

Reforming the Church by Hitting the Reset Button: Reconfiguring Collegiality within Synodality because of *sensus fidei fidelium*

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It is an honour and pleasure for me to speak at the 50th anniversary Conference of the Canon Law Society of Australia and New Zealand.¹ Five years ago in 2011 I also had the privilege to speak at your Conference and I do keep wonderful memories of the conversations as well as of the meetings with so many former class mates from our common time at Saint Paul University in Ottawa.

The Synods of Bishops held in 2014 and 2015 were not just Synods of Bishops on the family.² They were also and possibly above all events during which Pope Francis hit what might be called “the reset button” with regard to the interpretation of Vatican II. Something happened in the way faithful, bishops and Pope listened and interacted with each other in order to arrive at a decision. There was a reconfiguration in the interaction of the different protagonists leading to a transformation of discernment processes which will have a lasting impact on all decision making processes in the church.³ At the root of the ecclesiological gear shift lies Vatican II’s new understanding of revelation: whereas the pre-Vatican II church had a rather christomonistic understanding of revelation according to which faith was transmitted in a hierarchical understanding, the council moved to a more Trinitarian one. In hitting the reset button, the new doctrines of Vatican II concerning ecclesiology and revelation were not only reconfigured into a new relationship on a mere theoretical level, but it also happened in particular on the level of the reception, that is on the level of implementing the council. A new phase in the reception of the council occurred. The different doctrines finally “all fell into place.”

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¹ The lecture was given at the 50th Annual Conference of the Canon Law Society of Australia and New Zealand in Surfers Paradise, Gold Coast QLD, Australia on September 6, 2016. The present study contains some revisions of this lecture. The lecture style has remained.

² After the Synod on the Family Pope Francis issued the Postsynodal Apostolic Exhortation *Amoris Laetitia*. Cf. https://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20160319_amoris-laetitia.html.

³ A leading article in decision making and decision taking processes remains the study by Robert T. Kennedy, “Shared Responsibility in Ecclesial *Decision-Making*,” *Studia Canonica* 14 (1980) 5–23.

The resetting became obvious in actions and in words: in the way the synods on the family were conducted and in the address Pope Francis delivered as part of the commemoration of the 50th anniversary of the institution of the Synod of Bishops on October 17, 2015.⁴ First the deeds: due to structural changes in the preparation of the synods, the Pope paved the road for a communication between faithful, bishops and Pope. It all began with listening. He initiated a survey among all faithful for which he did not ask the bishops to report what they believe themselves, or what they think the faithful entrusted to their care believe and think, but he commissioned the bishops to ask the faithful themselves. It all began by a willingness to listen to “the joys and hopes, the griefs and the anxieties of all the members of the people of God” (GS 1). A process of communication was thus initiated and the faithful were at least indirectly involved in the discernment process of the synod. Their responses were summarized by the episcopal conferences and submitted to the commission preparing the Synod. Many episcopal conferences made their reports public, thus allowing the faithful to exchange their views beyond their national borders. The Synod of Bishops experienced a transformation also in the address by the Pope on 17 October 2015 in which the most important statement was possibly: “*Synodality*, as a constitutive element of the Church, offers us the most appropriate interpretive framework for understanding the hierarchical ministry itself.” The Pope does not emphasize the hierarchical structure as constitutive, but rather synodality which is the framework for hierarchical authority as service.

The resetting thus caused an expanded understanding of the notion and practice of synodality. Synodality is not any longer expressing exclusively the doctrine of collegiality of the bishops with the Pope, but it allows for and requires a participation of all faithful in discernment and thus decision making processes. The new configuration is rooted in different doctrines of Vatican II, such as the doctrine that the church is People of God, that all baptised participate in the threefold ministry of Christ - and related to this the doctrine on the charisms -, the doctrine of the sense of the faithful (*sensus fidei fidelium*), the doctrine that the church as such cannot err, the doctrine concerning the collegiality of bishops and with it the relationship to the primacy of the Pope. It should be stated upfront: Pope Francis did not change any of these doctrines of Vatican II in themselves, but by placing each one of them into a new relationship with each other he was able to transform the totality. In doing so he offered a new perspective on the familiar. He showed in words and deeds how the doctrines that hitherto stood side by side, unfold their deeper meaning when they are considered as mutually complementary. Not a change of doctrine, but a new understanding of the individual doctrines was made possible by looking at them as standing in an organic unity. This new configuration is

⁴ Pope Francis, Address during the Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops, October 17, 2015. The address has no numbers of paragraphs. I will refer to it as Pope Francis, Synod Address 2015. Cf. http://m.vatican.va/content/francescomobile/en/speeches/2015/october/documents/papa-francesco_20151017_50-anniversario-sinodo.html (Access: November 2, 2016).

ultimately not directed to decision making processes as such, but towards the higher purpose of the church and its internal ordering, namely to proclaim the faith in Jesus Christ faithfully and effectively to current people in their specific circumstances of life, so that it may more and more fill the hearts of people (DV 26).

The actions and in particular the 17 October 2015 address by Pope Francis obviously had a major impact on the Archbishop of Brisbane Mark Coleridge who participated in the 2015 synod. He indicates that Pope Francis' address gave him the inspiration to call for a synod or plenary council for the church in Australia in 2020.⁵ Indeed the archbishop must have felt the impact of the reset button being hit as he highlighted in his blog⁶ and said in an interview he gave: "He [Pope Francis] wasn't just asking for synodality from bishops, but of the whole Church. His cry was 'collegiality of the bishops within the synodality of the whole Church. He wants people listening to each other and talking to each other. He wants healthy decentralization'."⁷

Archbishop Coleridge must have seen and felt the need to transfer the implications to the local churches. Maybe the archbishop reacted intuitively, but it can hardly be denied that Pope Francis' reconfiguration of the protagonists goes beyond the Synod of Bishops on the family on at least two accounts: first, it will transcend decision making processes beyond family and marriage issues, because it will and should have an impact on all moral and doctrinal decision making processes in the church. Secondly, the reconfiguration will and should have an impact on all levels of discernment and decision making processes in the church whether they take place in the local church, that is the parish and the diocese, in groupings of local churches such as ecclesiastical provinces or the churches gathered through their bishops in an episcopal conference, or in the church universal.⁸

⁵ Archbishop Mark Coleridge said on 17 August 2016: "When I went to the synod last October, listening to the very important speech the Pope gave on the morning of October 17 where he spoke about the 'synodality' of the Church – that it's not just some of the bishops some of the time, but all of the Church all of the time." He added: "Everyone will want to have their say, as they did in the synods in Rome – which is fine." His colleague bishops had agreed to his proposal. Cf. <http://catholicleader.com.au/news/brisbane-archbishop-calls-for-first-synod-for-entire-catholic-church-in-australia-since-1937> (Access: 22.02.2017).

⁶ On his blog written during the synod Archbishop Coleridge summarizes the address by Pope Francis as "collegiality of the bishop within the synodality of the whole Church". Cf. <https://brisbanecatholic.org.au/articles/on-the-road-together-Pope-remarkable-speech/> (access: November 2, 2016). For the announcement to hold a synod or plenary council see: <http://catholicleader.com.au/news/brisbane-archbishop-calls-for-first-synod-for-entire-catholic-church-in-australia-since-1937>.

⁷ <http://www.abc.net.au/radio/programs/sundaynights/conclusions-from-the-synod-on-the-family-brisbanes-archbishop-co/7738356> (access: 3 March 2017).

⁸ In the interview Archbishop Coleridge points out that in the previous plenary councils held in Australia only men participated: bishops, priests and religious of clerical religious institutes of pontifical right. He stated that this time women would participate as well.

Indubitably, the impact of Pope Francis' words and actions will really be felt when among others canon lawyers take up their task and support the reconfiguration implicitly and explicitly when they advise on new legislation as well as on the interpretation and application of the current law. The purpose of this study is to reflect on the implications of Pope Francis' reconfiguration for canon law and for canon lawyers so that they assist the church in this process of reform. Therefore, this study has three parts: The first section will in particular investigate how and why the doctrine on episcopal collegiality is (to be) relocated within an expanded understanding of synodality *because of* the rediscovery of the doctrine on the *sensus fidelium*. It will explore why it is possible to speak of a hitting of the reset button with regard to Vatican II and what this implies.

The reflections on the presented doctrines and in particular their internal reordering in relation to each other require an investigation whether and if so in what way a canonical response is needed to follow up the developments in the doctrine of the church: does the doctrinal shift require adaptations or changes of the existing canonical norms? If so, what would be necessary? These questions concern future legislation. Because it might take a while for such legislation to be in place the question can be raised what can be done until new laws are promulgated? What can already be achieved through using the new perspective on the doctrine in applying the existing laws and by acting not against but apart from existing canonical norms (*praeter ius*)?⁹ Indeed such a reflection presumes that canonical norms not only give expression to a reform, but can and should facilitate - an ongoing - reform of the church.¹⁰

Since a similar process occurred after the closing of the Second Vatican Council when the old law was still in force while at the same time the conciliar doctrine was already to have an impact on the life of the church, it is worthwhile to investigate how canon lawyers handled this "in between" situation between 1965 and 1983. The purpose is to see what can be learned from them for the task ahead of today's canon lawyers. It should provide that confidence that might be needed to be "bold and creative in the task of rethinking the goals and structures, style, and methods of evangelization in the

<http://catholicleader.com.au/news/brisbane-archbishop-calls-for-first-synod-for-entire-catholic-church-in-australia-since-1937>.

⁹ The notion of law that develops *praeter ius* originates with customary law (cf. c. 24 CIC/1983) and thus belongs to the canonical tradition. Two remarks are in place: first, my proposal is not a call for disobedience to the law, but rather an appeal to use the space that the theology governing the law allows for. Secondly, my proposal does not affect procedural law, penal law or other areas that could touch on the protection of rights of persons.

¹⁰ The council affirmed that the church is "at one and the same time holy and always in need of purification" (*sancta simul et semper purificanda* - LG 8) and is called "to continual reformation" (*ad hanc perennem reformationem* - UR 6). Presuming that the Holy Spirit plays a decisive role in establishing when and where a renewal is necessary, canon law must enable an ongoing renewal process and must prevent stifling it. On Vatican II and renewal see Peter DeMey, "Church Renewal and Reform in the Documents of Vatican II: History, Theology, Terminology," *The Jurist* 71 (2011) 369-400.

respective communities” (EG 33).¹¹ Hence, the second section of this study will focus on learning from the past with regard to the future. The final session will then outline how with the help of the method used by canon lawyers in the past, the ecclesiological reconfiguration as presented by Pope Francis can be supported by and through canonical norms.

A preliminary remark is in order: Pope Francis’ hitting of the reset button leading to a reconfiguration of those involved in discernment and decision making processes might be received as good news. Why? There are probably no more burning and church unity dividing issues in our contemporary church as well as in other churches and ecclesial communities as the following two: Who *speaks* on behalf of whom on what topic with what authority and to what extent is this binding on whom? The question focuses on the teaching office of the church. It is a pivotal question with regard to decision-making processes on moral and doctrinal issues and the answer reveals how a church understands herself theologically: is she predominantly hierarchical or synodal; does she tend to be more christologically or pneumatologically oriented? These are questions about the theological foundation of authority and decision-making institutions and processes in moral and doctrinal issues.¹²

The topic of authority, participation and decision-making could be raised in a similar way with regard to the governing of the church in general. Then the question could be phrased in an analogous way: Who *decides* on behalf of whom on what topics and with what kind of authority and to what extent is the decision binding on whom? In a way both these questions really attend to the decision-making processes be it with regard to teaching or governing matters. There are two dimensions to these sets of questions:

¹¹ Pope Francis, Apostolic Exhortation *Evangelii Gaudium*, November 24, 2013 Cf. http://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html. References to this document: EG.

¹² The topic of discernment processes in ethical issues not only plays a role in the Roman Catholic Church, but has entered the world of ecumenism forcefully because virtually all churches and ecclesial communities are facing this challenge. Indeed churches are increasingly confronted with moral questions about which they not only have to decide, but where the outcome of the decision making process can be a threat to the unity of a church or can prevent the churches from speaking and thus proclaiming the faith with one voice. In all such cases the credibility and efficiency of giving witness to the world is at stake. For this reason the Commission of Faith and Order of the World Council of Churches has put this topic on its agenda. The Faith and Order Commission published the study *Moral Discernment in the Churches: A Study Document*, Faith and Order paper 215 (Geneva: WCC, 2013). In relation to this, Faith and Order commissioned a working group entitled “Moral Discernment in the Churches and Authority” in 2015. The Roman Catholic Church is not only fully engaged in this process, it also saw to it that its two representatives in this group are a moral theologian and a canon lawyer. The moral theologian is David Kirchhoffer from Australia Catholic University in Brisbane and I myself am the canon lawyer. The Commission of Faith and Order itself named the Roman Catholic canon lawyer together with a theologian from the Russian Orthodox Patriarchate as co-moderators of this project. Hence, the topic on authority in moral discernment processes is also a topic for canon lawyers.

First, *where*, that is, at what level are the decisions made? At a local, a national, a continental or at the universal level? Where could they be made? Where should they be made? The responses reveal and affect the understanding and actual praxis of unity and diversity, of relevance of inculturation, of authority of and within the local churches etc. Secondly, *who* is involved in what way in the decision-making or discernment process? It might well be of relevance to speak here about a decision-making or discernment *process* and not just about a decision *taking* institution or authority. The response to this latter question will reveal something about the ecclesiological understanding of the interaction of different people and the way they discern in the church: laity, priests, religious, men and women, youth and adults, bishops, Pope, theologians, synods, councils, etc. The responses to all these questions will display how the church understands herself ecclesologically. It will have ecumenical implications.¹³

Reconfiguring Collegiality within Synodality

To state that Pope Francis “hit a reset button” with regard to the interpretation of Vatican II leading to an ecclesiological reconfiguration is a rather strong statement that needs an explanation. This will follow in different rounds: the complexity of the explanation will increase as the explanation moves to a deeper level. A warning is in place: The complexity of the issue and the space available will imply that the presentation can only “indicate” the different aspects.

Ecclesiological aspects

The Second Vatican Council had to address the relationship between the Pope and the bishops. In particular the two dogmas of Vatican I on the infallibility and the primacy of jurisdiction of the Pope had left some questions. Among them were the status of a (diocesan) bishop and of the college of bishops in relation to the papacy. Vatican II responded with the doctrine of collegiality of bishops, declared that a bishop by ordination and hierarchical authority is a member of the college of bishops and that the college with the Pope enjoys supreme power, which includes the power to teach infallibly, and that the diocesan bishop is the vicar of Christ for his diocese. The pertinent questions were answered in particular in what was going to be chapter three of the Dogmatic Constitution on the Church *Lumen gentium* (LG). The content of that third chapter on the hierarchy was in itself not an easy birth as can be concluded from the rather unexpected highly controversial presentation of the so-called *Nota Explicativa Praevia* (NEP) in which some clarifications - others would call it modifications - were provided in relation to this third chapter just prior to voting on it. The NEP was possibly presented as a response to a small minority in the council which feared a weakening of

¹³ See for example the so-called Chieti Declaration of September 21, 2016: Joint International Commission for Theological Dialogue between the Roman Catholic Church and the Orthodox Church “Synodality and Primacy During the First Millennium: Towards a Common Understanding in Service of the Unity of the Church” http://www.vatican.va/roman_curia/pontifical_councils/chrstuni/ch_orthodox_docs/rc_pc_chrstuni_doc_20160 (Access: 04.11.2016).

the papal authority due to the doctrine on collegiality. The purpose of the NEP was indubitably that the Constitution on the Church could be and indeed was then approved by an overwhelming majority of the council fathers.¹⁴

The First Vatican Council had led many bishops to believe that due to the dogmas on the primacy of jurisdiction and infallibility of the Pope, a council would not be necessary in the future. However, from the beginning of the Second Vatican Council onwards the bishops experienced that it was of immense relevance and above all enriching that the Pope and the bishops of the world would actually meet regularly to discuss the challenges the church is meeting. The bishops at Vatican II not only experienced the benefit of exchanging thoughts among themselves and with the Pope, they also approved the doctrine of collegiality of bishops in relation to the papacy. It is important to notice that doctrine and experience coincided. Since, however, ecumenical councils are institutions that occur rather seldom, soon voices advocated the establishment of some sort of a permanent institution that would allow the Pope and some kind of a representation of the college of bishops to engage in dialogue on a more regular basis. However, possibly because of the fear of some bishops that the authority of the Pope might be compromised by any such institution, Pope Paul VI did not wait for the council to propose some kind of body, but decided to erect himself the institution of “Synods of Bishops” the very day the fourth and last session of the council was opened.¹⁵ The fact that Pope Paul VI took the initiative and did not wait for the council to decide on having a permanent institution, was possibly connected to the fact that he granted the synod in principle a mere consultative power; only in exceptional cases and after an explicit

¹⁴ At Vatican I the then minority feared that their reservations with regard to the papal dogmas were insufficiently taken into consideration and thus some of the bishops belonging to this group left the council before the final vote was taken. In this way they secured that there was consensus by those who were still there, and yet the departure implied that it was a compromised consensus. It turned out to be a traumatic experience which was to be avoided at all costs at Vatican II. What was advocated by the minority in Vatican I came to be the position of the majority at Vatican II. At Vatican II the minority was defending the position of what had been the majority at Vatican I. It could well be that Pope Paul VI feared that again a group might leave the council before the final vote would be taken, or that the traditionally intended approval by consensus - and thus not just a majority - at a council would not be obtained. For this reason he might have presented the NEP to the council just before the final vote was taken hoping that in this way a consensus could be achieved. Till today it is unclear, however, whether the vote on *Lumen gentium* implied an acceptance of the NEP or what even the status of the NEP is. See in this regard the very informative article by the current Cardinal of Manila Luis Antonio Tagle, “The ‘Black Week’ of Vatican II (November 14-21, 1964),” Giuseppe Alberigo, Joseph Komonchak (Eds.), *History of Vatican II, Vol. IV: Church as Communion. Third Period and Intercession - September 1964-September 1965* (Maryknoll, NY: Orbis, 2003) 386-452.

¹⁵ Cf. Paul VI., *Motu proprio Apostolica sollicitudo: Synodus Episcoporum pro universa Ecclesia constituitur* (15. September 1965), in: *AAS* 57 (1965), 775–780. English translation: *Motu proprio Apostolica Sollicitudo: Establishing the Synod of Bishops for the Universal Church*, http://w2.vatican.va/content/paul-vi/en/motu_proprio/documents/hf_p-vi_motu-proprio_19650915_apostolica.

decision by the Pope the synod would enjoy deliberative power. Such a restricted competence again was in agreement with the content of the NEP, as in this way the authority of the Pope was not restricted, which was important for the minority. Had the erection of the institution be left to the council itself, the majority of the council fathers might have decided something else with regard to its powers. Since Pope Paul VI acted before the council, all the council could do was to affirm the existence of the Synod of Bishops in the Decree of the Bishops and do so with the competence the Pope had already granted it (cf. CD 5).¹⁶

The Synod of Bishops is thus an institution that was born in order to give expression to the new understanding of the relationship between the papacy and collegiality as expressed by Vatican II in chapter three of *Lumen Gentium*, even though it did and does not enjoy the competence some might have wanted it to have.

With regard to the current study it is important to notice that in a certain way the Synod of Bishops opened a new era in which Pope and bishops meet on a regular basis to discuss topics of major relevance. At the same time this institution is indeed meant to give expression to the relationship between the Pope and - a representation of - the college of bishops. Or, to phrase it differently: it is an institution that gives expression to the doctrine on the papacy and episcopal collegiality. It is not an institution intended to give expression to the relationship between the local churches and the universal church. Or to express this differently again: Pope Paul VI instituted the Synod of Bishops as an expression of synodality which is rooted in the doctrine on the papacy and episcopal collegiality, but not in the doctrine on the church as People of God. Completely in line with this the 1983 Code of Canon Law locates the Synod of Bishops systematically with the supreme authority of the Church, i.e. Pope and college of bishops.

Vatican II, however, did not only clarify the relationship between the Pope and bishops, but decided to go one step further, as it inserted very consciously a chapter entitled the “People of God”. The purpose of the chapter was to express that all faithful together

¹⁶ In its third session the council voted on the Dogmatic Constitution on the Church *Lumen gentium*, thus affirming the doctrine on collegiality (1964). The Decree on Bishops *Christus Dominus* (CD) draws more practical implications of LG. Those who did not fully agree with the decisions taken in LG tried to see to a reduced impact of the doctrine in CD. They were in favour of approving CD as it was presented in the third session without a reworking of it in light of the changes made in LG in that third session. Because this “move” was noticed, it was decided that CD would not be voted on in the third session, but needed to be reworked in light of LG and then be presented again in the fourth session of the council. Among the difficult topics was the theological status of episcopal conferences. Some bishops were afraid that the conference could limit the newly approved doctrine that a diocesan bishop holds all power with taking possession of his diocese, others saw it as a good vehicle for diocesan bishops to cooperate with neighbouring bishops on topics that transcend their own diocese, and again others saw it as a mini-gathering of some bishops of the college of bishops which would raise serious questions about its authority. Because it was difficult for the council to agree, the council decided to mention the existence of the episcopal conference, but leave it to the post-conciliar time to investigate the matter.

make up the People of God due to being baptized in Christ, that the church as such and as a whole has a missionary task and that the hierarchy stands in service to this.¹⁷ Hence, what is common to all baptized was first expressed and inserted as chapter two before a differentiation among the faithful is made between the hierarchy (chapter three), the laity (chapter four) and the religious (chapter five). The problem, however, was that after having inserted the chapter “People of God” the council did not do a revision of what was subsequently going to be the third chapter on the hierarchy. As a result, the different teachings of chapter two and three stand side by side and are not really developed and reconciled into a new synthesis. Post-conciliar research reveals that the phenomenon of placing different doctrines side by side occurs rather often in Vatican II as this appeared to be an excellent method of renewal: old and new are set side by side and are not yet brought into a newly developed synthesis. Scholars refer to this phenomenon with the term “juxtapositions”.¹⁸

On several occasions, the council responded to questions alluding to this old and new, by stating that further elaboration and clarification would be left to the post-conciliar

¹⁷ Bishop Emiel-Josef DeSmedt from Bruges said already in the first session of the council on 1 December 1962 that in the people of God all are connected one to another and all enjoy the same rights and duties. All participate in the kingly priesthood of the people of God. The Pope is one of the faithful; the bishops, priests, laity and religious: they all are faithful. They approach for the same sacraments: they all need forgiveness, the Eucharistic bread and the Word of God, and all reach out for the same home”, *Acta Synodalia* I/IV, 143. For some interesting considerations see Eva-Maria Faber, “Volk Gottes” Mariano Delgado, Michael Sievernich (eds.) *Die große Metaphern des Zweiten Vatikanischen Konzils. Ihre Bedeutung für heute.* (Freiburg i.Br., Herder, 2013) 175.

¹⁸ Henk Witte, “Reform with the Help of Juxtapositions. A Challenge to the Interpretation of Vatican II,” *The Jurist* 71 (2011), 20–34. Hermann-Josef Pottmeyer was possible one of the first to explain, that Vatican II had two intentions: renewal of the church and fidelity in continuity. This led to juxtapositions which the council could not develop into a new synthesis. Herman-Josef Pottmeyer, “A New Phase in the Reception of Vatican II: Twenty Years of Interpretation of the Council,” in Giuseppe Alberigo, Jean-Pierre Jossua, Joseph A. Komonchak (ed.), *The Reception of Vatican II* (Washington DC: The Catholic University of America Press, 1987) 37-38. It does not mean, however, that old and new just stand side by side: by placing the old in a new context, the new context determines the interpretation of the old. For further reflections on the use of juxtapositions and then handling them see also Ormond Rush, *Still Interpreting Vatican II: Some Hermeneutical Principles* (Mahwah: N.J. Paulist Press, 2004) 27-30, 42 and 49. Richard R. Gaillardetz explains well the phenomenon of such juxtapositions in the council in his book *The Church in the Making: Lumen gentium, Christus Dominus, Orientalium Ecclesiarum* (Mahwah, N.J: Paulist, 2006) xvi-xviii. Walter Kasper writes: “Admittedly, the harmonisation between earlier and later tradition is often not completely successful; for—like most previous councils—Vatican II solved its task, not with the help of a comprehensive theory, but by pegging out the limits of the church’s position. In this sense it was completely in the conciliar tradition for a juxtaposition to remain. As in the case of every council, the theoretical mediation between these positions is a task for the theology that comes afterwards.” Walter Kasper, “The Continuing Challenge of the Second Vatican Council: The Hermeneutics of the Conciliar Statements,” in Walter Kasper, *Theology and Church* (New York: Crossroad, 1989) 171.

time. Such a response indicates that the council itself did perceive its work as not being finished with the closing of the council, which in turn implies a turn away from a static to a dynamic notion of understanding doctrine. Yet, this method also allowed for a possible source of conflict and tensions in the post-conciliar time, because in any conflict different sides can refer to statements in the conciliar documents that support their respective argument. For the drafting of the Code of Canon Law the juxtapositions were a real challenge and not seldom is only one side of the juxtaposition received in the 1983 Code. At times conciliar doctrines cannot even be found in the Code of Canon Law.¹⁹ The idea that the full meaning of doctrine is only revealed over the course of time also means that this did not stop simply because the Code of Canon Law was promulgated: it continues till today. That in turn means that there are major challenges for an ongoing interpretation of the legislation: the understanding of the doctrine governing the 1983 Code continues to evolve after its promulgation and must be taken into consideration when interpreting it.²⁰ I will return to this below.

New Understanding of Revelation and Teaching Authority

The deeper cause for the transformation that Pope Francis brought about lies not only with changes in the ecclesiology, but also and above all with Vatican II's new understanding of revelation and related to that with the teaching authority in the church which differs from the pre-conciliar time. Since the Council of Trent the Catholic Church increasingly saw revelation as a transmission of the faith in an hierarchically ordered way: God reveals himself through and in Christ; through Peter and the other apostles revelation occurs to the Pope, the other bishops and from there to the priests, who hand it over to the laity. The laity receive it in obedience. Such an understanding is considered to be christomonistic. With this understanding of revelation coincides the method of teaching: revelation is seen as a package of propositions which people can learn by heart. Hence catechisms are published which the faithful, in particular the laity and then the catechumens, have to learn by heart. This understanding of revelation is again quite present in the third chapter on the hierarchy of *Lumen gentium* as well as in opening canons of book three of the Code of Canon law (cc. 749-755).

The second chapter of *Lumen gentium* on the people of God, as well as the Constitution on Revelation, *Dei Verbum* present a very different understanding of revelation: it is not a package with a set of doctrines about God, but revelation implies that God speaks to men and women as friends to enter into fellowship with them (DV 2).²¹ It is an

¹⁹ For example: the council did teach the doctrine that all baptized participate in the threefold ministry of Christ, that they together compose the People of God, but there is no canonical institution that gives expression to this for the church on a universal level.

²⁰ See also Myriam Wijlens, "Vatican II and the Interpretation of the Code," *Proceedings Canon Law Society of Australia and New Zealand* 45 (2011) 3-19.

²¹ Cardinal Bea who was co-drafter of *Dei Verbum* wrote in 1967 that the word friends implies that this is an encounter at eye level. Scripture refers to Abraham as God's friend (Isiah 41:8 and James 2:23). The Book of Wisdom describes people as God's friends and prophets (Wisdom 7:27) Jesus

encounter with God. The Holy Spirit leads us into this relationship and understanding (DV 5). This understanding of revelation is not christomonistic but trinitarian. Of decisive importance is that the Word of God is listened to and heard by all, including the ordained members of the people of God; only subsequently proclamation can follow. It all begins with listening to the Word of God which is directed towards all people.²² It can only be understood under the guidance of the Holy Spirit through a complex interaction of all the faithful each and every one according to his or her position and function. Such an understanding touches on the notion of development of tradition. Tradition occurs through all faithful. *Lumen gentium* uses for this also the words *sensus fidei* and *sensus fidelium* (LG 12): the sense of the faith of all faithful. This thinking has consequences for the infallibility of the Church. The church has always taught that the church as such is infallible, but over the course of history this infallibility of the church came to be understood as the infallibility of the magisterium. The infallibility of the church was not denied, but the infallibility of the magisterium was understood to be “active” whereas the infallibility of the church was reduced to being merely “passive”. Consequently, the church almost reached the point where the infallibility of the church became dependent on the infallibility of the magisterium.²³

Vatican II, however, clarifies that revelation occurs within the whole people of God in a complex network of relations between all faithful, be they laity, religious, theologians, bishop, Pope, college of bishops etc. Such an understanding can only be appreciated in conjunction with both the doctrine that through baptism all faithful participate in the threefold ministry of Christ and receive charisms as well as the doctrine that the Holy Spirit is active in each and everyone (LG 14). Cardinal Suenens remarked at the council that the working of the Holy Spirit is not only granted to the ordained, but to all Christians. The Church would be a pneumatic reality not only built on apostles, but also on prophets.²⁴

By using the metaphor “People of God” the council highlights that the working of the Holy Spirit does not occur in isolation, but that the different people are dependent on and ordered towards each other: the individual cannot believe without the community.²⁵

also refers to the apostles as friends (Luke 12:4 and John 15:14-15) but the terminology implies that all disciples are meant: “What Jesus said to his first apostles he said, through them, to all his disciples throughout time. [...] So the idea of friendship between God and man expresses more clearly the generosity of God, who stoops to treat man as an equal. This is the new and characteristic element of the text in which God presents himself as the friend of man.” (Augustin Bea, *The Word of God and Mankind*, London: Chapman, 1967) 43.

²² The opening line of the Constitution on Divine Revelation thus opens with the words: “Hearing the word of God with reverence and proclaiming it with faith...” (DV 1).

²³ A very important preparatory study on this subject was done by the Belgian theologian Gustave Thils, *L’infallibilité de peuple chrétien “in credendo”*: *Notes de théologie posttridentine*, BETL 21 (Paris: Desclée de Brouwer, 1963).

²⁴ Cf. Cardinal Suenens, Address to the Council on 22 October 1963, *Acta Synodalia* II/III, 176.

²⁵ The community is both synchronic as well as diachronic: the faithful receive the faith within the

At the same time the common faith lives in the lived faith of the faithful (*sensus fidei*). The *sensus fidelium* finds its most comprehensive and at the same time most diverse expression in the lived faith. For this reason the living faith is an important witness and source of faith and thus a *locus theologicus* for theology. This implies that there is a need of mutual obedience and respect of laity and hierarchy.

The council draws an extremely important conclusion from this: she affirms that the church *in credendo* - the believing church - is infallible: ²⁶

“The entire body of the faithful, anointed as they are by the Holy One, cannot err in matters of belief. They manifest this special property by means of the whole peoples' supernatural discernment in matters of faith when ‘from the bishops down to the last of the lay faithful’ they show universal agreement in matters of faith and morals. That discernment in matters of faith is aroused and sustained by the Spirit of truth. It is exercised under the guidance of the sacred teaching authority, in faithful and respectful obedience to which the people of God accepts that which is not just the word of men [sic], but truly the word of God. Through it, the people of God adheres unwaveringly to the faith given once and for all to the saints, penetrates it more deeply with right thinking, and applies it more fully in its life.” (LG 12)²⁷

In this understanding the Pope and college of bishops enjoy infallibility, but this infallibility is, however, embedded *within* the infallibility of the church. The council teaches: the infallibility *in docendo*, which belongs to the Pope and the college of bishops, falls within the infallibility *in credendo* of the People of God or at least presumes this. Hence, Pope and (college of) bishops can only teach the faith of the

community of all times and places. Some Churches invite their faithful to profess the Creed with the words: “With the church of all times and places we profess...”

²⁶ Eva Maria Faber refers to Cardinal Suenens (Brussels) who emphasized that through the Holy Spirit Christ enlightens the people of God and leads them into the full truth. He added that it would be necessary to speak about the charisms of all faithful. Moreover, so, Suenens, it would not be appropriate to ask only from the faithful respect and obedience towards the pastors; in a similar way pastors should respect the charisms and gifts by the Holy Spirit granted to the laity. She also refers to bishop Candidus Padin (Rio de Janeiro) who remarked as well that also bishops should practise the virtue of obedience, like the good shepherd who knows his flock, as the flock knows him. In order for him to shepherd them well it would be necessary that he investigates the signs of God which appear in the people. Faber, Volk Gottes, 175f.

²⁷ The International Theological Commission published the document “*Sensus fidei* in the Life of the Church” in 2014 (Cf. http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_20140610_sensus-fidei_en.html). For a book with different commentaries on this document see Thomas Söding (ed.), *Der Spürsinn des Gottesvolkes. Eine Diskussion mit der Internationalen Theologischen Kommission*. Quaestiones disputatae vol. 281 (Freiburg i.Br.: Herder, 2016). For a collection with articles on the subject that were originally published before 2014: Charles Curran, Lisa E. Fullam (eds.), *The Sensus fidelium and Moral Theology*. Readings in Moral Theology, vol. 18 (Mahwah, NJ: Paulist 2017).

church. The infallibility of the church does not flow from the infallibility of the magisterium, but rather the latter presumes the former. If the infallibility *in credendo* belongs to the whole Church, it is necessary not only that all listen to the Word of God, but that they also listen to each other and discern together what the Holy Spirit is conveying to the Church (Rev. 2:7).

In summary: the council's new understanding of the cooperation of the different protagonists in the church is deeply rooted in the affirmation that in particular the Holy Spirit guides the church as well as in a new understanding of revelation. All of this finds particular expression in the second chapter of *Lumen gentium* on the People of God and in the Constitution on Revelation *Dei Verbum*. There is, however, some tension between this understanding and the doctrine that finds expression in chapter three of *Lumen gentium* (in particular LG 25) which reveals a more traditional understanding concerning the relationship between the hierarchy and the rest of the faithful as well as on the magisterium. The third chapter focuses more on the relationship between the Pope and the (college of) bishops and does not really pay attention to the rest of the faithful. In fact, the latter are asked to receive the doctrine with a religious assent (LG 25). Neither does chapter three clarify how the connection between the bishop and the faith of the church entrusted to his care is to be seen when he speaks within the college of bishops.

The Transformation by Pope Francis

In 2015 in the middle of the Synod on the Family Pope Francis commemorated the erection of the Synod of Bishops 50 years earlier in 1965. In his address he emphasizes that the Synod is “one of the most precious legacies” of Vatican II. According to Pope Paul VI the synod was meant “to reproduce the image of the Ecumenical Council and reflects its spirit and method.” He adds that already at the time of the establishing of the synod Pope Paul VI had foreseen that the organization could be “improved upon with the passing of time” and that Pope John Paul II had agreed with this. Pope Benedict XVI had, therefore, already made some changes. This would be necessary to continue on this path, because “the world in which we live, and which we are called to love and serve, even with its contradictions, demands that the Church strengthen cooperation in all areas of her mission. It is precisely this path that of synodality which God expects of the Church of the third millennium.” What God is asking, so the Pope said, is “in some sense present in the very word ‘synod’: Journeying together - laity, pastors, the Bishop of Rome - is an easy concept to put into words, but not so easy to put into practice.”²⁸

Remarkably, the Pope begins his reflections with the statement that the council taught that the whole body of the faithful cannot err in matters of belief. This is, so the Pope says, the famous *infallibility in credendo* and adds:

In the Apostolic Exhortation *Evangelii Gaudium*, I emphasized that ‘the people of God is holy thanks to this anointing, which makes it infallible *in*

²⁸ Pope Francis, Synod Address 27 October 2015.

credendo’, and added that ‘all the baptized, whatever their position in the Church or their level of instruction in the faith, are agents of evangelization, and it would be insufficient to envisage a plan of evangelization to be carried out by professionals while the rest of the faithful would simply be passive recipients’.

In light of previous considerations mentioned above it is not only possible to understand what Pope Francis wants to say, but also how to grasp better, how to weigh the different aspects of his address. He continues: “The *sensus fidei* prevents a rigid separation between an *Ecclesia docens* and an *Ecclesia discens*, since the flock likewise has an instinctive ability to discern the new ways that the Lord is revealing to the Church. “He adds that for this reason he wanted to consult (!) with the people of God before the council. He admits that such a consultation is not sufficient to perceive the *sensus fidei*,²⁹ but

how could we speak about the family without listening to their joys and hope, their sorrows and their anguish? [...] A synodal Church is a Church which listens, which realizes that listening ‘is more than simply hearing’. It is a mutual listening in which everyone has something to learn. The faithful people, the college of bishops, the Bishop of Rome: all listening to each other, and all listening to the Holy Spirit, the ‘Spirit of truth’ (*Jn* 14:17), in order to know what he ‘says to the Churches’ (*Rev* 2:7).

While underscoring the relevance of hearing and listening, Pope Francis receives the doctrine on Revelation as laid out by the Constitution *Dei Verbum*, which places the listening to the word of God prior to the teaching. Subsequently, he draws consequences on a more structural level when he states:

The Synod of Bishops is the point of convergence of this listening process conducted at every level of the Church’s life. The Synod process begins by listening to the people of God, which ‘shares also in Christ’s prophetic office’, according to a principle dear to the Church of the first millennium: *Quod omnes tangit ab omnibus tractari debet*.³⁰

²⁹ The document by the International Theological Commission on *Sensus fidei* ascertains that *sensus fidei* is not the same as a public or majority opinion. Public opinion is a sociological concept related in particular to the political model of representative democracy. *Sensus fidei* is not based on opinion, but it is based on faith. Cf. ITC, *sensus fidei*, Nr. 118.

³⁰ A remark: the original phrase adds: “et approbari debet” (it should be approved by all). Vatican I addressed the question of approval/reception of doctrine. Cf. the article by Yves Congar, « Quod omnes tangit, ab omnibus tractari et approbari debet, » *Revue historique de droit français et étranger* IV. Série 36 (1958) 210–259; Orazia Condorelli, «Quod omnes tangit, debet ab omnibus approbari. Note sull’origine e sull’utilizzazione del principio tra medioevo e prima età moderna, *Ius canonicum* 53 (2013), 101–127; Jasmin Hauck, Quod omnes tangit debet ab omnibus approbari – Eine Rechtsregel im Dialog der beiden Rechte,» *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung* 99 (2013) 398–417.

He then remarks:

The Synod process then continues by listening to the pastors. Through the Synod Fathers, the bishops act as authentic guardians, interpreters and witnesses of the faith of the whole Church, which they need to discern carefully from the changing currents of public opinion.

It is for this reason, so the Pope said, that he said on the eve of the synod a year earlier: “For the Synod Fathers we ask the Holy Spirit first of all for the gift of listening: to listen to God, so that with him we may hear the cry of his people; to listen to his people until we are in harmony with the will to which God calls us’.”

The Pope explains that the synodal process

culminates in listening to the Bishop of Rome, who is called to speak as ‘pastor and teacher of all Christians’³¹, not on the basis of his personal convictions but as the supreme witness to the *fides totius Ecclesiae*, ‘the guarantor of the obedience and the conformity of the Church to the will of God, to the Gospel of Christ, and to the Tradition of the Church’.³²

Decisive therefore is listening and the structure which enables this is a synod.

Pope Francis really hits the reset button when he subsequently says:

Synodality, as a constitutive element of the Church, offers us the most appropriate interpretive framework for understanding the hierarchical ministry itself. If we understand, as Saint John Chrysostom says, that ‘Church and Synod are synonymous,’ inasmuch as the Church is nothing other than the ‘journeying together’ of God’s flock along the paths of history towards the encounter with Christ the Lord, then we understand too that, within the Church, no one can be ‘raised up’ higher than others. On the contrary, in the Church, it is necessary that each person ‘lower’ himself or herself, so as to serve our brothers and sisters along the way.

It is important to note that Pope Francis sees synodality – and not just the hierarchy - as a constitutive element of the church and the framework for understanding hierarchical ministry. On the basis of this understanding he explains that “...in this church, as in an inverted pyramid, the top is located beneath the base. Consequently, those who exercise authority are called “ministers”, because, in the original meaning of the word, they are the least of all.”

The Pope explains that only in serving the people of God the bishop becomes vicar of Christ for that portion of the flock entrusted to his care, that is, “the vicar of that Jesus

³¹ The Pope refers here in a footnote to: Vatican I: Dogmatic Constitution *Pastor Aeternus* (18 July 1870), ch. IV: Denz. 3074. Cf. *Codex Iuris Canonici*, can. 749, § 1.

³² The reference made here is: Pope Francis, [Address to the Third Extraordinary General Assembly of the Synod of Bishops](#), 18 October 2014.

who at the Last Supper bent down to wash the feet of the Apostles (cf. *Jn* 13:1-15).” In a similar way the Successor of Peter is nothing else if not the *servus servorum Dei*: “For the disciples of Jesus, yesterday, today and always, the only authority is the authority of service, the only power is the power of the cross.” On the basis of this perspective, the Pope underscores the relevance of synodality also for the local churches as well as for other levels of cooperation in the church. The whole reflection for the Pope also has ecumenical implications in particular with regard to the exercise of the petrine ministry.

What did Pope Francis do that allows for stating that he “hit a reset button” with regard to the hermeneutics of Vatican II? Through his actions and his address on 17 October 2015 he did not change the theological understanding of the relationship between Pope and bishops, as well as between the Pope and the college of bishops, but he expanded this understanding by placing it into the context of the doctrine that finds expression in the second chapter of LG: the church as People of God. Consequently, the hierarchy is to be understood as standing in service to God, to the Church and thus to the People of God.

He reconfigures the conciliar doctrines in relation to each other. This leads him to say: “*Synodality*, as a constitutive element of the Church, offers us the most appropriate interpretive framework for understanding the hierarchical ministry itself.” Synodality is thus an expression of the church understood as a journeying together of God’s flock, each according to this position – canonically one would speak of *condicio* – and task. Pope Francis thus transforms in words and by action several juxtapositions existing between the second and third chapter of *Lumen gentium*, because he also reads the Constitution of the Church in light of and in conjuncture with the doctrine set forth in the Constitution on Revelation. By doing so, he is able to bring the different doctrines into a new synthesis.

Hence, fifty years after the closing of Vatican II Pope Francis put the doctrine of papacy and collegiality as expressed in the third chapter on the operative level finally into the context of the second chapter of *Lumen gentium*. Pope and (college of) bishops are now located within the people of God. The synods of 2014 and 2015 reflect this in their operation. One can say; the *exercise* of the doctrine of collegiality was put into the context of synodality which includes all members of the faithful. One could also phrase it differently: the synodality of the church obtained a new meaning because it includes the involvement of all baptized, however, each according to his or her *condicio* and task. Expressed in more technical theological terms one could say: the reception of Vatican II entered into a new phase because the juxtapositions that were existing between chapter two and three of *Lumen gentium* where the different doctrines stood side by side, were brought into a new synthesis both on the level of theology and on the level of action.

Implementing the Doctrine: Canon Lawyers Learning from the Past

Pope Francis did not change the doctrine itself, but by reconfiguring the different aspects in relation to each other a new and deeper understanding of their meaning opens up.

What stood beside each other (juxtapositions) was brought into a new harmony. It implies that individual doctrinal aspects obtained a new meaning. The reconfiguration, which itself is deeply rooted in the intentions of the council and the development of the conciliar documents, provides not only a new understanding of collegiality and synodality, but should also be understood as lenses through which existing legislation is to be interpreted and applied. It is indeed a change in hermeneutical perspective. This implies that much more is required than a modification of existing legislation. The transformation implies a new hermeneutical perspective for the whole legal system: it is necessary to think the whole ecclesiological construction of the church from the perspective of “the doctrine of the people of God and hierarchical authority as service.” It should be noted that Pope John Paul II already called for this perspective as he promulgated the Code of Canon Law in 1983.³³

The new perspective implies the need for a reflection on two levels: first, it is necessary to check whether existing legislation must be revised in light of the new insights and secondly the question arises whether and if so, to what extent, the new insights can and must have an impact on the interpretation of existing norms. The new perspective must permeate the whole church, that is, on all levels and with regard to all discernment processes. Ultimately, no reform can occur without canon lawyers themselves entering into the process of reform. No reform can occur if the persons responsible for it, do not engage in it. Required is an internal disposition, as Pope Paul VI already pointed out to canon lawyers soon after the council. He called for a *novus habitus mentis*: a new attitude of mind.³⁴ The attitude required is one of looking at the old and familiar in a new way. It was exactly this that the council did itself. History reveals canon lawyers from the past engaged themselves in such major reform processes, because they believed in it. It is worthwhile to see what can be learned from those who engaged in this before us. It is also my way to give tribute to those who started the Canon Law Society of Australia and New Zealand fifty years ago.³⁵

As I began preparing this lecture I wondered how the ecclesial and more specific the canonical world looked like fifty years ago when the Canon Law Society of Australia and New Zealand was established: Vatican II had come to a close. Bishops had returned to their home dioceses and initiated the process of reception and implementation of the

³³ John Paul II, Apostolic Constitution *Sacrae disciplinae leges*, *Code of Canon Law. Latin-English Edition* (Washington: CLSA 1998) xxx.

³⁴ Paul VI, Allocution to the Pontifical University Gregoriana on December 14, 1973, AAS 66 (1974) 10, English translation “Canon Law and the Church’s Pastoral Mission” *Canon Law Digest (CLD)* 8: 100-101 and *idem*, Allocution to the Roman Rota on February 4, 1977, AAS 69(1977) 153, English translation “The New Code and the Better Protection of Justice,” *CLD* 8: 111.

³⁵ At the conference of the Canon Law Society of Australia and New Zealand held in Melbourne in 2011 I spoke more extensively on these subjects. See: Myriam Wijlens, “Vatican II and the Interpretation of the Code,” *Proceedings Canon Law Society of Australia and New Zealand* 45 (2011) 3-19.

council. Canonical structures might not have particularly interested them then and it might not necessarily interest bishops to a great extent today. Simultaneously, the Commission for the Revision of the 1917 Code took up its work and began drafting a legislation for the church universal. As explained above, it would not be an easy task because Vatican II had often times old and new doctrine stand side by side that were no reconciled yet. No wonder it took more than fifteen years before the work was completed in 1983. Remarkably, the local churches did not sit and wait for the new legislation to be promulgated. The council began to take hold of the local churches in the dioceses, the parishes and in institutes of consecrated life in spite of legislation for the universal church not yet existing. The reception of the council was not a passive process of merely receiving, but an active one of creating and developing. This was all in line with the doctrinal understanding that the local church is not some branch of the universal church, but is fully church itself (LG 26), that the diocesan bishop is not a delegate of the Pope, but the vicar of Christ for his diocese which resulted in him not getting any longer the quinquennial faculties to govern his diocese, but upon taking possession of his diocese enjoying all power necessary to govern his diocese, except that which is reserved to a higher authority. Important furthermore was the doctrine that the universal church does not exist prior to the local church, but that the one does not exist without the other simultaneously. This led to the famous expression that the universal church exists in and from the particular churches (*in quibus et ex quibus* - LG 23).³⁶ This consideration would have implications for the necessary interaction between particular and universal law.³⁷ Related to this was the conciliar affirmation for a need of inculturation,³⁸ the acknowledgement of the cooperation of diocesan bishops in episcopal conferences, and the positive statements that the church lives in the world

³⁶ Vatican II was successful, because in the “periphery” and not in the center new understandings developed based on intense and very serious scholarship. These developments were presented in the council which received them and subsequently offered them to the local churches around the globe. There was a mutual interaction. A conference on the process of those developments resulting in Vatican II took place in Erfurt in 2012. The Australian fundamental theologian Ormund Rush spoke about “The *Sensus Fidelium* and Catholicity: The Church Local and Universal in Dialogue with God”. It was published in German in the proceedings of the: conference: Myriam Wijlens (ed.), *Die wechselseitige Rezeption zwischen Ortskirche und Universalkirche. Das Zweite Vatikanum und die Kirche im Osten Deutschlands*. Erfurter Theologische Schriften, vol. 46, (Würzburg: Echter, 2014).

³⁷ In as much as the universal church is neither the sum of the local churches nor a kind of confederation of local churches, is the local church a mere administrative unit of the universal church. The relationship between the local and the universal church can be understood as a perichoresis, a co-indwelling. The question can be raised, what this really means for the relationship between universal and particular law. Interesting is that a local church as a community could abrogate a universal law by way of custom (cc. 22-26), but according to the current law the legislator for that same community could not enact validly a law that would be contrary to a universal law (c. 135 §2). The diocesan bishop could, however, invoke *remonstratio* by which he would state that a law for the universal church could not be received by his particular church.

³⁸ Pope Francis affirmed this clearly again in *Evangelium Gaudium*, 116, 122, 126, 129.

(GS). These are but a few aspects that clarify why from a doctrinal aspect the local churches could not and did not want to wait for the council to be implemented with the help of legislation coming from “above” so to speak.

It is in this context that the Canon Law Society of Australia and New Zealand was established and turned out to be a gift to the local churches the Society serves. After the council had been announced and before Pope John XXIII opened it, three canon lawyers voiced such the idea of a establishing some kind of a society as early as 1960. The website of the CLSANZ reports that it was not until the council had been closed that the idea was put into action. In responding to a questionnaire investigating the possibility of setting up a Canon Law Society of Australia and New Zealand Kevin Barry-Cotter pointed out that Australia and New Zealand had to make their distinctive contribution to the life of the church in these countries and to that of the universal church. He expressed that the church here had always looked to what others did and imitated it. He noted that the church here had been a testing ground of much contemporary missionary law, but that the churches were still a silent voice in the church universal. Kevin Barry-Cotter, so the website of the CLSANZ says, felt that the aim of the society should be service to each other and to the church. The fact that they decided to establish a canon law society is indicative of the awareness of the canon lawyers at the time not to leave everything to the church universal, but to have the local church participate actively in the process of implementing the council. With and through their action they themselves began the implementation of the council above all by acknowledging the existence of the local church as being fully church (LG 26) for which legislation could be enacted.

Thus, canon lawyers on the ground - so to speak - took their responsibility in assisting their churches in receiving the council. Hence, while a group of men in Rome were drafting new norms for the legislation to be issued for the church universal, another group of canon lawyers “down under” had to see to the implementation of the council locally. Of course in the aftermath of Vatican II there were documents that contained already liturgical laws or that gave guidelines for different institutions on the diocesan level, as mentioned, for example, in the *motu proprio* “*Ecclesiae sanctae*” (1966) and the Directory for Bishops (1973), but the canon lawyers on the ground had a unique task: assist the local churches in the process of receiving the council in their specific context and culture and with the means available to those churches. The canon lawyers participated in, yes even guided the *transformative* process of renewal and reform that Vatican II had called for, and did it where the church is not an abstract notion but a lived reality: in the local church and, for example, in the institutes of consecrated life.

The local canon lawyers performed their task on two levels: on the level of legislation and on the level of interpretation. In both cases they worked so to speak “in spite of” the 1917 Code still being in force. On the legislative level they assisted bishops and episcopal conferences by drafting statutes for the different entities that were to be put into place: parish and diocesan pastoral councils, presbyteral councils, the National Council of Priests in Australia as well as the procedural norms for adjudicating marriage

cases that were in place in Australia as of the 1970s.³⁹ The latter two projects most likely did not come at the initiative of the universal church, but like the American Procedural Norms rather originated from the local church, albeit approved by the Holy See. The canon lawyers also helped religious institutes that were developing new Constitutions which would reflect their charism in light of new theological insights and the signs of the times in which they live. Often times these constitutions were approved “ad experimentum”.⁴⁰

Indeed the norms issued and the structures provided revealed that transformative stage that characterized the post conciliar church. The structures did not only express what had already been agreed on, but in many ways they simultaneously provided the community with a possibility of “learning about the doctrine by doing”. Through a participation in the diocesan pastoral council, for example, the laity learned about and at the same time experienced the conciliar doctrine on the participation of the laity in the threefold ministry of Christ. By the same token the parish priest or the bishop could begin to learn and experience the meaning of the notion of church as people of God requiring mutual listening, exchange and dialog in finding responsible answers to challenges posed, instead of they themselves making the decisions on their own to be received by the other faithful, as had been common in a hierarchically understood church. The learning by doing meant that the people – not unlike the fathers at Vatican II – got the opportunity to discover and experience the meaning of a certain doctrine in their own context, leading to a deepening of their faith and thus receiving the council in all it entailed. The norms thus not only implemented what the council taught but also assisted the community in entering into that process of reform and renewal for which a conversion is necessary. The structures for interaction, discernment processes and decision making facilitated a transformative process because they allowed people to experience the meaning and implications of baptism as expressed by the council. Hence, canon lawyers held and exercised a tremendous responsibility in which they were “bold and creative in their task of rethinking the goals, structures, style and methods” (EG 33) of the interaction of the people of God and of the implementation of the council. They did so, “in spite of” the 1917 Code still being in force. For the good of the local churches and thus for the church universal they went beyond the existing law, yes they developed what might be called norms *praeter ius*⁴¹ that is, norms beside the still not abrogated 1917 Code.

This working “in spite of” the 1917 Code turned out to be a special but fruitful challenge in marriage tribunals, because the canon lawyers there developed jurisprudence by which they interpreted the 1917 Code through the lenses of the doctrine on marriage as

³⁹ Canon Law Digest, vol. 9, 976-974.

⁴⁰ It would be worthwhile to investigate the role of canon lawyers in the reform of religious institutes after Vatican II. The transitory time was characterized by constitutions that were approved “ad experimentum” so that experience would become a decisive factor for finding new and appropriate structures.

⁴¹ See fn. 9 above on *praeter ius* and customs.

articulated in the Pastoral Constitution *Gaudium et spes*. From an epistemological perspective a rather interesting procedure: Not the doctrine that had given rise to the norms in 1917 was applied, but the doctrine of Vatican II had an impact on the norms that had been promulgated 50 years earlier. It became clear that the *mens legislatoris* could no longer be understood as the one that had given rise to the norms in the 1917 Code (*ex tunc*), but needed to be seen as well *ex nunc*.⁴² This implied that the awareness of historicity, development of and evolution in interpretation occurred also within canon law. The canon lawyers might not have been aware of it, but it implied terminating the understanding of law as presented by Francis Suarez (1564-1617) and returning to the older understanding of law by Thomas Aquinas (1225-1274). Suarez had seen law as exercising the will of the legislator (*lex est ordinatio voluntatis legislatoris*) which implies that the *mens legislatoris* has force as long as the law exists and the interpretation is geared towards exercising the will of the legislator. Hence, the interpretation focuses on the authority who issued the law. The focus on authority was common and in a way enforced after the council of Trent until Vatican II. Thomas Aquinas, on the other hand, defined law as an ordinance of reason (*lex est ordinatio rationis*) promulgated for the good of the community, by the one who has the care for the community.⁴³ This understanding grants a historical relevance to the *mens legislatoris* and thus allows for an interpretation of the law in light of the knowledge and situation of today.⁴⁴ It also means that the interpretation has to be reasonable: it is the strength of the argument that plays a decisive role. In this understanding, canonical terms can obtain a new meaning due to new insights.

After Vatican II the understanding of Thomas Aquinas was implicitly applied in particular in marriage cases. Juridical notions could be understood in a different way not only because of new doctrinal insights, but also because of a reception of insights from

⁴² Cf. e.g. Hugo Schwendenwein, "Der Geist der Gesetzgebung als dynamischer Interpretationsfaktor," *Revue de Droit Canonique* 22(1972) 313-332; Richard Potz, "Die Geltung kirchenrechtlicher Normen: Prolegomena zu einer kritisch-hermeneutischen Theorie des Kirchenrechts. Kirche und Recht vol. 15, Wien: Herder, 1978; Helmuth Pree, *Die evolutive Interpretation der Rechtsnorm im kanonischen Recht*. Linzer Universitätschriften, Monographien vol. 6 (Wien: Springer, 1980); Winfried Schulz, "Der Geist des Konzils als Interpretationsmaxime der kanonischen Rechtsordnung? Zur Auslegung der kodikarischen Interpretationsregeln, " *Appolinaris* 55 (1982) 449-460.

⁴³ Lex "est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata" - *Summa Theologiae* I-II, q 90, art. 4). It is important to notice that Aquinas speaks also about the one who has the care for the community and that he does not speak about someone who holds power.

⁴⁴ A "relict" of the past attitude can be found in the omission of providing the reasoning behind a so-called authentic interpretation. The interpretation is valid because of the authority promulgating it, but whether she is reasonable is thus not clarified. Cf. Rosalio J. Castillo Lara, *Die authentische Auslegung des kanonischen Rechtes im Rahmen der Tätigkeit der päpstlichen Kommission für die authentische Interpretation des ius canonicum*. *Österreichisches Archiv für Kirchenrecht* 32 (1987) 209 –228.

human sciences such as psychology and medicine. Through the jurisprudence the canon lawyers practised – and thus received - what the council had proclaimed: they developed a positive attitude towards human sciences (that is the world) and engaged into a dialogue with it for the benefit of the people of God. Canon law thus benefitted from and also contributed to the doctrine that there is a development in the church.

No wonder that 50 years ago canon lawyers felt the need to meet and gather in a society of canon lawyers to discuss and ponder about these new challenges which they courageously took on. Their service to the local churches implied an (implicit) awareness of the responsibility for the process of reception of the council in their local churches; their cooperation will have borne fruit when some of them were involved in the actual drafting of the 1983 Code or in reacting to the draft of it. With their activity the canon lawyers helped to pave the way for the reception of the 1983 Code.⁴⁵

The Roman project of drafting a new Code and the local ones of applying existing laws in a new context came to a culmination when the 1983 Code came into force. The law for the universal church took precedence, the legislation in the local church had to be adapted accordingly, the experimentation came to a halt, and the *mens legislatoris* as decisive for the *finis legis* was at least for a few years felt to be identical with the legislator who had promulgated the law. For those who studied shortly after the promulgation of the 1983 Code no differentiation could be made between the *ex nunc* and *ex tunc* meaning of the *mens legislatoris*, because they overlapped. At the time it would have been a mere theoretical reflection! Today however, also due to the immense research on Vatican II and post conciliar theological reflections, a differentiation must be made.

What can be learned from this with regard to future tasks that lie ahead of canon lawyers? I would like to offer four considerations:

First, the reform of canon law following Vatican II took place simultaneously at the local and universal level. Canon lawyers were involved at both levels. The local did not wait for the universal but made its own contribution, which was indeed based on sound doctrine that had been taught by Vatican II. In acting at the local level the road was possibly paved for the universal law to be received in the local churches after 1983. For the current time it could well mean that once more the local level must make its own contribution to the ongoing project of reform of the church. Pope Francis has called for a decentralisation. It cannot mean that the leadership of the local church – and with them their canon lawyers – will wait till the Pope tells them what to do locally. Diocesan bishops as vicars of Christ, those in leadership positions in the local church and canon lawyers as their advisors must take up their own responsibility both with regard to legislating and interpreting the law. However, a caveat is in place: It is important for

⁴⁵ See in this regard the most informative reflections by Ian Waters about the origin and activities by the Canon Law Society of Australia and New Zealand: “The Past and Future Challenges” in *Proceedings Canon Law Society of Australia and New Zealand* 45 (2016) 35-50.

them to become aware that the doctrine governing an institution might require different responses and solutions, because what might be good, appropriate and fitting for one place might not be feasible at all at another. Differences, for example, in culture, in the civil law that is to be respected, in available personnel and financial means, etc. will have an impact of what might be the best modality chosen for this community here and now. This might lead to a diversity in modalities. Again church history can help us to feel free to accept a differentiation between the doctrine governing a structure and the modality chosen. The sacrament of reconciliation is a wonderful example, because its modality was changed over the course of centuries in order for the people to profit from the grace to be received from it. The modality was changed in order to adapt to the needs of the people. The underlying theological notions remained, but the modality changed. Here it might be extremely helpful when canon lawyers and church leaders recall that Pope John XXIII differentiated between the substance of an ancient doctrine of the deposit of faith, and the way in which it is presented is another from. Similarly the way a doctrine is “translated” in a specific local context might differ from time to time and from place to place. Such differences do not touch the unity as such, but allow for a unity in diversity. The structure chosen for a specific doctrine to be lived cannot and should never be written in stone, but should in fact be adaptable to new circumstances precisely so that the content governing them can enrich the faithful in their spiritual life.

Secondly, the canon lawyers between 1965 and 1983 took their own responsibility in that they also acted on their perception of what Vatican II was about. In this way they participated in the conversion the council had called for and by offering new institutions they assisted the community in entering into this conversion process as well. In proposing new canonical institutions and structures, as well as in reinterpreting legal terms in light of Vatican II they acted “in spite of” - which is not the same as contrary to - the Code of Canon Law of 1917, because they saw that the new insights of the council could and should have an impact on the community already. This can be transferred to the current time: Considering that the understanding of what Vatican II entails is itself subject to development - this happened to other councils as well and is thus a normal procedure in the process of reception of a council - the question arises: how can we receive the legitimate development with regard to the understanding of the council into the interpretation of the existing laws so that the existing institutions give life to the communities of today and tomorrow? That leads also to the notions of the *mens legislatoris*.

Thirdly, the canon lawyers between 1965 and 1983 had to transform their understanding of the meaning of the *mens legislatoris* from having a lasting impact till a law is abrogated to seeing it as an authority that merits only historical relevance. With it came the transfer from searching for the will of the legislator to providing a reasonable interpretation for the good of the community. Vatican II became the point of reference for the interpretation. For the current time it means again to attribute merely historical relevance to the *mens legislatoris* which can open up new insights. It is necessary to

depart from Suarez' understanding of looking for the will of the legislator – including waiting for the Pope to instruct what to decide when, where and how. It is time to adopt Aquinas' understanding of the law for which a personal reasoning is required. Those who feel or fear that this would require to act “in spite of” the existing law, because in fact they have fossilized the meaning of the law to the date it came into force (thus November 27, 1983) may ask themselves whether they can accept a development of law, as it was common between 1965 and 1983. Others who take recourse to Aquinas would be able to see their action as a responsible way to read the signs of the times, interpret them and respond with solutions that are necessary today. They would do so because they would not see the fulfilling of existing laws as the highest goal, but the salvation of souls and the well-being of humanity. Accepting development in the meaning of legal terms and institutions will imply investigating how existing laws and the terms they contain can benefit from new insights that occur with regard to the theological notions that govern them. This in turn will require an increased dialogue of canon lawyers with theologians.

Fourthly, the canon lawyers from 1965 to 1983 did not act individually but sought the advice from their colleagues and worked in cooperation with each other. The Canon Law Society of Australia and New Zealand - as well as other Canon Law Societies - served as a vehicle for this cooperation and helped to offer a responsible service to the church. The task ahead is thus one of mutual exchange, common search and intellectual humility towards others. Required is team work. One point must be made though: any such teams should probably be composed not only of clerics, but also of women, lay men, deacons, religious and priests together. Only the latter would give expression to what the council thought and advocated. It is necessary to respect and use the charisms that the community has been blessed with and see them as complementary to each other.

These four points allow for connecting the first and the second part of this study.

Reform by Canon Lawyers

The task of the canon lawyers ahead lies on two levels: the legislation and the interpretation of the law. With regard to legislation most canon lawyers will not be involved in a revision of the law for the universal church. Nevertheless, a specific task might lie with the faculties of canon law around the world, to provide suggestions for needed reforms. Since most faculties around the world are in universities which also have theological faculties, common conferences and research projects could be held. They would invite theologians to reflect on the practical implications of their theological reflections and the canon lawyers would be updated on theological developments and insights. The different professional societies could as well initiate common workshop and study groups. In many countries not only professional canon law societies exist, but also different societies for other theological disciplines. A cooperation between those societies would be helpful for the church. It could occur by mutually inviting speakers from those other societies where for example one speaker would address the theological

issues followed by a canon lawyer to speak on the same subject from a canonical perspective. For such initiatives there is no need for canon lawyers to wait for an invitation by the theologians. Academic humility could lead to inviting the theologians for an exchange of thoughts and aspects.

At this point I would like to mention two such projects that are taking up this challenge. The first one is the Peter and Paul Seminar which started in 1999 and goes back to the initiative of Ladislav Örsy. Approximately 14 theologians and canon lawyers from Europe and North America have gathered together to reflect on necessary reforms of the church in the area of ecclesiology. The restoration of the unity of the church is an overriding goal. Subjects of research were “Collegiality of Bishops”, “Leadership in the Local Church”, “Conversion of the Church” and “Liturgy as Litmus Test of Reform in Ecclesiology”. The papers and their results with regard to possible changes both for the diocesan structures as well as for the universal church have been published mainly in *The Jurist* and in *Questions liturgiques*.⁴⁶ Of particular relevance for the research was the question: What to do with those who oppose reform? It became clear that a reform is more likely to be successful when it is based on or is accompanied by experience.

The work of the Peter and Paul Seminar is being noticed internationally: in October 2015 four of its members were invited to a meeting behind closed doors in Rome. At the initiative of Pope Francis some theologians mainly from Argentina invited a group of 30 scholars from around the world to reflect on “Reform(s) of and within the church”.⁴⁷ I was privileged to be part of this group. There was only one other canon lawyer: Alfonse Borrás from Liège (Belgium). We met to discuss further reforms in which the notions of people of God and synodality played a major role. Rather soon the need for a change of the existing laws was expressed. The canon lawyers present, however, issued a warning: nothing will change when the internal disposition of the ones who draft the law does not change. The change of the internal disposition, the awareness on what kind of theology the law is going to be built on should take place first. It is necessary to become aware of the theological presuppositions and presumptions from which you start. A warning was issued: if those who draft a new law remain in their familiar framework of thinking, nothing will change.

The canon lawyers present added, however, immediately that once the new attitude of mind would get hold of the canon lawyers as well as of others who apply the law, much could be achieved with the current law, because the law as such does not prevent reading and interpreting the law and the terms in them in a new way. We alluded to the shift that is to occur to see the *mens legislatoris* not as relevant for today, but rather as a

⁴⁶ The studies of the first three conferences were published in *The Jurist* (2004, 2008/2009, 2011), and of the latter in *Questions liturgiques* 2012 and 2014. For more information see: <https://www.uni-erfurt.de/en/canon-law/peter-and-paul-seminar/>.

⁴⁷ The acts of the conference were published: Antonio Spadaro, Carlos Galli, (eds.), *La riforma e le riforme nella Chiesa*. Biblioteca di Teologia Contemporanea, Bd. 177 (Brescia: Queriniana, 2016).

historically relevant aspect. This would create space for receiving new insights that occurred after the promulgation of a law while interpreting the current law. By accepting such a wider view, the community will be enabled to act correspondingly and thus the road for a new legislation is paved.⁴⁸ This proposal is very much in line with what the canon lawyers did between 1965 and 1983. The change in legislation is thus prepared by a change in interpretation of the current law, which in turn occurs, because a different hermeneutical way of thinking is accepted.

This leads to the contribution canon lawyers can make on the level of interpretation and application of the law. Instead of presenting a theoretical reflection, an example might clarify better what can be achieved.

In 2008 I met a diocesan bishop who had just been ordained and taken possession of his diocese. He told me that he had not reinstated the diocesan pastoral council as he considered it a waste of time, and as he added, “it is not obliged by canon law to have such a council, isn’t it? I responded by asking him whether he could remember his ordination. He had been ordained in his cathedral. I recalled what had happened in his and every ordination of a diocesan bishop:

At the beginning of the celebration a senior priest asks the principal consecrator:

“The church of X. asks you to ordain this priest, N., for service as bishop”.

The principal consecrator responds: Do you have you a mandate from the Holy See?

He replies: “We have.”

The Principal consecrator says: “Let it be read.”

After the reading, all present in the church say: “Thanks be to God” or they give their assent to the choice in some other way, according to local custom.

I pointed out to him that the little ceremony indicated that he had been ordained for this specific diocese: not that he had been given a diocese, but the diocese had been given a bishop who had to look after it. He had not been ordained for himself, but for service, for ministry in a local church.

I then asked him whether he actually administered the sacrament of confirmation in his diocese. “Oh yes”, he responded, “it is actually quite nice to do so”. I said: so what is the sacrament all about? Oh, he responded, it is about the Holy Spirit.” I then asked: “And do you believe that the Holy Spirit is subsequently working in these people to whom you

⁴⁸ My own contribution to this conference: “Riforma e rinnovamento nella normativa canonica: Attuare il concilio Vaticano II” in: Antonio Spadaro, Carlos Galli, (eds.), *La riforma e le riforme nella Chiesa*. Biblioteca di Teologia Contemporanea, Bd. 177 (Brescia: Queriniana, 2016) 309-329. A reworked version of this study will appear as: “Learning from the Past for a Future Reform of Canon Law: Hermeneutical and systematic-theological Reflections” in: Adrian Loretan, Felix Wilfried (eds.), *Revision of the Codes of Canon Law. An Indian European Dialogue*, Law and Religion/Religions Recht im Dialog (Vienna Zurich: Lit, 2018).

gave the sacrament?” He looked puzzled. I continued: “In case you do believe it, how do you as their bishop become aware of that working? What instruments do you use to discover how the Holy Spirit works through the people entrusted to your care?” He looked with great question marks in his eyes. I continued: “The diocesan pastoral council is actually one way of doing this. It enables the faithful to communicate with you as a bishop and reveal to you their needs, the possible solutions that might help them, the feasibility of what is being proposed. The community as such could benefit and grown from such an interaction.” We departed with a friendly handshake. I was not sure what he thought.

About seven years later I met the bishop again. He told me that the encounter with me had been a bit of a challenge for him. He had thought it over and had then set up a diocesan pastoral council. They met regularly and discussed what was of importance for the diocese. At times they discovered that a subject would need to be treated by all the dioceses of the region. He would then bring the concern of his diocese to the Episcopal conference. The pastoral council had helped him writing pastoral letters by suggesting topics, content, style etc. Those letters had been well received in his diocese, because the people had told him that they addressed their questions, needs and provided answers that were to the point. He had used the diocesan pastoral council to help him write the *Ad limina* report. Instead of writing a dull report, he said, it turned into an occasion for the diocese to take stock and see where they were heading. He mentioned that ever since his new awareness, his visitations of parishes had obtained a new dimension. It was not so much about inspecting financial and other records, but it was about meeting the people and finding out where they are at. Listening to their concerns, challenges and suggested solutions. He also admitted that he had to get over his initial fear of what he might encounter. The gear change from immediately speaking and from the feeling that he must proclaim to first listening had been a personal challenge. Indeed, he concluded, he had been pleasantly surprised by the many talents that were present in the community and by the energy the people had been willing to put into the life of the diocese. An energy that helped and sustained him in his own life as well.

The example shows that a new set of lenses can provide a new view on an already existing institution. The new way of looking allows the community not only to engage, but also facilitates an increase in awareness of all in the community that each and every one has been blessed with charisms, as well as that the Holy Spirit can unfold its work for the benefit of the whole community. The question remains: how can church leaders and their canonical advisors be help the community to take on that set of lenses?

Conclusion

At the end of this study it is time to make a confession: The hitting of the reset button did not just occur in the context of the two synods on the Family in 2014 and 2015. It all began already on March 13, 2013, the evening Pope Francis appeared on the balcony after being elected as the new bishop of Rome. He greeted everyone and then asked with

great humility that before he would give his blessing, the people would pray for him! The people praying for the pope! He then bowed his head...⁴⁹ The interaction had begun. The bishop of Rome at the service of the people of God. The pyramid had been inverted. A new phase in the reception of Vatican II had begun.

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⁴⁹ See the moving ceremony: https://www.youtube.com/watch?v=CYeMbm_hg3A.