements that have been signed by the Pope and a number of leaders of Eastern Churches. For example, the *Common Declaration* issued by Pope Paul VI and the Coptic Pope Shenouda III in 1973, expressing a common faith in the mystery of the Incarnation, in the perfect humanity and divinity of Jesus. See E. Yarnold, *They are in Earnest* (St Paul Publications 1982) p114. Similar joint christological declarations have been made by Pope John Paul II with the Syrian Patriarch, Ignatius Zakka I, in June 1984, and with the Catholicos-Patriarch of the Church of the East, Mar Dinkha IV, in November 1994. This latter resolved the separation that had been caused by the Council of Ephesus in 431. Referring to it, Pope John Paul II said: 'This will settle and definitively put an end to more than fifteen centuries of misunderstanding that afflict our faith in Christ, true God and true man, born to the Virgin Mary by the Holy Spirit' (*Osservatore Romano*, 10 November 1994). These joint declarations show it is possible to have diversity of formulations even of essential doctrines within the unity of faith. This had been stated clearly in 1964 at the Second Vatican Council in the Decree on Ecumenism, *Unitatis Redintegratio*, n. 17: 'What has just been said about legitimate variety must also be taken to apply to the differences in theological expression of doctrine. In the study of revelation east and west have followed different methods, and taken different steps, towards their understanding and confession of God's truth...In such cases, these various theological expressions are often to be considered complementary rather than conflicting.' N.Tanner, *Decrees of the Ecumenical Councils*, vol II, p 917.

¹¹⁴ Decree on Ecumenism, *Unitatis Redintegratio*, n.17.

¹¹⁵ 'Consuetudo communitatis christianae, quatenus actuositati Spiritus Sancti in corpore ecclesiali respondet, vim iuris obtinere potest.' That canon law developed out of customs in the early Church is clearly shown in the sources given in the Eastern Code for this canon: canons 6 and 7 of the First Council of Nicaea; canon 2 of the First Council of Constantinople; canon 8 of the Council of Ephesus; canons 14–15 of the Second Council of Nicaea (787), as well as a number of canons from the eastern Fathers.

¹¹⁶ R. A. Markus, *Gregory the Great and his World* (Cambridge 1997) p 73.

¹¹⁷ Gregory would have arrived in Constantinople just a year after the death of Patriarch John III Scholastikos, whose *Synagoge in 50 Titles* is one of the earliest collections of eastern canon law that has come down to us. John Scholastikos had also gone to Constantinople around 550 as the apocrisarius of the Patriarch of Antioch.

encouraged the development of local customs. His attitude to diversity in unity is most evident in his famous reply to Augustine of Canterbury concerning the rite in which Mass should be celebrated in England:

You, Brother, know the usage of the Roman Church in which you were brought up: hold it very much in affection. But as far as I am concerned if you have found something more pleasing to almighty God, either in the Roman or in the Frankish or in any other Church, make a careful choice and institute in the Church of the English—which is yet new to the Faith—the best usages which you have gathered together from many Churches. For we should love things not because of the places where they are found, but places because of the good things they contain. Therefore choose from each particular Church what is godly, religious and sound, and gathering it all together as it were into a dish, place it on the table of the English for their customary diet.¹¹⁸

Dom Paul Meyvaert has established the authenticity of this letter. He has also convincingly shown how the attitude embodied in it fits perfectly into the context of all Gregory's writings. The reply to Augustine of Canterbury, argues Dom Meyvaert, 'presents itself as only one particular instance of a recurrent theme which has its roots in a deep doctrinal level: diversity within unity.'¹¹⁹ Gregory certainly maintained the primacy of the Roman See over the whole Church but he also recognised the jurisdiction of his brother bishops and expected each patriarch to govern within his own jurisdiction. Yet he consistently throughout his pontificate showed great respect for legitimate differences in conditions, places and circumstances and he thought it the duty of all in authority to adapt themselves to this diversity. The drive for uniformity of discipline and conformity of customs only became effective in the Latin Church in the second millennium.

During the first thousand years of the Church's history, the Eastern patriarchs along with their synods exercised a far-reaching autonomy. Nor did the popes claim to have established the rights of the patriarchs, which in fact they recognised. This autonomy did not exclude, on occasion, the intervention of a higher authority. It was not at all in opposition to the primacy of the Roman See. In matters of faith Rome was acknowledged to be of central importance. It is rather a question of canonical autonomy. The Eastern Churches freely elected their own patriarchs and bishops; they were independent in regulating their liturgy and their canonical legislation; they dealt independently with the discipline of clergy and laity.¹²⁰ It is not being suggested here that the practice of the first thousand years should be taken as a pattern for the future. Developments have taken place in many spheres within the Church, and it must be presumed that many of these have taken place under the guidance of the Spirit. However, as we look forward to the third millennium and ask how Christians

¹¹⁸ 'Novit fraternitas tua Romanae ecclesiae consuetudinem in qua se meminit nutritam: valde amabilem [eam] habeat. Sed mihi placet sive in Romana sive in Galliarum sive in qualibet ecclesia aliquid invenisti quod plus omnipotenti Deo possit placere sollicitè eligat et in Anglorum ecclesia, quae adhuc ad fidem nova est, institutionem praecipuam quam de multis ecclesiis colligere potuit, infundat. Non enim pro locis res sed bonis rebus loca amanda sunt. Ex singulis ergo quibusque ecclesiis quae pia, quae religiosa, quae recta sunt eligat et haec quasi in vasculo collecta apud Anglorum mensam in consuetudinem deponet.' This version of the text and the English translation is taken from an article on Pope Gregory's general approval of diversity in unity by Dom Paul Meyvaert, 'Diversity within Unity, A Gregorian Theme', *Heythrop Journal* 4 (1963), pp 141–162.

¹¹⁹ Dom P. Meyvaert, *op. cit.*, p.146.

¹²⁰ For a fuller discussion of this question, see W. de Vries, 'The Origins of the Eastern Patriarchates and Their Relationship to the Power of the Pope. Part I', in *One in Christ*, 1966, pp 50–69. See also De Vries's magisterial work on the eastern patriarchates, *Rom und die Patriarchate des Ostens* (Freiburg 1963).

can come back into full communion with each other, it cannot but be helpful to look carefully at how Christians lived and how authority was in fact exercised in the first thousand years of the Church's history and see just how far it was possible to have diversity in unity.¹²¹

¹²¹ F. Dvornik has argued that a sound basis for mutual understanding between the Eastern Churches and the Latin Church of the West would be a clearer understanding of the actual condition of the Church in the period from the fourth to the eleventh centuries. F. Dvornik, *Byzantium and the Roman Primacy* (New York 1966).