

## Sensus Fidelium and Canon Law: Sense and Sensitivity?

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### Abstract

Canon law has had a negative press for many years and is often seen as insensitive, unnecessary or static. This article looks at the origins and sources of the 1983 Code of Canon Law, what it covers, and who is expected to hear it. It considers to what extent canon law finds a resonance in the minds and hearts of the People of God, ways in which the echo is heard or not, and the response of the supreme legislator to this. The idea of 'law in theory' and 'law in action' is explored in relation to a particularly neuralgic issue today, that of governance, and then three issues are considered where there continue to be particular problems of reception.

### Keywords

Canon law, Sensus fidelium, Death, Finance, Marriage

### Introduction

There is a scene from the 1970s film, *The Life of Brian*, in which the members of the political group, the People's Front of Judaea, are plotting revolution against their Roman imperialist masters. One of the group, Reg, asks the question: 'what did the Romans ever do for us?' He expects the answer 'nothing' and is surprised when the group list things such as the aqueduct, roads, sanitation, irrigation, medication, education, wine, public baths, fresh water systems, keeping order, and bringing peace. In the same way, we might ask that same question about the 1983 Code of Canon Law: 'what did canon law ever do for us?' Furthermore, given the very negative press it has had in recent years in terms of the abuse crisis, we might ask the question whether it still finds a resonance (if it ever did) in the minds and hearts of Christ's faithful. It is true that there is a perception that canon law is the arteriosclerosis in the Body of Christ; the shadow side of the Good News, exhibiting neither 'sense' nor 'sensitivity.' Yet this is far from reality in many respects, and I would

like to explore the relationship between Canon Law and the '*sensus fidelium*'.

First, a brief outline of how we got to where we are today in the 1983 Code, and the content of the Code. Then a brief account of who is expected to 'hear' what is said in the Code, followed by a consideration of how canon law makes 'sense', and how problems of reception have been heard and responded to. Orsy speaks of 'law in theory' and 'law in action', and I will explore an instance of this relating to the governance of the church and how the theory is being translated into action. Finally, I explore three issues where there is a problem of reception: (i) the treatment of the dead; (ii) contributing towards the support of the church, and (iii) the exclusion of divorced-remarried people from the Eucharist.

### Where did Canon Law come from?

What is now set out in the 1983 Code is derived from a long history, and its canons have various sources such as scripture, ecclesiastical assemblies and local and ecumenical councils. These dealt with issues such as reconciliation for Christians who had abandoned their faith, infant baptism, heretical teachings, questions on the sacraments, Sabbath observance, rules governing those in ministry, and the alienation of ecclesiastical property. The conversion of Constantine in 312, and the subsequent involvement of emperors in the life of the church led to imperial edicts becoming another source of law. These addressed themselves to questions of internal governance of the community, liturgical issues (Sunday observance, the date for Easter), and many other varied subjects such as the burial of heretics, decorum in church, episcopal interest in military payment, donations for pious purposes, and the segregation of monks and nuns. Other sources of authoritative writings emerged during the course of the fourth-century, one being the writings of the Fathers, and a second being papal letters and decretals.

Subsequent ecumenical councils also became a source of canons, the best known of which is the Council of Trent (1545-1563), which enacted a series of decrees on the internal reform of the church in addition to major doctrinal clarifications. Various collections of canons made over the centuries culminated in a definitive Code being promulgated in 1917. The Second Vatican Council (1962-1965) led to a new self-awareness of the church in terms of a renewed ecclesiology, of *communio*, which was reflected in the revised Code of 1983. This revised Code would provide the conditions for human flourishing in terms of the anthropology, ecclesiology and Christology articulated in the Council's documents.

## What does the 1983 Code cover?

The 1983 Code of Canon Law comprises 1752 canons, divided into six books after General Norms (aspects of interpretation): The People of God (including their rights and obligations), The Teaching Office of the Church, The Sanctifying Office of the Church, Temporal Goods, Sanctions (penal law) and Processes.<sup>1</sup> Superseding its predecessor of 1917, this Code was promulgated by Pope John Paul II, the supreme legislator, on 25 January 1983, by way of an apostolic constitution. In this constitution, the Pope notes that the purpose of the Code is not to replace faith, grace, charisms or charity, but that it 'looks towards the achievement of order in the ecclesial society . . . such that it facilitates at the same an orderly development in the life both of the ecclesial society and of the individual persons who belong to it'.<sup>2</sup>

The noted canonist, Ladislav Orsy, states:

The purpose of canon law is to assist the Church in fulfilling its task which is to reveal and to communicate God's saving power to the world. Law can help by creating order in the community, an order that leads to tranquillity and peace: a good disposition for the 'assembly' to become 'light to the nations'. The law can be also a teacher to the people, as the Torah once was: guiding them toward the kingdom.<sup>3</sup>

So it has a positive aspect: the preservation of right order as well as looking to the common good and the rights of individuals. As Frank Morrissey writes: 'The law, as a means to an end, can only be justified if it fulfils its mission: providing freedom and a context wherein free choices can be made without the threat of the arbitrary hanging over everyone'.<sup>4</sup>

## Who hears?

Is it the case that all of the faithful are expected to 'hear' the content of the Code of Canon Law? Before the 1917 Code was promulgated, it had been sent to all bishops and all superiors of Religious Orders 'who are legitimately invited to an ecumenical council' for

<sup>1</sup> The Code governs the Latin Church only; the Eastern Catholic Churches are governed by a separate Code promulgated in 1990.

<sup>2</sup> The official language of the Code is Latin; this translation is from the *Code of Canon Law Annotated*, 2<sup>nd</sup> edition, eds. E. Caparros, H. Aube, et al, Wilson & Lafleur, Montreal, 2004, p. 7. Future references are abbreviated to CCLA, with page number.

<sup>3</sup> L. Orsy, 'Theology and Canon Law' in *New Commentary on the Code of Canon Law*, ed. J. Beal et al, Paulist Press, 2000, pp. 1-9.

<sup>4</sup> F. Morrissey, 'Introduction' to *A Handbook on Canons 573-746*, eds. J. Hite, S. Holland, D. Ward, Collegeville Minn, Liturgical Press, 1985, p. 13

comment.<sup>5</sup> The Code itself was published in Latin and translated into English only in 2001. This being the case, there is the sense that it was not intended that all ‘the faithful’ should hear and echo the teaching of the new Code. However, the Apostolic Constitution (*Sacrae Disciplinae Leges*), which promulgated the revised Code of 1983, was addressed not only to bishops, priests and deacons but also to ‘the other members of the people of God’. In this, Pope John Paul II noted that the Code was ‘an indispensable instrument to ensure order both in individual and social life, and also in the church’s own activity’, and that certain doctrines were to be emphasised – the church as the people of God; communion; all the members of the people of God participate in the threefold priestly, prophetic and kingly office of Christ, ‘to which doctrine is also linked that which concerns the duties and rights of the faithful and particularly of the laity’. He ended: ‘I therefore exhort *all the faithful* to observe the proposed legislation . . . [italics added].’

This does not mean that every one of Christ’s faithful has to become a canon lawyer, though it is true to say that in recent years there has been significant interest from lay people in studying canon law, reflected in the numbers who have pursued studies at degree level. There are also a number of popular publications available for those who have an interest in the subject. However, in considering the community in general, it is worth reflecting on words from Orsy, who says:

. . . law is what has been promulgated and *received*. The inclusion of the existential element is indispensable for the correct understanding of what the fullness of law is. *Law in theory and law in action are not the same*, not even by the classical scholastic criteria. *The one is on the way to becoming a vital force, the other has become one*. The contribution of the subjects must come precisely on the existential level: their impact must be felt while the law is being applied. *Thus, reception by the community belongs to the fullness of the law*. To avoid any misunderstanding, by ‘reception’ we do not mean an act of formal ratification through some kind of plebiscite; but we do mean the intelligent and responsible accommodation of the law, an abstract norm, to the demands of concretely obtainable values [italics added].<sup>6</sup>

Orsy speaks of the life-cycle of a law: it is conceived, it is born, it lives, it dies or fades away. He continues: ‘. . . the community consists of intelligent and free human beings. The law is not and cannot be received by them existentially, unless they understand and act on it’.<sup>7</sup>

<sup>5</sup> E. N. Peters, *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, Ignatius Press, 2001, p. 23.

<sup>6</sup> L. Orsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation* (Collegeville Minn, Liturgical Press, 1992), pp. 85-86.

<sup>7</sup> *Ibid*, p. 41.

So, the legislator has to explain the need for the law and the values it intends to uphold, ‘reception’ is necessary for the law to become a vital force in the life of the community, and any law not received is as good as non-existent. The law can also change or become fully or partially extinct, either because it has served its purpose or because the whole matter has had to be legislated all over again. A law might also be abandoned by custom, as the people of God have judged it and found it to be unnecessary.

### Canon law as ‘sense’

People may not know the specifics of canon law, but they may well understand that some things make sense; they appeal to common sense, and are echoed by the *sensus fidelium*. These could include the idea of penalties attached to certain actions: for example the existence of automatic excommunications attached to certain violations of the sacraments (violation of the Sacred Species, breaking the sacramental seal of confession, absolving a partner in a sin against the sixth commandment), or using physical force against the Pope, or a bishop ordaining another bishop without a pontifical mandate. Most people would see the sense in penalties in instances of heresy, apostasy, schism, profanation of sacred objects, simony, trafficking for profit in mass offerings, solicitation in the confessional, and the abuse of ecclesiastical power or an office.

Similarly, in terms of sacramental discipline, the law spells out who can administer the sacraments, who can receive them, as well as the ‘where’, ‘when’ and ‘how’, and how ecclesiastical funerals are to be conducted. The Code also spells out how dioceses and parishes are to be ordered, laws applying to Religious congregations, the formation of clerics, and descriptions, obligations and limits of different roles and offices within the church. These canons generally make sense in terms of promoting good order in the community.

### Canon Law and ‘sensitivity’

There has been a common perception that the process of having a marriage declared null is long, cumbersome and expensive. There is also the problem that in some parts of the world, tribunals do not exist or are not very efficient. Given the reality of marriage breakdown, and that people have the right to have the validity of their marriage scrutinized (with a view to achieving a declaration of nullity and being free to marry again), the problem of petitioning for an annulment has been the cause of much pastoral anguish for those caught up in the situation. Recognising the need for a more

streamlined and readily-accessible judicial process and, in response to this echo from the *sensus fidelium*, Pope Francis has attempted to deal sensitively with this question by introducing some reforms to the annulment process through his *motu proprio Mitis Iudex Dominus Iesus* (for the Latin Church) and *Mitis et Misericors Iesus* (for Eastern Catholic Churches).

First, he has introduced an abbreviated process which is decided by the bishop himself. This will be particularly useful in countries in the southern hemisphere where there are often no functioning tribunals. Second, where there is a collegial tribunal of 3 judges, 2 of these can now be lay people (canon 1421) instead of one. Third, the requirement for mandatory appeal to a second tribunal and a double-conforming sentence has been abolished. Fourth, the preamble to the *motu proprio* specifically mentions making the services of the tribunal free of charge, while preserving the just remuneration of people who work for the tribunal. Needless to say, there has been quite a bit of discussion about whether bishops will want to act as judges themselves (even though they are such by virtue of their office), or how tribunals will be funded in the future. Whatever the issues, there has been a clear and sensitive response by the Pope to what is a pressing concern for a long time.

### Law in theory and law in action

One of the most striking changes from the 1917 Code to the 1983 Code is the listing of the rights and obligations of all of Christ's faithful. From what might be caricatured as the idea of 'pay, pray, obey' in the pre-conciliar church, there has emerged a series of rights, some applicable to all Christ's faithful, while others are specifically for clergy or for lay people. To some people these come as a surprise; however, those parishioners with some knowledge of rights have become something of a bane in the lives of certain parish priests and bishops. This often manifests itself when a diocese is seeking to merge or suppress parishes. The rights themselves include that of making known their needs and their views to pastors (c. 212); being assisted by pastors using the spiritual riches of the church (c. 213); a right of association and assembly for the purposes of charity and piety (c. 215); a right to promote apostolic action under their own initiative (c. 216); a right to a Christian education (c. 217). These are balanced by a number of obligations: to contribute to building up of the Body of Christ (c. 208); preserving communion (c. 209); leading a holy life and promoting the growth and sanctification of the church (c. 210), striving that the divine message may reach all, and everywhere (c. 211), and obedience to what sacred pastors declare as teachers of the faith and rulers of the church (c. 212). Above all, in

exercising their rights, individuals and associations must remember the common good of the church, the rights of others; and their own duties to others (c. 223).

Whether they have knowledge of the specific canons or not, the idea of such rights has a resonance in people's consciousness fostered, no doubt, by a number of popular publications on the subject. More than this, there is a sense that people want to be more involved in real decision-making in the church. We have seen discussions on the possibility of lay cardinals, opening the diaconate to women, and appointing women to key decision making roles in the Vatican. This whole discussion about governance raises questions as to how canon 129 is to be interpreted. This reads:

- §1: Those who are in sacred orders are, in accordance with the provisions of law, capable of the power of governance, which in fact belongs to the Church by divine institution. This power is called the power of jurisdiction.
- §2: Lay members of Christ's faithful can cooperate in the exercise of this same power in accordance with the law.

This is a major change from the 1917 Code and, as canon law requires interpretation, much discussion has emerged on what the word 'cooperation' actually means, and whether the power of jurisdiction is tied to those who have been ordained. A number of possibilities have emerged:

1. One school of thought denies the exercise of jurisdiction to lay people, saying that all power resides in those who have been ordained. Lay people should not be admitted to certain roles.
2. Others might speak about 'collaboration', but in a way where there is a grudging admission of lay people.
3. Others would see that the power of orders and the power of jurisdiction are distinct; lay people can exercise the power of jurisdiction when canonically missioned to do so.
4. Others would go further; canonical mission simply appoints the person to a specific role and area of ministry, the qualification for which is not based on the distinction between lay and ordained, but rather on competency on a professional level.

If we are advocating increased levels of lay participation, perhaps involvement should not happen just because someone is a lay person, but because that person is competent, informed, reflective, articulate

and is rooted in the life and tradition of the church. Perhaps we need to revisit and reword this canon to reflect what is becoming reality: ‘lay members of the Christian faithful are also qualified for the power of governance according to the norm of law’.<sup>8</sup> Finally, maybe we need to have a look again at our history. The letters to and from St Cyprian in the third century indicate the active participation of lay people in decision making. In the election of bishops, the appointment of clergy, conciliar decision-making, and the reconciliation of the lapsed, lay people were clearly very much involved.<sup>9</sup> So, perhaps there is a need for sense and sensitivity to see what we can learn from the past that might be useful today.

### Lack of reception: three instances

What are the issues where there is a problem of reception when what appears in canon law fails to find a resonance among the faithful? In this last part, I want to look at three particular issues.

#### *Dealing with death*

The canons on ecclesiastical funerals give clear indication that bodies are to be buried or cremated. However, the idea that people in general have the ‘sense’ and ‘sensitivity’ in their grasp of the law to understand that cremated remains ought to be treated in a certain way should not be assumed automatically. That this is the case is evidenced in a document from the Department for Christian life and Worship of the Bishops’ Conference of England and Wales. *Guidance Note on the Burial of Ashes (2008)* makes it clear that Granny’s ashes should not be divided among her children, stored in a cupboard at home, fired into space by a rocket, or turned into a glass ornament like an ashtray or an artificial diamond (giving a whole new meaning to the term ‘diamond geezer’). We might ask what accounts for such a lack of reception, and whether it is the influence of society, a lack of catechesis, ignorance or indifference.

#### *Dealing with finance*

Archbishop Paul Marcinkus is reported to have said: ‘you can’t run a church on Hail Marys’, and it is true that the church needs money

<sup>8</sup> James Coriden, ‘Lay Persons and the Power of Governance’, *The Jurist*, 59, 1999, pp.343-4.

<sup>9</sup> Francis A. Sullivan, ‘St Cyprian on the Role of the Laity in Decision Making in the Early Church’, in *Common Calling*, ed. S. J. Pope, (Washington, 2004), pp 39-49.



in order to operate. This is not simply to run its infrastructure, as successive Popes have demonstrated. In *Centesimus Annus*, John Paul II said:

Faithful to the mission received from Christ her Founder, the Church has always been present and active among the needy, offering them material assistance in ways that neither humiliate nor reduce them to mere objects of assistance, but which help them to escape their precarious situation by promoting their dignity as persons (para 49).

The range of material assistance is mentioned also in Benedict XVI's *Deus Caritas est* (2005), but a further dimension is highlighted, as the pope says that, as the church spread throughout the world:

... the exercise of charity became established as one of her essential activities, along with the administration of the sacraments and the proclamation of the word: love for widows and orphans, prisoners, and the sick and needy of every kind is as essential to her as the ministry of the sacraments and preaching of the Gospel. The Church cannot neglect the service of charity any more than she can neglect the Sacraments and the Word (para 22).

This is a very significant statement as it puts charitable activity as a fundamental element of the church's life. This is reflected in canon 222 of the Code of Canon Law which outlines the obligation of the Christian faithful to 'assist with the needs of the church so that the church has what is necessary for divine worship, for the works of the apostolate and of charity, and for the decent support of ministers'. The Code also speaks of 'stewardship', involving the idea of trust where the goods are held for the benefit of others, and where one has been charged by a higher authority to look after the goods of another. Nevertheless, as reported in the press, and discussed in several books, there is a question about just how accountable and transparent are church finances in different parts of the world.

I have already mentioned the obligation of the faithful to provide for the needs of the church (canon 222). This is reinforced in canon 1261 which states that 'the diocesan bishop is bound to remind Christ's faithful of that obligation'. Further, canon 1262 says that 'the faithful are to give their support to the Church in response to appeals . . .' A levy (or tax) can be made on public juridical persons subject to the diocesan bishop's jurisdiction (canon 1263), and an extraordinary tax made on physical persons 'only in a grave necessity'.

There is a major issue with the reception of these canons for many who belong to the church in Germany because of the (in)famous *Kirchensteuer* (church tax). Under German law, anyone baptised as a child is automatically a member of a church and is obliged to pay church tax when s/he starts to earn. This is charged as 8–9% of income regardless of whether they attend church or indeed believe

in anything, and has since been extended by the German Bishops' Conference to capital gains tax. The tax is collected by the state and passed on to the various denominations, but not everyone is happy with this involuntary mode of giving, with the result that many have filed to leave the church so that they no longer have to pay it. Bearing in mind that this tax raised £4.6 billion in 2013, and that 200,00 left the church in 2014, it should come as no surprise that the German bishops have exhibited some anxiety<sup>10</sup>, and have sanctioned those leaving with exclusion from the sacraments, from parish and diocesan committees and official church organisations, and not allowing them to be godparents.<sup>11</sup>

This was challenged by Hartmut Zapp, a retired canon lawyer, who signed the required documents for leaving the Church in 2007 but then went to the archbishop's office to declare that he was still a Catholic. He said that he was only leaving the church as a statutory body under German law but that he intended to continue being a member of the church as a community of faith. Here he was relying on the content of a letter from the Pontifical Council for the Interpretation of Legislative Texts (13 March 2006) to the then president of the US Conference of Catholic Bishops (Bishop William Skylstad), in which it said that the juridical-administrative act of abandoning the church does not per se constitute a formal act of defection, because there could still be the will to remain in the communion of faith. A lower court upheld Zapp's challenge<sup>12</sup> and, naturally enough (because of the financial implications), this panicked the German bishops, who appealed against the decision and won.<sup>13</sup>

This whole situation is problematic on a number of points. Until 2009 the Code recognised the possibility of a formal act of defection from the church and in 2006 the Pontifical Council specified in what a formal act of defection consisted (which differed from *behaviour* that indicated that the faith had been notoriously or publicly abandoned). Interestingly enough, it stated that having one's name removed from a church register that was maintained by the government to produce certain civil consequences did *not* constitute a formal act of defection. Anyway, in 2009, Benedict XVI made certain changes to canon law (*Omnium in Mentem*, 26 October 2009), and removed the idea of a formal act of defection from the Code altogether, noting the various

<sup>10</sup> See M. Woods, 'Catholic Church in Germany hit by mass withdrawals', *Christian Today*, 20 July 2015, <http://www.christiantoday.com/0> (accessed 3 September 2016).

<sup>11</sup> This decree was approved by the Congregation for Bishops. See J. Luxmoore, 'German bishops defend exclusion of Catholics who stop paying tax', *Catholic Herald*, 26 September 2012, <http://www.catholicherald.co.uk> (accessed 3 September 2016).

<sup>12</sup> M. St Leger, 'German court upholds tax challenge', *National Catholic Reporter*, 28 August 2009, <http://www.ncronline/> (accessed 2 September 2016).

<sup>13</sup> M. St Leger, 'Church wins appeal in German court', *National Catholic Reporter*, 4 May 2010, <http://www.ncronline/> (accessed 2 September 2016).

theological problems that had emerged from it. So, you might say that the church is like the Eagles' song, *Hotel California*: 'you can check out anytime you like, but you can never leave'.

The exclusion of people from the sacraments has been described as a *de facto* excommunication. While people are automatically excommunicated for apostasy, heresy and schism, it is hard to see how de-registering as a Catholic in civil terms falls under these headings. Is the obligation to give money to the church a central tenet of the faith? Is it really a distancing from the church, or an attempt to be only partly a member? Is it violating the bonds of communion, or avoiding the obligation to support the church? While parish priests are to write to people, asking them to state their reasons, and then have the consequences of their decision outlined to them, there is a concern that the bishops are not listening to the reasons why people are leaving. The 'We Are Church' group have condemned the decree with its 'pay and pray' mentality and the failure to listen to the reasons why such large numbers are leaving the church in this way. Clearly, this is an area where some sensitive and sensible listening needs to be done.

### *Dealing with failed marriages*

The issue of whether people who have divorced and remarried in a civil ceremony should be admitted to the Eucharist is, as we have seen, something that will not go away. However, it has to be said that the canons relating to this have changed dramatically from their formulation in the 1917 Code. Under canon 2356, people who had attempted a new marriage while a previous bond still existed were considered 'bigamists', and the language used was strong and unequivocal:

Bigamists, that is, those who, notwithstanding a conjugal bond, attempt to enter another marriage, even a civil one as they say, are by that fact infamous; and if, spurning the admonition of the Ordinary, they stay in the illicit relationship, they are to be excommunicated according to the gravity of the deed or struck with personal interdict.

As bigamists, they fell within the category of the legally 'infamous', and therefore paragraph 1 of canon 855 was applicable to them:

All those publicly unworthy are to be barred from the Eucharist, such as excommunicates, those interdicted, and those manifestly infamous, unless their penitence and emendation are shown and they have satisfied beforehand the public scandal [they caused].

As bigamy was considered 'manifest', those who had divorced and remarried were specifically barred from reception of the Eucharist.

The revised Code of 1983 toned down the language considerably and did not specifically mention those who had entered into a second marriage. Canon 915 reads:

Those who have been excommunicated or interdicted after the imposition or declaration of the penalty and others obstinately persevering in manifest grave sin are not to be admitted to holy communion.

There has been much discussion on how this canon is to be interpreted, whether it applies to all people who are divorced-remarried, or only to certain categories within that overall description. How this canon should be interpreted in light of *Familiaris Consortio* 1981, which made it clear that those in irregular marriage situations were not to be admitted to the Eucharist, and the later *Catechism of the Catholic Church*.

Despite these authoritative pronouncements there appears to be a sense that they were not heard and/or received, since subsequent documents were issued to reinforce the point that those who were divorced-remarried (and therefore deemed to be living in a state of sin, being ‘adulterous’) were excluded from receiving the Eucharist (though not from attending Mass or taking part in the life of the church through prayer and works of charity).<sup>14</sup> Not only that, but some bishops did not see *Familiaris Consortio* as the final word on the subject, because it continued to develop at subsequent synods. At the 1983 Synod, the Bishops’ Conference of Japan judged its practical directives to be too severe and urged greater latitude on the issue.<sup>15</sup> Other bishops raised the question of reconciling divorced-remarried people to full communion, and some expressed a hope for an extraordinary gesture of reconciliation. However, in the apostolic exhortation following the Synod, *Reconciliatio et Paenitentia* (1984), John Paul II reaffirmed without change what he had said in 1981. The issue was raised again at the 1985 Extraordinary Synod when Archbishop Berg of Austria called for the readmission of divorced-remarried people to the Eucharist, and Bishop Shirayanagi of Japan pointed out that this issue was a problem for evangelisation as the church’s present practice was more than people could bear.<sup>16</sup>

<sup>14</sup> See the Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church Concerning the Reception of Holy Communion by Divorced and Remarried Members of the Faithful* (14 September 1994); John Paul II, *Address to the Pontifical Council for the Family* (24 January 1997); Pontifical Council for the Interpretation of Legislative Texts, *Declaration Concerning the Admission to Holy Communion of Faithful Who Are Divorce and Remarried* (24 June 2000); Benedict XVI, *Apostolic Exhortation, Sacramentum Caritatis*, 2007.

<sup>15</sup> See J. H. Provost, ‘Intolerable Marriage Situations: A Second Decade’, *The Jurist*, 50, 1990, pp. 573-612 (587).

<sup>16</sup> Provost, p. 588, note 54.

Timothy Buckley, author of the popular *What Binds Marriage?*, which looked at the issue of pastoral care for those in situations of marriage breakdown, sought opinions from clergy and lay people on the issue. Having consulted with those directly affected – separated, divorced, and divorced-remarried people – he observed:

... this part of the research has demonstrated that the *sensus fidelium* as expressed within this same group is in harmony with the Church's fundamental belief in the sanctity and permanence of marriage, but has enormous problems with the discipline which has evolved as the means of protecting that belief.<sup>17</sup>

However, it is not just those directly affected by this issue who exhibit concerns about such Eucharistic exclusion. Some, including canonist James Coriden suggests a pastoral approach using 'a good conscience/internal forum solution'. This is presented as an exercise of moral discernment rather than canonical judgement and some canonists or moral theologians would argue that this represents an exception to the general policy of exclusion from the sacraments, and one that is based on the primacy of conscience and the virtue of *epikeia*.<sup>18</sup> Coriden is far from being alone in advocating such an approach as such a practice was advocated in Chicago in the 1940s, inspired by the marital difficulties of prospective converts, and focussed on the possible non-validity of a first marriage but where a canonical judgement was not possible.<sup>19</sup> Such an approach recognised the power of the priest to exercise governance in the internal forum, and was supported by Bernard Häring who recounts this in his book, *No Way Out?* as part of his own pastoral practice.<sup>20</sup>

The so-called 'internal forum solution' has its advocates, but there are also those who see it as deviating from the teaching of the church and much has been written about it over the years. In 1993, the then bishops Kasper, Lehmann and Saier attempted, in a pastoral letter, to put in place some guidelines to foster a spiritual and pastoral dialogue between pastors and those in irregular marriage situations.<sup>21</sup>

<sup>17</sup> T. Buckley, *What Binds Marriage?: Roman Catholic Theology in Practice* (Geoffrey Chapman, London, 1997), p. 110.

<sup>18</sup> 'Epikeia' can be defined as 'a reasonable judgement to act against the law's letter' (see G. Grisez, *The Way of the Lord Jesus*, vol 2, Quincy IL, Franciscan Herald Press, 1983, p. 282), and applied when a strict interpretation or application of the law makes it unreasonable and failing to serve the good. (See R. Gula, *Reason Informed by Faith*, New York, Paulist Press, 1989, p. 256).

<sup>19</sup> See R. G. Carey, 'The Good Faith Solution', *The Jurist*, 29, 1969, pp. 428-438; W. E. May, 'Marriage, Divorce and Remarriage', *The Jurist*, 37, 1977, pp. 266-286.

<sup>20</sup> B. Häring, *No Way Out? Pastoral Care of the Divorced and Remarried*, St Paul Publications, Slough, 1989.

<sup>21</sup> The English translation of this document can be found in *Origins*, 10 March 1994, vol 23, pp. 670-676.

The final decision on whether to approach the Eucharist would be left to the individual following their conscience as a morally responsible agent. This initiative was challenged by the CDF the following year.<sup>22</sup> In general, opinion continues to be divided on whether people should decide for themselves according to their own conscience (albeit with pastoral guidance),<sup>23</sup> or whether an internal-forum solution can be done only where strict criteria are used (separation or living as brother-sister, and avoiding the possibility of scandal).<sup>24</sup>

As we have seen in the reporting on the recent Synod on the Family, the argument has continued to rumble on, with some people taking a hard line on the exclusion of divorced-remarried people, while others advocate a return to the internal-forum solution with a careful discernment of individual situations. The idea that the interpretation of canon 915 excludes all people in irregular marriage situations does not fit all situations. So I think the issue is still far from settled and will continue to generate some light, and a great deal of heat.

### Conclusion

In conclusion, in looking at '*sensus fidelium*' in relation to canon law, what I hope is clear in all this is that canon law itself is open to change, to new formulations and new interpretations. Communities apply rules differently, and canon law leaves what I call 'wiggle room' for sensible and sensitive interpretation. It is not perfect, but it is far from being the dark side of the good news.

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<sup>22</sup> CDF, *Epistula ad Catholicæ Ecclesiæ Episcopos de Receptione communionis Eucharisticæ a Fidelibus qui post divortium novas inierunt nuptias*, 1994. An English version appears in *Origins*, 24/20, 27 October 1994, pp. 337-341.

<sup>23</sup> See T. Davey, 'The Internal Forum', *The Tablet*, 27 July 1991, pp. 905-906.

<sup>24</sup> See G. Grisez, J. Finnis and W. W. May, 'Indissolubility, Divorce and Holy Communion: An Open Letter to Archbishop Saier, Bishop Lehmann and Bishop Kasper', *New Blackfriars*, 1994, pp. 321-330.